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Larry J. HARTSFIELD *v.* Benjamin W. LESCHER, Ann Madison Lescher, Susan Corcoran Lescher, and Mary Thomas Sneed

CA 07-1125 289 S.W.3d 123

Court of Appeals of Arkansas
Opinion delivered November 5, 2008

Hartsfield, Almand, Denison, PLC, by: *Larry J. Hartsfield*, pro se appellant.

Ford, Glover & Roberts, by: *Danny W. Glover*, for appellees.

JOSEPHINE LINKER HART, Judge. Larry J. Hartsfield, a licensed attorney, appeals from an order of the Cross County Probate Court sanctioning him for his failure to timely file an accounting. Hartsfield had been ordered to file an accounting on February 14, 2007, and had been given additional time to prepare it

on May 1, 2007. On appeal, he argues that the probate court erred in awarding an attorney's fee and compensation for missed work and travel expenses incurred by the personal representative and a witness. We affirm.

Hartsfield served as Trustee of the George Wright Lescher Trust during the lives of the four beneficiaries. The last beneficiary, George Hamilton Lescher, died on April 17, 2003. On June 17, 2003, Hartsfield petitioned to have Lescher's holographic will, which purported to devise all of Lescher's "things" to Hartsfield, admitted to probate and to have himself named as personal representative.

On May 27, 2004, the appellees, Benjamin W. Lescher, Ann Madison Lescher, Susan Corcoran Lescher, and Mary Thomas Sneed, the children of the decedent, petitioned to have the will set aside and Hartsfield removed as personal representative. In their petition, they also asked the probate court to order Hartsfield "to provide a detailed accounting of all property and funds he has received and distributed since the decedent's death" as well as an accounting for the time he served as Trustee of the George Wright Lescher Trust. After a hearing, on February 7, 2006, the probate court entered an order setting aside the holographic will, finding that the decedent lacked testamentary capacity and that the will was a product of Hartsfield's "undue influence." The order also removed Hartsfield as personal representative of the estate. The order specifically reserved ruling on the request for an accounting of the George Wright Lescher Trust.

Hartsfield filed a notice of appeal of this order, but failed to perfect his appeal when he did not timely file the transcript. After a hearing, the probate court entered its February 14, 2007, order requiring that Hartsfield file an accounting within forty-five days of all assets and funds that he had administered since he was appointed Trustee of the George Wright Lescher Trust. On March 21, 2007, Hartsfield was granted additional time to file the accounting, and the probate court set a review hearing for June 27, 2007.

At the June 27, 2007, review hearing, Hartsfield asserted for the first time that the probate court did not have jurisdiction to order an accounting for the time he served as Trustee of the George Wright Lescher Trust. The trial court found merit in his assertion. However, Hartsfield also conceded that he failed to file an accounting of the estate as was required of a personal represen-

tative, asserting that he was "not familiar with the Probate Code with respect to the filing of an accounting."

The probate court gave Hartsfield an additional thirty days to submit an accounting. The probate court awarded attorney fees to the estate; compensation to a witness, Benjamin Lescher, for lost earnings engendered by his having to attend the hearing; and travel expenses and lost earnings to the personal representative, Todd Sneed.

On appeal, Hartsfield argues that the probate court erred in awarding attorney's fees and expenses because he prevailed on the jurisdiction issue, which he argues can be raised at any time. He contends that the sanctions failed to comport with the requirements of Rule 54(d) and (e) of the Arkansas Rules of Civil Procedure. Hartsfield asserts that "there is no statute or rule that even allows attorney fees to be awarded under these circumstances," the reimbursement provided to Lescher and Sneed did not qualify as "costs" under the rule, the award of fees was made without the filing of a proper motion, and he was not given a hearing to contest the amount of the award. We find these arguments unpersuasive.

The decision to award attorney's fees and the amount awarded are reviewed under an abuse-of-discretion standard. *Calvert v. Estate of Calvert*, 99 Ark. App. 286, 359 S.W.3d 456 (2007). Under Arkansas law, attorney's fees are not allowed except where expressly provided for by statute. *Id.*

Contrary to Hartsfield's characterization of the fees and costs awarded, it was not an award made to the prevailing party, but rather a sanction levied against him for his failure to produce the accounting as representative as ordered by the probate court. Such a sanction is expressly provided for by statute. Arkansas Code Annotated section 28-52-103(c)(2) (Repl. 2004) states:

> The court shall have power to issue attachments and all other process necessary to compel the settlement of accounts by personal representatives, to enforce the judgments and orders of the court, and may assess against the personal representative any costs incurred by reason of his or her neglect of duty.

Accordingly, we hold that the award of attorney fees and expenses in this case was not an award of fees and costs pursuant to Arkansas Rule of Civil Procedure 54, but rather a tool of enforcement made available

to the probate court through the probate code. Ark. Code Ann. § 28-52-103(c)(2). Likewise, the reimbursement for lost earnings and travel expenses was not related to the type of "costs" contemplated by Rule 54. Consequently, a fee petition, as contemplated by Rule 54(e), was not necessary, nor was another hearing. Hartsfield was made aware that the trial court intended to make an award of attorney fees and expenses to punish him for his neglect of his duty as personal representative.

Whether Hartsfield was a "prevailing party" due to his assertion that the trial court did not have jurisdiction to order him to render an accounting for his time as Trustee of the George Wright Lescher Trust does not factor into our analysis. As discussed previously, the probate court did not award fees and costs to the "prevailing party"; therefore that argument is simply a red herring.

Finally, we note that when the probate court announced its intention to sanction Hartsfield, Hartsfield was made aware of the manner in which the request for fees and expenses were to be submitted to the probate court, and he voiced no objection. We will not consider arguments raised for the first time on appeal. *Dunaway v. Garland County Fair & Livestock Show Ass'n, Inc.*, 97 Ark. App. 181, 245 S.W.3d 678 (2006).

Affirmed.

GLADWIN and HEFFLEY, JJ., agree.

Brouce HOLDEN *v.* STATE of Arkansas

CA CR 08-361 289 S.W.3d 125

Court of Appeals of Arkansas
Opinion delivered November 5, 2008

Sharon Kiel, for appellant.

Dustin McDaniel, Att'y Gen., by: *Valerie Glover Fortner*, Ass't Att'y Gen., for appellee.

ROBERT J. GLADWIN, Judge. Appellant Brouce Holden was convicted by a Lonoke County jury on September 20, 2007, of residential burglary, attempted arson, and violating a protection order. On appeal, he contends that the trial court abused its discretion in declining to order a mental-health evaluation pursuant to Arkansas Code Annotated section 5-2-305(a) (Supp. 2007). We affirm the trial court's ruling.

Statement of Facts

On April 19, 2007, the State filed a felony information alleging appellant committed the offenses of residential burglary, criminal attempt to commit arson, criminal mischief in the second degree, and violation of a protection order. Trial was set for August 29 and 30, 2007. On August 20, 2007, a motion for continuance was filed by appellant based upon his hiring of private

counsel. This motion was granted, and the trial was reset for September 19, 2007.[1] Appellant's new counsel filed a motion for mental-health evaluation on September 17, 2007, pursuant to Arkansas Code Annotated section 5-2-305.

At the pretrial hearing held September 18, 2007, no testimony was heard. Appellant's counsel argued that he filed the motion for mental-health evaluation based upon a conversation he had had the previous day with appellant's mother, Vickie Nance. Ms. Nance was not present to testify, but counsel for appellant stated that Ms. Nance had indicated to him that appellant suffered from depression and periods of blackouts. Ms. Nance had questioned whether appellant was of sound mind. Defense counsel acknowledged that appellant had problems with alcohol and that appellant had a previous DWI, fourth-offense conviction. Appellant did not take the stand. The State's attorney stated that in his conversations with Ms. Nance, she indicated she had paid for appellant to have substance-abuse rehabilitation on more than one occasion, and she would like an explanation as to why her son would treat her in such a way for an extended period of time.

The State then stated it was ready for trial the following day. Defense counsel told the trial court that additional time would be useful to prepare for trial, and that he had a scheduling conflict. The trial court denied the motion for mental-health evaluation, stating that it did not find sufficient cause or reason for it to suspect that appellant had a mental disease or defect.

Following the trial, the jury acquitted appellant of criminal mischief, but found him guilty of residential burglary, criminal attempt to commit arson, and violating a protection order. He was sentenced to 360 months for each of the burglary and arson convictions and twelve months for violating the protective order. These sentences were ordered to run concurrently. Appellant filed a timely notice of appeal, and this appeal followed.

Statement of Law

It is well settled that the conviction of a defendant while he is legally incompetent to stand trial violates due process. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992). Arkansas Code

[1] The trial was continued from September 18, 2007, to September 19, 2007, in order to accommodate a pretrial hearing on appellant's motion for mental-health evaluation, which was held on September 18, 2007.

Annotated section 5-2-302 expressly prohibits trying a person who lacks the capacity to understand the proceedings against him or to assist effectively in his own defense because of mental disease or defect. A criminal defendant is ordinarily presumed to be mentally competent to stand trial, and the burden to prove otherwise is on the defendant. *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993). The test of competency to stand trial is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational and factual understanding of the proceedings against him. *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001); *Lawrence, supra.*

When reviewing issues of statutory interpretation, the basic rule is to give effect to the intention of the legislature, making use of common sense, and assuming that when the legislature uses a word that has a fixed and commonly accepted meaning, the word at issue has been used in its fixed and commonly accepted sense. *Yamaha Motor Corp. v. Richard's Honda Yamaha*, 344 Ark. 44, 38 S.W.3d 356 (2001); *State v. Joshua*, 307 Ark. 79, 81, 818 S.W.2d 249, 250 (1991).

Arkansas Code Annotated section 5-2-305(a)(1) states that the trial court shall immediately suspend proceedings if the defendant files notice that he will put his fitness to proceed in issue or if there is otherwise reason to doubt the defendant's fitness to proceed. Use of the word "shall" makes compliance with a statute mandatory. *See Smith v. State*, 347 Ark. 277, 61 S.W.3d 168 (2001); *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001). Upon suspension of the proceedings, the trial court is required to enter an order directing a mental examination of the defendant under one of the means outlined in the statute. *See* Ark. Code Ann. § 5-2-305(b)(1). This statute is intended to prevent the trial of anyone who is legally incompetent. *Lawrence v. State, supra.* The trial court's determination of the issue is reviewed under the "clearly erroneous" standard. *Hardaway v. State*, 321 Ark. 576, 906 S.W.2d 288 (1995).

Argument

Appellant contends that he put the trial court on notice on September 17, 2007, that his fitness was at issue and requested a mental-health evaluation and hearing pursuant to Arkansas Code Annotated section 5-2-305, which states in pertinent part as follows:

> (a)(1) Subject to the provisions of §§ 5-2-304 and 5-2-311, the court shall immediately suspend any further proceedings in a prosecution if:
>
> (A) A defendant charged in circuit court files notice that he or she intends to rely upon the defense of mental disease or defect;
>
> (B) There is reason to believe that the mental disease or defect of the defendant will or has become an issue in the cause;
>
> (C) A defendant charged in circuit court files notice that he or she will put in issue his or her fitness to proceed; or
>
> (D) There is reason to doubt the defendant's fitness to proceed.

Ark. Code Ann. § 5-2-305(a)(1)(A)-(D).

Appellant contends that a plain review of the statutory language reflects a requirement of a mental-health evaluation upon proper notice. He maintains that at the pre-trial hearing held the day before trial, he asked for a mental evaluation. His counsel stated it was unclear whether appellant was unfit during the time of the alleged offense. He argues that our supreme court in *Smith v. Fox*, 358 Ark. 388, 193 S.W.3d 238 (2004), ruled that when a defendant requested a state mental evaluation, it was error for the lower court to deny that request based upon the fact that defendant had been previously given a federal mental evaluation some months earlier. Appellant maintains that the statutory language in section 5-2-305 is mandatory, not discretionary.

The State contends that the trial court need not order an evaluation where it has no reason to believe that a defendant's competency or a mental disease or defect will be an issue at trial. *See* Ark. Code Ann. § 5-2-305(a). Further, the State argues that Arkansas Code Annotated section 5-2-304(a) (Repl. 2006), requires that, when a defendant intends to raise mental disease or defect as a defense in a prosecution or puts in issue his fitness to proceed, the defendant shall notify the prosecutor and the court at the earliest practicable time. Appellant was declared indigent and appointed counsel on April 23, 2007. His appointed counsel represented him and received notice of the original jury-trial setting of August 29 and 30, 2007. Appellant moved to substitute private counsel on August 20, 2007, and that motion was granted. A continuance was also granted, and the trial date was moved to

September 18, 2007. On September 17, 2007, appellant filed his motion requesting a mental-health evaluation. The trial date was then moved to September 19, 2007, and a hearing on appellant's motion was held September 18, 2007. Thus, the State contends that appellant's filing of his motion for mental-health evaluation on September 17, 2007, was not the "earliest practicable time" as required by the statute.

The State argues that appellant, relying on *Smith v. Fox*, *supra*, contends that by simply filing notice pursuant to sections 5-2-304 and 305, the trial court had a duty to grant him a mental evaluation as a matter of law. However, in *Smith v. Fox*, Smith maintained that he suffered from a mental disease or defect from his plea and arraignment forward. He actively objected to the introduction of the federal evaluation and sought motions for reconsideration, continuances, and ultimately sought an extraordinary writ to address the matter. Appellant's circumstances herein are not comparable.

The State argues that there is nothing in this record to support the necessity of a mental evaluation except unsubstantiated statements of defense counsel based on one conversation with appellant's mother. The motion itself did not give notice of anything specific. In denying the motion, the trial court held that there was insufficient cause presented to suspect appellant suffered from a mental disease or defect. Faced with only a second-hand account of appellant's mental state, no explanation for the delay in filing, and the knowledge that defense counsel needed more time due to scheduling conflicts, we cannot say that the trial court's decision to deny appellant's request for mental evaluation was clearly erroneous.

Affirmed.

VAUGHT and HUNT, JJ., agree.

STATEWIDE OUTDOOR ADVERTISING, LLC, and
Sears Gentry *v.* TOWN of AVOCA, ARKANSAS

CA 08-483 289 S.W.3d 111

Court of Appeals of Arkansas
Opinion delivered November 5, 2008

Ed Daniel IV, P.A., by: *Kathleen Reynolds* and *Ed Daniel, IV*, for appellants.

Andrew R. Huntsinger and *Howard L. Slinkard*, for appellee.

SAM BIRD, Judge. This is an appeal from the trial court's dismissal of the complaint of appellants, Statewide Advertising, LLC, and Sears Gentry. The trial court dismissed appellants' declaratory-judgment action against appellee, the town of Avoca, for failure to state a cause of action. We reverse the trial court's order.

I.

According to appellants' complaint and attached exhibits, the following events led to this dispute. Statewide leased two billboard spaces in the town of Avoca from Mr. Gentry and obtained permits from the Arkansas State Highway Commission, through the Arkansas Highway and Transportation Department (hereinafter AHTD), to build outdoor advertising billboards on the sites. AHTD issued Permit A092732 on February 22, 2006, and Permit A092741 on April 27, 2006. Statewide began construction of the billboards on June 5, 2006, and completed construction on July 12, 2006.

On September 5, 2006, the mayor of Avoca sent a letter to AHTD complaining about the billboards, stating that the billboards were in violation of Avoca's new Ordinance No. 73, which required any new commercial development in Avoca to be approved by the town council. On October 16, 2006, the mayor sent another letter to AHTD, stating that AHTD had failed in its duty to inspect the locations for the billboards and that the billboards were in violation of Avoca's new Ordinance No. 75, passed on September 12, 2006, which established a one-hundred-eighty-day moratorium on the erection of billboards within the Avoca city limits. On January 4, 2007, the recorder-treasurer of Avoca sent AHTD a letter asking for a response to the mayor's letter of October 16, 2006. On January 10, 2007, AHTD responded, stating: "Unfortunately, an ordinance prohibiting billboards was not in place at the time the permit applications were received."

Finally, on March 14, 2007, Avoca alderman, Darlene Gregory, faxed a copy of Ordinance No. 69 to AHTD. Ordinance No. 69 states in pertinent part as follows: "Any person, partnership, corporation or other legal entity shall, before commencing construction on any commercial or industrial building or structure and/or before commencing any business activity must first obtain a business permit from the Town of Avoca." On August 17, 2007, Avoca, through its attorneys, the Slinkard Law Firm, sent a letter to Statewide indicating that the firm represented the town of Avoca and had been asked to write Statewide "concerning the above referenced billboards," which were referenced by their permit numbers.

The letter explained as follows:

> As Statewide has previously been informed by the Arkansas State Highway and Transportation Department (the Highway Depart-

> ment) that the above referenced billboards are located within the incorporated town limits of the Town of Avoca, Statewide should be aware that it is subject to the ordinances and regulations of the Town of Avoca. Specifically, Statewide was required to comply with Avoca Ordinance No. 69 which set forth that business permits must be acquired from the Town before certain activities may be conducted within the Avoca town limits.

The letter then set forth Ordinance No. 69. The letter said that the billboards constituted "a commercial structure" and, therefore, that Statewide was required to obtain a permit before it began construction. The letter continued, stating, "Statewide failed to comply with Town Ordinances, and consequently, their permit for the billboards has been revoked by the Highway Department." The letter stated that since Statewide had "failed to comply with the orders of the Highway Department by not removing the billboards, and [had] failed to obtain a business permit as required under Ordinance No. 69, the Town of Avoca is compelled to act. Pursuant to Section 7 of Ordinance No. 69, Statewide shall be fined fifty dollars ($50.00) per day until the billboards in question are removed."

On September 8, 2007, appellants filed a complaint against the town of Avoca, alleging that Avoca was demanding removal of the billboards, that Avoca was attempting to enforce an illegal ordinance against them, and that irreparable harm would result if the situation were permitted to continue. Appellants requested damages, a preliminary and permanent injunction, and a declaratory judgment finding that Ordinance No. 69 did not require appellants to obtain a business permit to build the two billboards or prohibit the erection of the billboards in any other manner.

Avoca responded by filing a motion to dismiss pursuant to Rules 12(b)(6) and 8(a) of the Arkansas Rules of Civil Procedure, alleging that it had not ordered the removal of appellants' billboards nor cited appellants for any violation of town ordinances. Therefore, the town argued, there were no facts presented in the complaint upon which relief could be granted.

The trial court granted Avoca's motion, finding that appellants did not state any facts "alleging they ever applied and were denied a permit to erect the structures (billboards), nor do they allege in the Complaint (when taken with the incorporated exhibits) that the Town of Avoca *has or could have demanded the removal of the commercial structure.*" (Emphasis added.) The trial court went on

to explain that while AHTD had "interacted" with appellants, the town of Avoca had "not interacted with Plaintiffs to permit the structure or to demand its removal." Thus, held the court, there was "no case or controversy alleged in the Complaint between the Plaintiffs and this Defendant."

II.

We review a trial court's decision on a motion to dismiss by treating the facts alleged in the complaint as true and by viewing them in the light most favorable to the plaintiff. *See Clowers v. Lassiter*, 363 Ark. 241, 213 S.W.3d 6 (2005); *King v. Whitfield*, 339 Ark. 176, 5 S.W.3d 21 (1999). In viewing the facts in the light most favorable to the plaintiff, the facts should be liberally construed in the plaintiff's favor. *Clowers*, 363 Ark. at 243, 213 S.W.3d at 8. Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. Ark. R. Civ. P. 8(a)(1); *Grine v. Board of Trustees*, 338 Ark. 791, 2 S.W.3d 54 (1999).

Appellants contend on appeal that the trial court's order must be overturned because it does not address an aggrieved party's right to declaratory judgment pursuant to Ark. Code Ann. § 16-111-102 to -104 (Repl. 2006). Viewing the facts alleged in the complaint as true and in the light most favorable to the plaintiff, we find the circuit court erred and reverse its order dismissing appellants' complaint.

The Arkansas statutes governing actions for declaratory judgment very clearly state that they are to be "liberally construed and administered." Ark. Code Ann. § 16-111-102(c). The stated purpose of a declaratory-judgment action is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Ark. Code Ann. § 16-111-102(b). Pursuant to Ark. Code Ann. § 16-111-104, any person "whose rights, status, or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder."

Municipal corporations are creatures of the legislature and as such have only the power bestowed upon them by statute or the Arkansas Constitution. *City of Cave Springs v. City of Rogers*, 343 Ark. 652, 657, 37 S.W.3d 607, 610 (2001). Moreover, any substantial doubt about the existence of a power in a municipal

corporation must be resolved against it. *Id.* In their complaint, appellants alleged that the town of Avoca is not a city of the first class, and therefore its power to regulate derives from Ark. Code Ann. § 14-56-201 (Repl. 1998) — which allows regulation of buildings — and not Ark. Code Ann. § 14-56-202 (Supp. 2007), governing cities of the first class — which allows for more extensive regulation, including the regulation of structures. Therefore, appellants contended in their complaint, Ordinance No. 69 was not promulgated in compliance with Arkansas law and exceeds the authority delegated to Avoca to regulate "buildings." Accordingly, appellants alleged that Avoca had no power to regulate its billboards.

Further, while the trial court's order stated that appellants did not allege in their complaint that Avoca "has or could have demanded the removal of the commercial structure," we find that appellants did in fact so allege. In paragraph 4 of the complaint, appellants contended that Avoca had "exceeded its authority under Arkansas law by demanding that plaintiffs remove two outdoor advertising billboards . . . pursuant to an ordinance governing business permits in Avoca ('Ordinance 69')." In paragraph 28, appellants argued that they will suffer irreparable harm "if Avoca is allowed to require plaintiffs and [AHTD] to remove the Two Billboards." Again, in paragraph 32, appellants alleged that "Avoca is demanding that plaintiffs remove the lawfully erected Two Billboards and has threatened daily sanctions against Statewide." In paragraph 33, appellants alleged that "Avoca is attempting to enforce an illegal ordinance against Plaintiffs." Finally, in paragraph 40, appellants requested the trial court to enter a declaratory judgment finding that Ordinance No. 69 and all other Avoca ordinances in effect through July 12, 2006, do not require appellants to obtain a business permit to build the two billboards or prohibit the erection of the billboards in any other manner.

The trial court's finding that the town of Avoca had not interacted with appellants "to permit the structure or to demand its removal" is also incorrect. Appellants attached to their complaint numerous letters from the mayor of Avoca to AHTD stating that appellants' billboards were in violation of various ordinances of the town of Avoca, including Ordinance No. 69. Further, Avoca hired a lawyer to write a letter directly to Statewide advising it that the billboards constituted "a commercial structure" and, therefore, that Statewide was required to obtain a permit pursuant to Ordi-

nance No. 69 before it began construction. The letter stated that Statewide had failed to comply with the town's ordinances, "and consequently, their permit for the billboards [had] been revoked by the Highway Department." The letter warned that, because Statewide had "failed to comply with the orders of the Highway Department by not removing the billboards, and [had] failed to obtain a business permit as required under Ordinance No. 69, the Town of Avoca [was] compelled to act. Pursuant to Section 7 of Ordinance No. 69, Statewide shall be fined fifty dollars ($50.00) per day until the billboards in question are removed." Viewing the facts in the light most favorable to the plaintiff, we fail to see how the trial court could find that Avoca had not "interacted" with appellants "to permit the structure or to demand its removal" when Avoca's letter to Statewide was just such an "interaction" demanding removal of the billboards.

Construing the statutes governing actions for declaratory judgment liberally as required and treating the facts alleged in the complaint as true, as we must, we hold that the trial court erred in granting the town of Avoca's motion to dismiss. Appellants have filed a complaint sufficiently alleging that their rights "or other legal relations" have been affected by Ordinance No. 69, and hence they are entitled under Ark. Code Ann. § 16-111-104 to have "determined any question of construction or validity arising under" this ordinance and "to obtain a declaration of [their] rights, status, or other legal relations thereunder."

Reversed and remanded.

GRIFFEN and GLOVER, JJ., agree.

AVERITT EXPRESS, INC., American Casualty Company *v.* Gary D. GILLEY

CA 08-152 289 S.W.3d 118

Court of Appeals of Arkansas
Opinion delivered November 5, 2008

Bridges, Young, Matthews & Drake, PLC, by: *Michael J. Dennis*, for appellants.

McDaniel & Wells, P.A., by: *Phillip Wells*, for appellee.

WENDELL L. GRIFFEN, Judge. On November 27, 2007, the Workers' Compensation Commission found that Gary Gilley had sustained 12% permanent physical impairment and 20% wage-loss disability. Averitt Express, Inc., and its carrier, American Casualty Company, challenge both the physical-impairment rating and the award of wage-loss disability, contending that neither decision is supported by substantial evidence. We affirm, as both awards are supported by substantial evidence.

Facts

At the time of the hearing, appellee was age fifty-nine and had a high school diploma. He had two years of military experience, and since November 1967, he had been an over-the-road truck driver. He began working for Averitt in January 2005 and made $1000 to $1200 per week. Appellee suffered an admittedly compensable injury on June 1, 2005, when he slipped on the side of a truck and suffered a torn rotator cuff on his left shoulder. He stopped working for Averitt in February 2006, just prior to undergoing surgery.

Appellee received treatment from Dr. Henry Stroope. Dr. Stroope released appellee to work on July 26, 2006, but appellee did not return to Averitt. Instead, he found other employment driving a dump truck for his friend, Gary Barker. When appellee worked for Averitt, he drove eleven hours a day, per government regulations. His job also required him to hook up trailers and to load and unload heavy appliances and freight. Appellee testified that his condition prohibited him from doing that work. On cross-examination, appellee admitted that no doctor had forbidden him from driving over the road, though he explained that he did not return to Averitt because it could not offer him any work within his abilities. He stated that he was unable to pick up his three-year-old son or four-year-old daughter and that his wife had to help put his belt in the back loops. Appellee's job driving the dump truck only paid $350 per week, but he only drives fifteen to twenty minutes at a time. Other than driving, the only thing he does with the dump truck is flip a switch and push a button to load and unload the truck.

By letter dated August 22, 2006, Dr. Stroope assessed appellee with an impairment rating of 10% to his upper extremity, which translated to 6% to the body as a whole. By agreement of the

parties, however, appellee underwent an independent medical evaluation on March 21, 2007. Dr. David Collins, an orthopedic surgeon, agreed that appellee suffered a full thickness rotator cuff tear and decreased range of motion in his left shoulder. Dr. Collins wrote:

> It would appear that he is well suited for his present occupation. I believe that he has reached maximum medical improvement. He has sustained permanent partial impairment as it relates to his work related injury and its treatment on the basis of anatomic alteration of the skin, subcutaneous tissue, deltoid muscle, acromion process, coracoacromial ligament, subacromial bursa and the rotator cuff. Impairment is equal to 20% to the upper extremity, equal to 12% to the body as a whole.
>
> I believe there has been alterations of coracoacromial archway that render his shoulder more weak in forward elevation than one might expect. I believe there is limited capacity to recover active forward elevations even with superb restoration of muscular strength.

An administrative law judge (ALJ) found that appellant suffered 12% permanent physical impairment as well as 20% wage-loss disability. In a separate opinion, the Commission affirmed the findings of the ALJ. While it recognized Dr. Stroope's assessment, it relied on Dr. Collins's findings. Regarding wage loss, the Commission found that appellee was unable to return to work with Averitt due to his injury, his surgery, and his physical limitations.

Standard of Review

Appellants challenge both the 12% permanent physical-impairment rating and the 20% wage-loss disability award. When reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if that decision is supported by substantial evidence. *Smith v. City of Ft. Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the

result found by the Commission, we are required to affirm. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). Our review is limited to the findings of the Commission. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

Permanent-Impairment Rating

Under two separate points, appellants challenge the 12% permanent impairment rating. First, they assert that the Commission erred in relying on Dr. Collins, who only saw appellee once, rather than Dr. Stroope, appellee's treating physician. Appellants correctly state that the Commission may give greater weight to a treating physician rather than a doctor who sees a patient once for an independent evaluation. *See Guy v. Breeko Corp.*, 310 Ark. 187, 832 S.W.2d 816 (1992). However, the Commission is not required to do so. *See, e.g., Roberson v. Waste Mgmt.*, 58 Ark. App. 11, 944 S.W.2d 858 (1997) (holding that a doctor's medical records supported the Commission's findings despite the fact that the doctor only examined the claimant for ten minutes). The opinion of a doctor who performs a one-time examination of the claimant can constitute substantial evidence of the Commission's opinion.

Second, appellants contend that there was no evidence to show that Dr. Collins used the *AMA Guides* to make an evaluation of permanent impairment. They rely on the dissenting Commissioner's analysis of the impairment rating, which determined that Dr. Collins's findings could not be reconciled with the *Guides*. While Dr. Collins does not cite to the *AMA Guides* when stating his opinion of appellee's impairment rating, Arkansas does not require any specific "magic words" with respect to expert opinions; said opinions are to be judged upon the entirety of the opinion, not validated or invalidated on the presence or lack of "magic words." *See Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001). Further, the Commission found that the *AMA Guides* support Dr. Collins's rating, and appellants fail to present a record (or argument except for citation to the dissenting Commissioner) showing the contrary.

Wage-Loss Disability

Appellants also contend that the award of wage-loss disability is not supported by substantial evidence. They observe that

appellee's treating physician returned him to work with no physical restrictions and assert that the Commission's finding that he had significant physical restrictions that prevented him from working full-time with Averitt was not supported by substantial evidence.

Pursuant to Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002), the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical impairment rating to the body as a whole. *See Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). This wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *McDonald, supra.* In considering wage-loss disability, the Commission can consider such factors as the claimant's age, education, work experience, and "other matters reasonably expected to affect his or her future earning capacity." Ark. Code Ann. § 11-9-522(b)(1).

Appellants heavily rely on evidence that appellee did not attempt to return to Averitt after his surgery. They are correct in stating that factors such as motivation to work, lack of interest, and attempts to return to work are valid factors to be considered in a determination of an award of wage-loss disability. *See, e.g., SSI, Inc. v. Lohman*, 98 Ark. App. 294, 254 S.W.3d 804 (2007); *Weyerhaeuser Co. v. McGinnis*, 37 Ark. App. 91, 824 S.W.2d 406 (1992). But the Commission considered evidence, in the form of appellee's testimony, that he was unable to continue his duties with the employer. The Commission was entitled to rely upon this testimony, and once the Commission finds a claimant credible, we are bound by that determination. *See Lohman, supra.*

The record shows that appellee was fifty-nine years old at the time of the hearing and that most of his career was spent driving long-haul trucks. He received a permanent-impairment rating and still suffered from pain that restricts his life activities. Appellee cannot use his left upper extremity for long periods of time; therefore, it is reasonable to believe that appellee would be unable to return to driving over the road for eleven hours a day. The record supports the Commission's decision to award 20% wage-loss disability, and we affirm on this point as well.

Affirmed.

HART, GLADWIN, BAKER, and HUNT, JJ., agree.

PITTMAN, C.J., ROBBINS, VAUGHT, and HEFFLEY, JJ., dissent.

LARRY D. VAUGHT, Judge, dissenting. I dissent from the majority because I believe that substantial evidence does not support the Commission's decision. Accordingly, I would reverse and remand.

There are two issues in this case: whether substantial evidence supports the Commission's award of 12% impairment and 20% wage-loss. On both issues, the majority answers yes; however, the majority (as did the Commission) fails to actually state what that substantial evidence is.

Regarding the 12% impairment rating, the majority concludes that substantial evidence supports the award because the Commission can give greater weight to an independent medical physician over the treating physician. *See Roberson v. Waste Mgmt.*, 58 Ark. App. 11, 944 S.W.2d 858 (1997). While this proposition of law is correct, the majority fails to identify any facts supporting the Commission's decision to weigh the medical evidence in this way.

Arkansas Code Annotated section 11-9-522(g)(1)(A) (Repl. 2002), requires that the Commission adopt an impairment-rating guide to be used in the assessment of anatomical impairment. The Commission adopted the *American Medical Association's Guide to the Evaluation of Permanent Impairment* (4th ed. 1993), to be used in this assessment. *See* Arkansas Workers' Compensation Commission Rule 34. While Rule 34 does not require that a doctor specifically state that he or she is issuing an impairment rating as per the *AMA Guide*, the rule does require that the *AMA Guide* be used in the assessment of anatomical impairment. *Id.*

The Commission found that "[t]he *Guides* at Table 3, page 3/20 support Dr. Collins's assessment of a 12% whole-body impairment rating."[1] The majority opinion agreed, stating that "the Commission found that the *AMA Guides* support Dr. Collins's rating." However, *AMA Guide* Table 3 page 3/20 is merely a chart that converts upper-extremity ratings to whole-body ratings. This table does not demonstrate how an upper-extremity rating is assessed.

The *only* finding made by the Commission on the impairment-rating issue was that "the rating assigned by Dr. Collins was based on 'anatomic alteration of the skin, subcutane-

[1] Dr. Collins's report did not include this information.

ous tissue, deltoid muscle, acromion process, coracoacromial bursa and the rotator cuff.' " Based on that finding, the Commission concluded that "the record indicates that these findings were objective and not within the claimant's voluntary control." Again, the Commission and the majority fail to cite the *AMA Guide* or any other facts in the record that support this conclusion.

While, as the majority stated, no magic words are required, citing the *AMA Guide* and not applying it to the specific injury makes a mockery out of section 11-9-522(g)(1)(A). I would remand for the Commission to apply the *AMA Guide* and make findings of fact, which we can review on appeal.

I would also remand the 20% wage-loss award to be reexamined in light of the findings on the impairment rating.

PITTMAN, C.J., and ROBBINS and HEFFLEY, JJ., join.

Alice HUCKABEE *v.* WAL-MART, INC.,
Claims Management Insurance

CA 08-515 289 S.W.3d 107

Court of Appeals of Arkansas
Opinion delivered November 5, 2008

The Zan Davis & McNeely Law Firm, PLLC, by: *Steven R. McNeely*, for appellant.

Roberts Law Firm, P.A., by: *Susan M. Fowler* and *Stephanie Egner*, for appellees.

WENDELL L. GRIFFEN, Judge. By opinion dated March 17, 2008, the Workers' Compensation Commission denied Alice Huckabee additional medical treatment for her right ankle involving annual visits to her doctor to monitor her condition. Her appeal challenges the sufficiency of the evidence to support that decision. We hold that the Commission erred as a matter of law when it determined that appellant, who was diagnosed with a compensable and permanent ankle injury, did not seek reasonably necessary medical treatment when she sought periodic examinations to determine whether a medically foreseeable condition related to her compensable injury was advancing. Thus, we reverse and remand for an award of benefits.[1]

Appellant suffered a severe right ankle injury on March 6, 2001, when she fell from a ladder while stacking boxes. She presented to Dr. Gordon Newbern, who diagnosed her with a dislocated ankle. Dr. Newbern performed an irrigation and debridement of the dislocation and reduction of her ankle and subtalar joint that day. Two days later, he applied a short leg cast to the ankle. On April 9, 2001, Dr. Newbern reported that appellant

[1] The parties also contested appellant's entitlement to permanent-partial disability. Appellees paid for a twelve-percent permanent impairment rating, but appellant sought benefits for a twenty-eight-percent rating. The ALJ found that appellant was entitled to only a twelve-percent rating. She attempted to argue that she was entitled to the twenty-eight-percent rating before the Commission, but she did not file a notice of cross-appeal to the Commission. The permanent-impairment rating is not an issue in this appeal.

could put more weight on the ankle, but that she was still using a walker to move. He replaced her cast with a walking boot. On January 4, 2002, Dr. Newbern wrote that appellant still had stiffness, swelling, and soreness; however, her condition had improved to the point where she could return to work. Dr. Newbern assessed her with a twelve-percent permanent impairment rating. As for future plans, Dr. Newbern stated that appellant could possibly develop arthritic changes, and he recommended annual follow-up examinations to assess whether her condition worsened. On December 2, 2002, he released appellant to full duty with no restrictions.

Dr. Newbern wrote a letter to appellee-insurance carrier on April 16, 2003. He stated that, despite the soft tissue healing around the ankle, appellant was still experiencing pain. He reiterated the possibility of the potential for developing post-traumatic arthritis in the ankle:

> I have mentioned in most of my notes that there is a significant potential for development of post-traumatic arthritis in this dislocated ankle. The fact that she has continued to have pain and stiffness with an objective loss of range of motion is evidence that the ankle joint has not returned to normal. This ankle will never return to normal. This ankle has a definite possibility of developing post-traumatic arthritis over time due to this injury.
>
> As I understand, the care for injuries sustained in the workplace when there is an injury that has ongoing symptoms and objective reasons for the patient to have potential further problems with an injury, these cases are maintained open to monitor this situation and to provide for care of this injury over time.
>
> I do attest to the fact that with a greater than 50% degree of medical certainty that Ms. Huckabee is at a real potential for further problems with her ankle down the road and that this case does need to be monitored over time so that if a problem does arise it can be addressed.

Appellant presented to Dr. Ruth Thomas for an independent medical examination on October 8, 2003. On that day, appellant rated her pain as a ten on the one-to-ten scale. Dr. Thomas related appellant's degenerative changes, stiffness, and pain to her compensable injury. She recommended that appellant

wear a solid ankle brace to help with the pain. She opined that appellant's pain would increase as the degenerative changes became more significant and that appellant might require surgical fusion in the future.

Appellant returned to Dr. Newbern on February 16, 2004, where she continued to complain of pain. Dr. Newbern wrote that appellant received some relief from the brace. He also noted the persistence of symptoms, but he did not see any significant development of post-traumatic arthritis. He again opined that appellant could develop post-traumatic arthritis and would need an ankle fusion, but he had yet to see any evidence of the condition. He instructed appellant to follow up with him within a year "to keep her file open as an ongoing case with Worker's Compensation."

Appellant was re-examined on December 3, 2004, November 28, 2005, and December 8, 2006. She continued to complain of pain and swelling, but Dr. Newbern opined that no further intervention or therapy would likely benefit her. On each occasion, he recommended annual monitoring of the ankle to determine the status of her condition. Specifically, on December 19, 2005, he wrote to appellant's attorney:

> I think that it is very possible that she will have subsequent problems with this ankle down the road. The ankle is stiff. She did suffer some post-traumatic arthritis to the joint. She may indeed have worsening stiffness, at some point, and she may develop significant post-traumatic arthritis to the ankle joint. This could conceivably result in the need for ankle fusion or ankle replacement. The outcome of this injury in the long run simply cannot be known.
>
> For this reason, I have recommended that she have an annual follow-up visit for this to keep this as an "open case," which I think most reasonably serves her interests and is appropriate for this injury.

Appellant presented to Dr. William Blankenship for another independent medical exam on March 6, 2006. She reported to Dr. Blankenship that she was doing her regular job with no restrictions. Dr. Blankenship reported that her ankle had healed, and he found no objective basis for any additional medical treatment.

The administrative law judge (ALJ) found that appellant proved entitlement to additional medical benefits, holding that continued monitoring to detect the onset and possible progression

of the post-traumatic arthritis in appellant's ankle was a reasonable and necessary medical expense. The Commission reversed the ALJ and held that appellant was entitled to no additional benefits, finding that appellant was seeking additional medical treatment solely to toll the statute of limitations. It specifically observed that Dr. Newbern had not offered or recommended any additional treatment and that appellant had not developed any degenerative or arthritic changes over the previous five years.

The sole issue is whether appellant is entitled to continued monitoring of her right ankle by Dr. Newbern. In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if that decision is supported by substantial evidence. *Smith v. City of Ft. Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, this court must affirm the decision. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Workers' compensation law provides that an employer shall provide the medical services that are reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a) (Supp. 2007); *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005). What constitutes reasonable and necessary treatment under this statute is a question of fact for the Commission. *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Stone, supra.*

■ With these standards in mind, we reverse the Commission's decision and remand for an award of benefits. Drs. Newbern and Thomas found that appellant had a chronic condition that could result in the development of post-traumatic arthritis and that could require an ankle fusion. Dr. Newbern consistently recommended that appellant be periodically evaluated to allow for proper monitoring of the condition. Periodic evaluations of a medically foreseeable condition related to a compensable injury constitute reasonably necessary medical treatment. As long as appellant remains at risk, any treatment that goes toward

monitoring the condition is reasonable and necessary. *See Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004) (stating that a claimant may be entitled to ongoing medical treatment, even after the healing period has ended, if the treatment is geared toward management of the injury). Accordingly, we reverse the findings of the Commission and remand this case for an award of appropriate benefits.

BIRD and GLOVER, JJ., agree.

Lavearn MOODY *v.* ADDISON SHOE COMPANY, Crockett Adjustment Co., TPA Munro & Company

CA 08-452 289 S.W.3d 115

Court of Appeals of Arkansas
Opinion delivered November 5, 2008

Fogleman & Rogers, by: *Joe M. Rogers*, for appellants.

Barber, McCaskill, Jones & Hale, P.A., by: *Robert L. Henry, III* and *Cynthia W. Kolb*, for appellees.

D.P. MARSHALL JR., Judge. This workers' compensation case asks whether substantial evidence supports the Commission's denial of benefits to Lavearn Moody for her gradual-onset shoulder injury. It does not. We therefore reverse and remand for the Commission to consider Moody's claim further.

I.

Lavearn Moody worked at Addison Shoe Company for thirty years. She spent her entire career working as a heel padder. The Commission found her to be a credible witness. Moody explained that she started each morning at work by bringing a bucket of glue and a bucket of cleaning fluid to her workstation. She then brought a rack of shoes to her station. Each rack had four shelves, and each shelf held three pair of shoes. Once back at her station, Moody would reach up with her right hand and grab a bundle of heel pads from the shoe rack. She then picked up all three pair of shoes on the bottom shelf — holding three shoes in each hand — and placed them on her work table. With a heel pad in her left hand, she used her right hand to dip her brush in the glue, and brushed the bottom of the heel pad. She then switched the heel pad into her right hand, placed it inside a shoe, and pressed down for about two seconds. Moody repeated these steps with all six shoes. She then returned them to the bottom shelf and did the same thing with the shoes on the other three shelves. Once she

finished the entire rack, Moody pushed it back in line and brought a new rack to her station.

Moody testified that it took her about five minutes to complete a rack of shoes and that she finished an average of eighty to ninety racks of shoes — between 1920 and 2160 individual shoes — each day. She worked about seven-and-one-half hours a day excluding lunch and breaks. Moody completed around four shoes a minute, inserting a heel pad into an individual shoe in about twelve-and-a-half to fourteen seconds. Her testimony shows that padding a single shoe required multiple right-hand movements.

In 2002, Moody began having pain in her right hand and arm. During the next few years, the pain moved to her right shoulder. She eventually underwent right-shoulder surgery. Moody's employer initially paid benefits for her hand and arm, but refused to pay any benefits related to her shoulder problems. After a hearing, the Administrative Law Judge found that Moody failed to prove that she suffered a compensable gradual-onset shoulder injury. The Commission adopted the ALJ's opinion, one Commissioner dissenting. Moody appeals.

II.

To receive benefits, Moody had to prove five things: (1) that her shoulder injury arose out of and in the course of her employment with Addison Shoe Company; (2) that the injury caused internal or external physical harm to her body which required medical services or resulted in death or disability; (3) that the injury was caused by rapid repetitive motion; (4) that the injury was the major cause of the disability or need for treatment; and (5) that the injury was established by medical evidence supported by objective findings. *Malone v. Texarkana Public Schools*, 333 Ark. 343, 349-50, 969 S.W.2d 644, 647 (1998). The Commission found that Moody did not prove a compensable shoulder injury because, though her work tasks were repetitive, they did not involve rapid motion. Under our substantial-evidence standard of review, we will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same set of facts before them could not have reached the conclusion arrived at by the Commission. *Hapney v. Rheem Manufacturing Co.*, 342 Ark. 11, 17, 26 S.W.3d 777, 781 (2000).

The General Assembly has not established guidelines for what constitutes the "rapid" element of rapid repetitive motion.

Malone, 333 Ark. at 349, 969 S.W.2d at 647. But our cases give guidance. In *Hapney v. Rheem Manufacturing Co.*, our supreme court reversed this court, finding that one bend of the neck every twenty seconds was sufficiently rapid to satisfy the statutory requirement. 342 Ark. at 18, 26 S.W.3d at 781. Hapney's job was to attach metal parts to an air-conditioning unit using six screws per unit. *Hapney v. Rheem Manufacturing Co.*, 67 Ark. App. 8, 10, 992 S.W.2d 151, 152 (1999). She had to bend her neck for each screw and, by completing 316 units during her nine- to ten-hour shift, Hapney bent her neck once every twenty seconds. *Hapney*, 342 Ark. at 17, 26 S.W.3d at 780. Similarly, assembly-line duties requiring a worker "to ensure one nut to be in place on an average of every fifteen seconds during the majority of her shift" satisfied the rapid-repetitive-motion requirement. *High Capacity Products v. Moore*, 61 Ark. App. 1, 7, 962 S.W.2d 831, 835 (1998).

Moody's movements — completing a shoe every twelve to fourteen seconds — were faster than the movements found to be sufficiently rapid in *Hapney* and *Moore*. The ALJ made clear in his opinion, which the Commission adopted, that "the credibility of [Moody] is not disputed regarding her work history." We are therefore convinced that fair-minded persons confronted with the facts described by Moody could not have arrived at the Commission's conclusion that her work tasks were not rapid. *Hapney*, 342 Ark. at 17, 26 S.W.3d at 781.

Because the Commission's denial of benefits was based solely on its finding that Moody did not perform her repetitive work rapidly, we reach no conclusion about the compensability of her injury. We reverse and remand for consideration of the other elements of compensability in light of our decision about rapidity.

Addison Shoe Company argues, as an alternative basis for affirmance, that substantial evidence supports the Commission's conclusion that Moody failed to prove that her shoulder injury arose out of and in the course of her employment. We reject this argument. The Commission, in adopting the ALJ's opinion, denied benefits based solely on Moody's failure to establish rapid repetitive movement. Because the Commission did not base its denial of benefits on Moody's failure to prove that her injury was work related, we cannot affirm on that basis.

Reversed and remanded.

ROBBINS and VAUGHT, JJ., agree.

Ronald BLANCHARD *v.* STATE of Arkansas

CA CR 07-1157 289 S.W.3d 129

Court of Appeals of Arkansas
Opinion delivered November 5, 2008

David O. Bowden, for appellant.

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

SARAH J. HEFFLEY, Judge. In July 2005, appellant Ronald Blanchard was charged by information with the offenses of rape and sexual assault in the second degree. In a jury trial, appellant was acquitted of the rape charge but was found guilty of second-degree sexual assault. Accordingly, appellant was sentenced to fifteen years in prison and fined $15,000. On appeal, he asserts that the trial court erred by allowing more than 1000 photographic images of pornography to be introduced into evidence.

The admissibility of photographs lies in the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *Smart v. State*, 352 Ark. 522, 104 S.W.3d 386 (2003). Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court acted improvidently, thoughtlessly, or without due consideration. That high standard was met here, and we reverse and remand for a new trial.

The victim in this case was a child, RAB, who was born on September 22, 1992, and who was appellant's step-daughter. She testified as to acts of sexual abuse that she said began when she was five years old. She testified that appellant first tickled her vagina and breast area and that the abuse progressed to his licking her vagina, sucking on her breasts, using a vibrator against her vagina, and making her masturbate with a vibrator. RAB stated that appellant would put butter on her vagina and have their dog lick it off of her. She also testified that appellant made her put her mouth on appellant's penis and "go up and down on him." RAB also recalled an incident when appellant put Vaseline on his penis and tried unsuccessfully to insert it in her anus. She said, however, that appellant never put his penis in her vagina.

RAB further testified that appellant made her watch pornographic movies, including a video of appellant and her mother having sex. She also said that appellant showed her pornography on the family computer. She recalled images of people having sex with animals and others that depicted a "he/she man," meaning "someone who looks like a girl but also has a penis."

The computer was sent to the Arkansas State Crime Lab where the hard drive was examined by Jeffery Taylor, the Digital Evidence Section Chief. Taylor retrieved 1022 pornographic images that he placed on a compact disc. Appellant objected to the introduction of all of the photographic images, and the trial court overruled appellant's objection. The exchange between court and counsel was as follows:

> DEFENSE COUNSEL: I guess my second issue, and I may have not been clear on this, but yesterday as far as these images were concerned I made two arguments. One is that they were, you know, that they were more prejudicial and the other was that they were cumulative. And you said that they were not more prejudicial. I didn't know for sure we were going to be able to limit

1,000 pictures down to, you know, five or ten, or, I mean they're all going to be representative of what's on there.

THE COURT: They went through them fast last time.[1] I don't remember, it seemed like it was less than 30 minutes.

DEFENSE COUNSEL: That's a pretty long time just for pictures and pictures and pictures.

PROSECUTOR: Well, Your Honor, our argument would be is the sheer number of them shows — goes to his predilection.

DEFENSE COUNSEL: And we could stipulate as to the number. I just think it's more for shock value than it is for — I mean it's not pictures of men and little girls which is what he's being charged with.

PROSECUTOR: Some of them are.

DEFENSE COUNSEL: Well, some of them are little girls standing on a beach, but it's not the same as —

PROSECUTOR: This is probative.

DEFENSE COUNSEL: Which is not the same as 1,000 pictures of horses and dogs and eels and fish.

THE COURT: The State went through them very fast last time. I don't think you're prejudiced by it. So, your objection's noted.

As a result of the trial court's ruling, the compact disc was shown to the jury in its entirety.

Before reaching the merits of appellant's argument, we must discuss a preliminary matter. Appellant failed to include copies of the compact disc or otherwise provide copies of the images in his brief. Rule 4-2(a)(5) of the Rules of the Arkansas Supreme Court and Court of Appeals provides in pertinent part:

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[1] Appellant's previous trial ended in a mistrial due to juror misconduct.

> Whenever a map, plat, photograph, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by photography or other process and include it in the Addendum with a reference in the abstract to the page in the Addendum where the exhibit appears unless this requirement is shown to be impracticable and is waived by the Court upon motion.

The rule thus requires photographs and other similar exhibits that cannot be abstracted in words to be reproduced and placed in the addendum, unless the court on appeal waives this requirement. *Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827 (2002). Appellant filed no motion with this court, in advance of submitting his brief, asking us to waive this requirement. His counsel did explain in an abstractor's note the difficulties associated with reproducing this exhibit and in effect asked the court to waive the requirement of reproducing the pornographic photographs in the addendum. We accept counsel's explanation and request in lieu of filing a formal motion, but we caution that in the future permission should be sought for waiving this requirement by filing a motion before a brief is submitted.

In his argument on appeal, appellant concedes that some of the pictures are likely admissible, but he argues that a vast number of them were cumulative and that their overall prejudicial effect exceeded their probative value. After reviewing the images, we must agree.

The 1022 images retrieved from the computer's hard drive were graphic and of an indecent sexual nature. Given the volume and variety, the pictures defy categorization. It is enough to say that the images portrayed men or women purporting to have intercourse with dogs, donkeys, and horses; women inserting snakes, eels, and other creatures into their vaginas; women inserting vegetables into their vaginas; close up views of men and women having sex; group sex; closeup views of female genitalia; acts of cunnilingus and fellatio; closeup views of urination and defecation; and nude women, including some who were pregnant or elderly. A few images depicted young, unclothed females, young girls near penises, and young girls who appeared to have penises. In sum, a literal potpourri of pornographic images was shown to the jury.

The controlling rule of evidence is Ark. R. Evid. 403, which states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Although highly deferential to the trial court's discretion in these matters, our courts have rejected a *carte blanche* approach to the admission of photographs. *Sanders v. State*, 340 Ark. 163, 8 S.W.3d 520 (2000). Stated differently, the trial court cannot simply give *carte blanche* admission of any and all photographs, as that would be a failure to exercise discretion. *Smart v. State, supra.* We have cautioned against promoting a general rule of admissibility that essentially allows automatic acceptance of all photographs that the prosecution can offer. *See Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003). We have rejected the admission of inflammatory pictures where claims of relevance are tenuous and prejudice is great, and we expect the trial court to carefully weigh the probative value of photographs against their prejudicial nature. *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997). We require the trial court to first consider whether such evidence, although relevant, creates a danger of unfair prejudice, and then to determine whether the danger of unfair prejudice substantially outweighs its probative value. *Garcia v. State*, 363 Ark. 319, 214 S.W.3d 260 (2005). "Unfair prejudice" means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

Nonetheless, when photographs are helpful to explain testimony, they are ordinarily admissible. *Garcia v. State, supra.* Even the most inflammatory photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to enable a witness to testify more effectively, or enable the jury to better understand testimony. *Sanders v. State, supra.* Further, a defendant cannot prevent the admission of a photograph by conceding the facts portrayed therein. *Garcia v. State, supra.* Of course, if a photograph serves no valid purpose and could only be used to inflame the jury's passions, it should be excluded. *Id.*

This case was about the rape and sexual assault of a young female. The State purported to introduce these images to show appellant's sexual proclivities. In our view, the photographs of young girls do have some tendency to prove a depraved sexual appetite, and thus the photographs depicting those images were relevant to the crimes alleged. The pornographic images were also relevant because they served to corroborate the child's testimony

with respect to her claim that appellant showed her pornography and with respect to her account of certain sexual acts perpetrated against her by appellant. Although relevant, it is our considered judgment that the probative value of introducing all of the images was outweighed by the danger of unfair prejudice. The photographic images numbered 1022, and they depicted a wide range of pornographic materials. The inflammatory nature of the images is readily apparent. By the trial court's estimate, it took thirty minutes for them to be shown to the jury. Many of the photographs were duplicates, and many portrayed similar subject matter over and over again. The record is clear that the trial court did not perform the requisite gate-keeping function of sifting through the photographs to determine their probative value in relation to their obvious prejudicial effect. Instead, the trial court simply admitted all of the photographs without exercising any discretion, which is what our case law proscribes. The purposes for admitting the materials could just as well have been accomplished by introducing a sampling of the images, rather than the wholesale admission proposed by the State and allowed by the trial court. Consequently, we find a manifest abuse of discretion, and we reverse and remand for a new trial consistent with this opinion.

Reversed and remanded.

HART and GLADWIN, JJ., agree.

Tarequis FIELDS *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 08-296 289 S.W.3d 134

Court of Appeals of Arkansas
Opinion delivered November 5, 2008

Deborah R. Sallings, Arkansas Public Defender Commission, for appellant.

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

Jo Ellen Carson, attorney ad litem for the minor child.

SARAH J. HEFFLEY, Judge. Appellant Tarequis Fields brings this appeal from the trial court's order terminating his parental rights to his son TF, born on March 23, 2006. He argues that there is insufficient evidence to support the trial court's decision. We disagree and affirm.

The Arkansas Department of Human Services (DHS) took TF and his half-brother into emergency custody on May 2, 2006, after the Fort Smith police arrested appellant and his girlfriend, Nikki Christian,[1] the mother of both children, at their home on drug charges. The affidavit[2] supporting the motion for emergency custody also noted that there were environmental issues with the home. The affidavit stated:

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[1] Ms. Christian's parental rights to both of her children were also terminated at a separate hearing. We affirmed that decision on appeal. *Christian v. Arkansas Dep't of Human Servs.*, CA08-294 (Ark.App. June 25, 2008). We also note that TF's half-sibling is not involved in this appeal.

[2] At the termination hearing, the trial court incorporated and made a part of the record all the pleadings and orders contained in the case file. Although appellant objected to the court's action, appellant does not challenge the trial court's ruling in this appeal. Therefore, all pleadings and orders are before us and are properly considered as evidence in this case.

> Worker Williams observed that the home was dirty. Worker Williams observed that floors were dirty and covered with trash. Worker Williams observed that refrigerator was dirty, and the sink and counters were covered [with] dirty dishes and trash. Worker Williams observed that the family did not have running water. Worker Williams also observed that bathroom [was] dirty. There were clothes on the floor, and it appeared the family had been using the toilet for an extended time, since the water had been turned off. The toilet was full of feces to the point of almost overflowing.
>
> Worker Williams was able to speak with Detective Wayne Barnett. Detective Barnett states that law enforcement discovered one ounce of crack cocaine, drug residue, marijuana, a digital scale, and other drug paraphernalia in the home. Detective Barnett also states that officers located a forty-five automatic "Taurus" hand gun on [appellant].

The trial court granted DHS emergency custody of the children on May 5, 2006. The court later found probable cause to believe that the boys were dependent-neglected.

The adjudication hearing was held on June 16, 2006. Appellant was present at this hearing. The trial court found the children to be dependent-neglected and ordered appellant to complete parenting classes, have a psychological evaluation and drug and alcohol assessment, to obtain follow-up treatment as recommended, obtain and maintain stable housing and transportation, visit regularly, and to resolve the pending drug charges.

The case was reviewed on November 16, 2006. Appellant did not attend this hearing, nor was he represented by counsel. Genetic testing showed that appellant was the father of TF and a finding of paternity was made. The goal of the case remained reunification, although the court also found that appellant remained incarcerated and had been unable to comply with its orders.

At a permanency-planning hearing on May 1, 2007, the court changed the goal of the case to a concurrent one of reunification and termination of parental rights and adoption. The court again recognized that appellant had been unable to comply with court orders due to his continued incarceration. Subsequently, at a review hearing on August 7, 2007, the court set the goal as termination of parental rights and adoption. Appellant was not present at either of these hearings.

DHS filed a petition for the termination of appellant's parental rights on October 5, 2007. Counsel was appointed to represent appellant by an order dated December 7, 2007, and the termination hearing was held on December 21, 2007.

At the hearing, appellant testified that he had been incarcerated since his arrest on May 2, 2006, when TF was only five weeks old. In January 2007, he pled guilty to reduced charges of possession of marijuana with intent to deliver, possession of drug paraphernalia, and maintaining a drug premises, and he was serving concurrent sentences of ten years in prison followed by a suspended sentence of ten years. His driver's license had also been suspended. Appellant testified that his first possible parole date was in June 2008. He acknowledged that he had a disciplinary action in the past two months for fighting. Appellant testified that his eligibility for release was something that may happen in the future, if he did not get into any more trouble and "everything goes fine."

When paroled, appellant planned to live with his mother in Blytheville and get a job driving a fork lift or working in a factory, as he had done before. Appellant testified that since 2005, and during the time he lived with Ms. Christian in Fort Smith, he had only worked two days because he had left his car in Blytheville and lacked transportation to get to work. Appellant admitted that the home he lived in with TF was not very clean and that it had no running water. He also said that cocaine, marijuana, drug paraphernalia and scales were in the home. He also claimed ownership of the .45 pistol that was seized upon his arrest.

Appellant understood that TF had been out of the home and with the same foster family since TF was five weeks old. He believed that it was in TF's best interest to wait for him to get out of prison, set up a house, obtain employment, and get his driver's license restored. Appellant testified that no one from DHS had contacted him about a case plan, but that he was willing to take parenting classes and that he had completed anger-management and substance-abuse classes while he was in prison.

Angela Carvey, the DHS caseworker, testified that the department did not offer appellant any services but that services were provided for the child and foster parents. She recommended termination of appellant's parental rights because the foster home was the only home TF had known. She also stated that TF was adoptable and that the foster family had expressed the desire to adopt him. According to Carvey, the only part of the case plan that

appellant had completed was to resolve his criminal charges. On cross-examination, Carvey denied that the department had a policy of automatically seeking termination of parental rights any time a parent is incarcerated. She also said that she was unaware of any case where the department did not seek termination but instead waited for the parent to be released. She testified that the child had been in foster care for nineteen months and that it would not be in TF's best interest to wait any longer. Carvey further testified that the mother never suggested that appellant's family be considered as a placement for the child.

Nikki Christian, TF's mother, testified that, at the time the case arose, she and appellant were living together and that he was helping her with both children. She asserted that appellant was a good father. She admitted that she and appellant were both selling drugs. She said that she was still in communication with appellant and would resume her relationship with him when released from prison. On cross-examination, she admitted that their house was messy and had no running water and that the toilet was to the point of overflowing at the time the children were removed.

At the conclusion of the hearing, appellant's counsel argued that DHS had offered appellant no rehabilitation services whatsoever and thus DHS had failed to present sufficient proof of the ground for termination found at Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a) (Repl. 2008), which requires DHS to prove that it put forth a meaningful effort to rehabilitate the parent and correct the conditions that caused removal. Appellant urged the trial court to wait and see if appellant might be released from prison in June and then to see if appellant would carry through with the things he said that he was going to do if paroled. DHS responded that appellant knew what he needed to do to achieve reunification and that he had never contacted DHS in the nineteen months that had passed since the child was removed from the home. DHS also asked the court to consider the alternative ground for termination based on a parent's incarceration for a substantial period of the child's life found at Ark. Code Ann. § 9-27-341(b)(3)(B)(viii). The trial court announced its ruling terminating appellant's parental rights from the bench:

> The child has been out of the home for a period in excess of twelve months; it's actually been nineteen months. The court notes that the child was six [five] weeks old when removed from the home, and the child has virtually been out of the home its entire life. ... The likelihood that the father could comply within a reasonable

> time as viewed from the children's standpoint is highly unlikely. You know, by his own testimony he's not going to be eligible to get out, at the earliest, in what, June, another six months. And then if he got out and did absolutely everything perfect that he was supposed to do it would be another six months before the court would consider any type of trial placement. So, we're looking at another year, absolute minimum with a child that's now twenty [nineteen] months old and has spent all but six [five] weeks of its life in the State's custody. So, from the child's standpoint this cannot be accomplished within a reasonable period of time.
>
> And, the only date that we're sure of, he entered a plea on January 17, 2007, and is serving ten years in the Department of Correction on possession with intent to deliver, possession of drug paraphernalia, and maintaining a premises for drug activities with credit for time served since May 2, 2006. You know, that is the date that we know for certain. These dates where they may be eligible all can fluctuate depending on their behavior. He's testified he's already had one disciplinary action, so you know, that is just something that may happen.
>
> Then the other thing the court has to consider if the court doesn't terminate, what would be the risk of harm if returned to the father. During the time he's known the mother he's worked a total of a legitimate job for two days by his own testimony. The other money he was earning, he was dealing drugs. Now to me, he didn't care about these children, he was interested in dealing drugs. He has a six [five] week old and a year old toddler in the home when the arrests occurred and they have marijuana, cocaine, paraphernalia, and a loaded weapon in the home.
>
> . . . .
>
> Then looking at the other part of the problem we have is what was the condition of the home when these children were living in it irregardless [sic] of the drugs. They're in a home that's filthy with no running water. They are not taking care of these children; there's no indication that they're going to change and take care of them when they get out. These children at their tender ages need to go on to permanency and not wait another year, or two, or three years to see if they may get their acts together.

In the subsequent written order, the trial court found that terminating appellant's parental rights was in the child's best interest and was justified on two grounds: (1) "that the juvenile has

been adjudicated by the Court to be dependent-neglected and has continued out of the custody of the parents for twelve (12) months and, despite a meaningful effort by the Department to rehabilitate the parents and correct the conditions which caused removal, those conditions have not been remedied by the parents"; and (2) "Furthermore, the father has significant criminal drug charges and has received a ten (10) year sentence. From the juvenile's viewpoint, the father could not achieve reunification within a reasonable time."

We have held that when the issue is one involving the termination of parental rights, there is a heavy burden placed on the party seeking to terminate the relationship. *Jefferson v. Arkansas Dep't of Human Servs.*, 356 Ark. 647, 158 S.W.3d 129 (2004). Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.* A circuit court may terminate parental rights if the court finds by clear and convincing evidence that termination is in the child's best interest, considering the likelihood that the child will be adopted and the potential harm the child would suffer if returned to the parent's custody; and finds by clear and convincing evidence that at least one statutory ground for termination exists. *See Latham v. Arkansas Dep't of Health and Human Servs.*, 99 Ark. App. 25, 256 S.W.3d 543 (2007); Ark. Code Ann. § 9-27-341(b)(3) (Repl. 2008). One of the grounds included in the statute is that the child "has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent." Ark. Code Ann. § 9-27-341(b)(3)(b)(i)(a). Another ground is that the "parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life." Ark. Code Ann. § 9-27-341(b)(3)(B)(vii).

When the burden of proving a disputed fact is by clear and convincing evidence, the question we must answer on appeal is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Malone v. Arkansas Dep't of Human Servs.*, 71 Ark. App. 441, 30 S.W.3d 758 (2000). In determining whether a finding is clearly erroneous, we give due deference to the opportunity of the trial court to judge the credibility of the witnesses. *Id.*

We hold that the trial court did not err in terminating appellant's parental rights on the ground that appellant was sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the child's life. First, we clarify for the sake of the dissenting judges that the trial court did indeed terminate appellant's rights on this ground. It was argued, without objection, as a ground for termination at the hearing by counsel for DHS, and it is apparent from the trial court's oral remarks and the written order that this ground was a basis for the trial court's decision. Although the trial court did not quote the statutory language in its exact form, the court's meaning could not be more clear. Moreover, appellant addresses this ground in his brief.

Secondly, we cannot say that the trial court's finding is clearly erroneous. Appellant was sentenced to concurrent terms of ten years in prison. The child in this case was ten months old when appellant received the ten-year sentence and nineteen months old at the time of the termination hearing, when appellant had served only eleven months of his sentence. For a child so young as TF, the sentence appellant received without question constitutes a substantial period of his life. Appellant argues, however, that the term of his imprisonment is not determinative, citing *Crawford v. Arkansas Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997), where it was said that "[a]lthough imprisonment imposes an unusual impediment to a normal parental relationship, we have held that it is not conclusive on the termination issue." Appellant has taken this familiar statement of law out of context. In *Crawford*, the father's parental rights were not terminated on the ground that he had received a substantial prison sentence.[3] Crawford's rights were terminated on the entirely different ground that he had willfully failed to provide significant material support for his children and to have meaningful contact with them. Thus, the statement in *Crawford* that imprisonment is

[3] In *Crawford v. Arkansas Dep't of Human Servs.*, *infra*, the father had been sentenced to ten years in prison with five years suspended. This sentence would not have served as a ground for termination because the statute in effect at that time defined "substantial period" as "a sentence, not time actually served, of no less than fifteen years, none of which has been suspended." Ark. Code Ann. § 9-27-341(2)(H)(ii) (Repl. 1998). In its current form, Arkansas Code Annotated § 9-27-341(b)(3)(B)(viii) requires only that the parent be sentenced to a substantial period of the juvenile's life, but it does not set a minimum term of imprisonment.

not controlling is pertinent when the issue involves the willful failure to provide meaningful support and to maintain meaningful contact, or the like. *See also, e.g., Linker-Flores v. Arkansas Dep't of Human Servs.*, 364 Ark. 224, 217 S.W.3d 107 (2005) (imprisonment not controlling but does not toll parental responsibilities when considering the parent's failure to remedy the conditions that caused removal); *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984) (incarceration not controlling on the issue of abandonment); *Zgleszewski v. Zgleszewski*, 260 Ark. 629, 542 S.W.2d 765 (1976) (incarceration not controlling on the issue of abandonment). However, this statement of law has no particular application when the very ground at issue involves a prison sentence that constitutes a substantial period of the child's life. When that ground is under consideration, the length of the prison sentence can be determinative of the termination decision.

Although the statute speaks in terms of the sentence received by the parent, the trial court addressed appellant's wait-and-see argument regarding the possibility that he might be released on parole in six months.[4] The trial court found, however, that appellant's release from prison could not be predicted with certainty and that, even if appellant were released from prison when he claimed, the child could not be returned to him immediately or within a reasonable time thereafter. In making this determination, the trial court considered appellant's demonstrated failings as a parent, which included evidence that appellant dealt drugs instead of working and evidence showing the deplorable condition of the home. In all, the court reasoned that a prolonged delay, possibly spanning another year or perhaps more, was not in the best interest of a child who was nineteen months old and who had been in foster care since he was five weeks old.

These are worthy and pertinent considerations. The trial court's findings addressed the issue of the best interest of the child and were consistent with the stated intent of the termination statute, which is "to provide permanency in a juvenile's life in all circumstances where return to the family home is contrary to the

[4] In a footnote, appellant's counsel advises that appellant has been released on parole and is now living in Blytheville. It is not proper for counsel to include this statement in his brief, and this belated information can play no part in our decision. It is axiomatic that we do not consider matters outside the record to determine issues on appeal. *Peterson v. Dean*, 102 Ark. App. 215, 283 S.W.3d 610 (2008).

juvenile's health, safety or welfare, and it appears from the evidence that return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective." Ark. Code Ann. § 9-27-341(a)(3). From our review of the record as a whole, we are convinced that the trial court's decision is not clearly erroneous. Therefore, we affirm the trial court's best-interest determination and the finding that appellant was sentenced for a period of time that constituted a substantial period of the child's life. Although we consider DHS's reunification efforts woefully inadequate, that issue is moot because only one ground is necessary to terminate parental rights. *Lee v. Arkansas Dep't of Human Servs.*, 102 Ark. App. 337, 285 S.W.3d 277 (2008).

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

HART and BAKER, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. I agree with Judge Baker that this case should be reversed, but write separately to make two points. First, the basis for the trial court's conclusion that custody could not be regained by Fields within a reasonable time was largely created by DHS's inaction, as DHS knew about Fields's whereabouts and his status as T.F.'s biological father and did nothing to make him a part of the case until it assumed that termination of his parental rights was a fait accompli. Fields was not even represented by counsel until December 5, 2007, not two weeks before the December 21, 2007, termination hearing. Of course, as Judge Baker so clearly states, no reunification services were offered. DHS did not even make the effort to ascertain Fields's date of release from incarceration, which should have been a key element in their case. The majority has, however, overlooked this glaring failure by speculating, despite Fields's testimony to the contrary, that the time for his release would be too far in the distant future to provide "permanency" for T.F.

Furthermore, although the actual time remaining on Crawford's sentence was not proved at the hearing to be "a substantial period of the juvenile's life," as specified by Arkansas Code Annotated section 9-27-341 (b)(3)(B)(viii) (Repl. 2008), the majority creates out of whole cloth a legal theory to work around this failure of proof through a twisted interpretation of the holding in *Crawford v. Arkansas Deparment of Human Services*, 330 Ark. 152, 951 S.W.2d 310 (1997). In *Crawford*, the supreme court expressly

states, consistent with two other cases, that imprisonment is "not conclusive on the termination issue." 330 Ark. at 157, 951 S.W.2d at 313. While the supreme court affirmed the termination, it noted that the appellant not only faced an additional four years on his sentence, he was incarcerated for sexually abusing the half-sister of his two children. Obviously, the instant case is distinguishable.

My second point is of broader nature. I think the State of Arkansas has made a fundamental error in how to approach these cases. The basic terminology involved proves this: we call these actions "termination of parental rights." In effect, they are termination of parental *responsibility*. The goal of this state should not be to punish those whom we perceive to be bad parents, but to ensure that they carry out their basic responsibility to support and nurture the children that they bring into this world. I do not dispute that almost all the parents of the children in DHS custody are part of the problem. We as a society need to make them part of the solution, not absolve them of that responsibility and leave them unencumbered to produce more offspring. In this case, Fields, albeit belatedly, stepped forward to assume responsibility for the child he fathered. We should not penalize him for doing this — indeed, we should expect nothing less.

KAREN R. BAKER, Judge, dissenting. As the majority acknowledges, the department *did not offer Fields any services.* (Emphasis added.) Appellant's counsel correctly argued at the conclusion of the hearing that Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a) (Repl. 2008) requires DHS to prove that it put forth a meaningful effort to rehabilitate the parent and correct the conditions that caused the removal. The majority reasons that the issue is moot because only one ground is necessary to terminate parental rights, and, that despite the trial court's failure to properly identify the statutory language, the trial court correctly found that appellant's incarceration prevented the father from achieving reunification within a reasonable time. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(viii).

In support of this conclusion, the majority relies upon Angela Carvey's recommendation of termination of Fields's parental rights because the foster home was the only home T.F. knew. She also asserted that T.F. was adoptable and that the foster family had expressed interest in doing so. According to Carvey, the only part of the case plan Fields had completed was to resolve his criminal charges. On cross-examination, Carvey denied that the department had a policy of automatically seeking termination of

parental rights any time a parent is incarcerated. She also said that she was unaware of any case where the department did not seek termination but instead waited for the parent to be released.The only issue before this court is whether there is sufficient evidence to support the circuit court's decision. The court found that DHS had proven two grounds for termination of Fields's parental rights: that the children had been adjudicated to be dependent-neglected and had continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions had not been remedied by the parent, *see* Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a), and that Fields was sentenced to a period of time that constitutes a substantial period of the juvenile's life and is still subject to that sentence. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(viii).

The first ground found by the circuit court, based on section 9-27-341(b)(3)(B)(i)(a), required proof that T.F. had been adjudicated dependent-neglected, that he had remained out of his parents' custody for more than twelve months, that DHS made reasonable efforts to provide services, and that the conditions that caused T.F.'s removal had not been remedied. While the majority reasons that the issue is moot, the circuit court's finding that all four elements had been met is clearly erroneous because the DHS caseworker testified that no services were offered to Fields. Fields testified that while incarcerated he completed parenting classes, a substance-abuse program, and an anger-management program without assistance from DHS. Fields testified that he had a place to live and transportation lined up. However, DHS did not determine whether this would be an adequate home for T.F. Therefore, Fields's parental rights cannot be terminated based on section 9-27-341(b)(3)(B)(i)(a).

The majority reasons that the length of the prison sentence can be determinative of the termination decision and holds that the prison sentence in this case constitutes a substantial period of the child's life. It finds that the possibility of parole within a few months was inconsequential and relies upon the trial court's reasoning that the delay "possibly spanning another year or perhaps more, was not in the best interest of a child who was nineteen months old and who had been in foster care since he was five weeks old."

I dissent to point out that our review of the trial court's determination that the sentence in a criminal proceeding would

constitute a substantial period of the juvenile's life should be limited neither to the length of the child's current years lived nor by the years left to emancipation. Rather, we should focus upon the full life expectancy of the juvenile and the length of the incarceration in relation to that life expectancy.

According to the Child Welfare League of America (CWLA), approximately 150,000 teens are in foster care.[1] About 20,000 of these older youth "age out" of foster homes and institutions each year. *Id.* The age at which foster care youth must leave the system varies from state to state. *Id.* CWLA reports that at least 22 states have set that age at 21; Massachusetts has the option to age out youth at 23. Nineteen states, including Arkansas, age out foster care youth at 18. *Id.* Many teens also leave the system prior to the "official" emancipation age and try to make a go of living on their own. *Id.* According to the National Alliance to End Homelessness, in some areas of the country as many as 60 percent of homeless people have a foster care history. *Id.* Many never complete high school and go on welfare. *Id.* About one-quarter of the men end up incarcerated. *Id.* In 1991, the U.S. Department of Health and Human Services found that only one in six of the teens they tracked who had recently left care was completely self-supporting. *Id.*

Statistics such as these indicate that many of these children, from whom the state permanently separates their parents, leave our care and gravitate to homeless shelters, prison, and welfare. When we consider the entire life of the child in this case, another year spent in determining whether reunification with his father could be achieved would not have been significant. In fact, the time frame would have only been a few short months. No services were provided to this father. While we have repeatedly said that few consequences of judicial action are so grave as the severance of natural family ties, *see Osborne v. Ark. Dep't of Human Servs.*, 98 Ark. App. 129, 252 S.W.3d 138 (2007), we should also be cognizant that the grave consequences of that severance extends far beyond the juvenile years of the child life. In this case, the father sought and completed classes with no help or support from the department. The law favors preservation, not severance, of natural familial bonds. *See Santosky v. Kramer*, 455 U.S. 745 (1982); *Benedict*

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[1] *Almost Home*, by Kendra Hurley, Shelterforce Online, Issue 125, September/October 2002; National Housing Institute, http://www.nhi.org/online/issues/125/independence.html.

v. Ark. Dep't of Human Servs., 96 Ark. App. 395, 242 S.W.3d 305 (2006). Whether Fields would ultimately be successful in being reunited with his son, we cannot know. Nonetheless, the State of Arkansas owes this child the opportunity to have that chance.

Tamara Kay WESLEY *v.* Carlos Deshaun HALL

CA 07-1293 289 S.W.3d 143

Court of Appeals of Arkansas
Opinion delivered November 5, 2008

Brenda Austin, LTD, by: *Brenda Austin*, for appellant.

One brief only.

KAREN R. BAKER, Judge. Appellant Tamara Kay Wesley challenges the trial court's order finding that appellee Carlos DeShaun Hall was not the biological father of her child, setting aside the prior order of paternity, and ordering that any unpaid child

support under the previous orders also be set aside and vacated. The trial court in this case followed the provisions of Arkansas Code Annotated section 9-10-115 (Repl. 2008) in its disposition of this case. The amendments of this statute were in effect at the time the trial court entered its order. Accordingly, we affirm.

Appellant gave birth to a son on November 16, 2002. Two days later both she and appellee signed the acknowledgment of paternity in Fort Smith, Arkansas, where the child was born. On January 21, 2005, and October 31, 2006, orders were entered in Tennessee, where appellee lived, that established paternity and support, an educational trust, and medical payments for the child. The two orders were registered as foreign orders on November 8, 2006, and May 2, 2007, respectively. Appellant filed a petition for contempt citation and modification on November 14, 2006. A hearing was set on January 8, 2007. Appellee filed an amended petition to determine paternity, visitation, and support on January 4, 2007. The test results established that appellee was not the biological father. The court set aside the previous order of paternity, the orders for child support, vacated the outstanding amounts, and ordered that there be no refund for amounts previously paid.

Appellant argues that the trial court erred in ordering the paternity testing and in ordering that any unpaid child support owed under the previous orders was set aside and vacated.[1] The trial court followed the provisions of section 9-10-115 in effect at the time the court entered the order. The statute provides in relevant part as follows:

> (a) The circuit court may at any time enlarge, diminish, or vacate any order or judgment in the proceedings under this section except in regard to the issue of paternity as justice may require and on such notice to the defendant as the court may prescribe.

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[1] While appellant states briefly that the trial court should not have ordered paternity testing because appellee failed to state sufficient facts to support his conclusion that there was a material mistake of fact, appellee's petition specifically alleged that only after he executed the acknowledgment of paternity did he learn that appellant had engaged in sexual relations with other parties who could have fathered the child and that the child did not physically resemble appellee. Furthermore, even the prior version of the statute, which appellant urges us to apply, allows a legal father to have an absolute right to a paternity test and have his child-support obligation terminated if it is determined that he is not the biological father. *See Martin v. Pierce*, 370 Ark. 53, 60, 257 S.W.3d 82, 88 (2007).

(b) The court shall not set aside, alter, or modify any final decree, order, or judgment of paternity in which paternity blood testing, genetic testing, or other scientific evidence was used to determine the adjudicated father as the biological father.

. . . .

(d)(1) Beyond the sixty-day period or other limitation set forth in subsection (c) of this section, a person may challenge a paternity establishment pursuant to a voluntary acknowledgment of paternity or an order based on an acknowledgment of paternity only upon an allegation of fraud, duress, or material mistake of fact.

(2) The burden of proof shall be upon the person challenging the establishment of paternity.

(e)(1)(A) When any man has been adjudicated to be the father of a child or is deemed to be the father of a child pursuant to an acknowledgment of paternity without the benefit of scientific testing for paternity and as a result was ordered to pay child support, he shall be entitled to one (1) paternity test, pursuant to § 9-10-108, at any time during the period of time that he is required to pay child support upon the filing of a motion challenging the adjudication or acknowledgment of paternity in a court of competent jurisdiction.

(B) If an acknowledgment of paternity was the basis for the order of support, the motion must comply with the requirements of subsection (d) of this section.

(2) The duty to pay child support and other legal obligations shall not be suspended while the motion is pending except for good cause shown, which shall be recited in the court's order.

(f)(1) If the test administered under subdivision (e)(1)(A) of this section excludes the adjudicated father or man deemed to be the father pursuant to an acknowledgment of paternity as the biological father of the child and the court so finds, the court shall:

(A) Set aside the previous finding or establishment of paternity;

(B) Find that there is no future obligation of support;

(C) Order that any unpaid support owed under the previous order is vacated; and

(D) Order that any support previously paid is not subject to refund.

(2) If the name of the adjudicated father or man deemed to be the father pursuant to an acknowledgment of paternity appears on the birth certificate of the child, the court shall issue an order requiring the birth certificate to be amended to delete the name of the father.

(g) If the test administered under subdivision (e)(1)(A) of this section confirms that the adjudicated father or man deemed to be the father pursuant to an acknowledgment of paternity is the biological father of the child, the court shall enter an order adjudicating paternity and setting child support in accordance with § 9-10-109, the guidelines for child support, and the family support chart.

Ark. Code Ann. § 9-10-115.

The paternity test determined that appellee was not the father. Pursuant to that test result, the trial court entered an order in compliance with section 9-10-115. Appellant argues that the trial court should have applied Arkansas Code Annotated § 9-10-115 (Supp. 2005) instead of the amended version that was in effect at the time the trial court entered its order filed for record on October 17, 2007. Appellant insists that because the petition for paternity testing was filed prior to the effective date of July 31, 2007, and that the results of the paternity testing were filed of record prior to the effective date of the amendments, that the trial court had no authority to enter an order pursuant to the statutory provisions in effect at the time the order was entered. She urges us to apply the previous provision that allowed for only a prospective termination of support.

Her argument is unpersuasive. As Justice Brown explained:

> There is continued confusion over the issue of child-support arrearages under § 9-10-115(f)(1) among the bench and bar, as evidenced by the case at hand. I urge the General Assembly, which is now in session, to clarify § 9-10-115(f)(1) once and for all on whether child-support arrearages must be paid by a non-biological father in all instances.

Office of Child Support Enforcement v. Parker, 368 Ark. 393, 400, 246 S.W.3d 851, 856 (2007) (Brown, J., concurring).

Our legislature was in session when *Parker* was published and our legislature amended the statute at issue here to clearly state its intention that a nonbiological father be relieved of

all child-support arrearages as well as all future child support. The trial court applied the statute in effect at the time the written order was filed. Accordingly, we find no error and affirm.

HART, BIRD, and HEFFLEY, JJ., agree.

PITTMAN, C.J., concurs.

HUNT, J., dissents.

JOHN MAUZY PITTMAN, Chief Judge, concurring. Because the court declined to certify this case to the Arkansas Supreme Court, and I must therefore consider the merits of the arguments presented therein, I concur with the result stated in the majority opinion. I write separately to voice my opposition to this court's continued reluctance to certify significant cases such as this to the Arkansas Supreme Court. We are forced to choose between two potentially unjust results, and to do so we must determine the intent of the General Assembly on a matter that is less than clear. Furthermore, the issues decided herein will potentially affect many Arkansans, including a disproportionately large number of children. To my mind, this case requires construction of Arkansas statutes on an issue of significant public interest, both of which are expressly listed as grounds for certification in Ark. Sup. Ct. R. 1-2(b).

Refusing to certify cases such as this is simply a waste of resources. As often as not, after multiple panels of this court spend several weeks wrangling over the important issues that a case presents, our effort is rendered meaningless when the Arkansas Supreme Court subsequently accepts review of our decision. *See, e.g., Barnett v. Monumental General Insurance Co.*, 81 Ark. App. 23, 97 S.W.3d 901 (2003), *aff'd*, 354 Ark. 692, 128 S.W.3d 803 (2003). This waste could often be avoided by the simple expedient of certification, which is in reality nothing more than asking the Supreme Court if it would like to decide the appeal in the first instance. To do so, it seems to me, is simply a matter of courtesy.

Furthermore, questions of such weight require a definitive and clear opinion. As I noted in my concurrence in *Barnett v. Monumental General Insurance Co., supra*, even judges of our own court often regard our decisions in such cases to be of dubious precedential value. When issues of significant public interest are involved, the bench, bar, and public deserve an analysis that is authoritative and clear.

I respectfully concur.

EUGENE HUNT, Judge, dissenting. I disagree with the majority's opinion. The opinion ignores the fact that Carlos Hall was not present and did not testify at the hearing wherein paternity testing was ordered. Carlos Hall filed his petition for paternity testing on December 27, 2006. In paragraph three of that petition, Hall stated: "That the Plaintiff and Defendant engaged in a relationship which led to the live birth of one (1) child, namely, Carlos Deshaun Hall, whose date of birth is November 16, 2002." In paragraph six of the same petition, Hall stated: "That the Plaintiff prays for an order for paternity testing to determine if he is the biological father of the minor child, Carlos Deshaun Hall." A hearing was held on May 3, 2007, and the parties were ordered to undergo paternity testing. Based on the abstract of the record, Carlos Hall was not present at this hearing.

Arkansas Code Annotated section 9-10-115(d), provides, inter alia, that:

> (1) Beyond the sixty-day period or other limitation set forth in subsection (c) of this section, a person may challenge a paternity establishment pursuant to a voluntary acknowledgment of paternity or an order based on an acknowledgment of paternity only upon an allegation of fraud, duress, or material mistake of fact.
>
> (2) The burden of proof shall be upon the person challenging the establishment of paternity.

Based on the plain language of the statute, the burden of proof was on Carlos Hall to prove that he was entitled to a paternity test. Hall was only required to testify that he initially believed that he was the father of the minor child but later decided his belief was erroneous. He did not do that. The trial court ordered the parties to submit to paternity testing although Carlos Hall was not present to offer any testimony in support of his petition that also contained a declaration that Carlos Hall was the father of Carlos Deshaun Hall. Carlos Hall was not entitled to a paternity test because he failed to meet the threshold requirement set forth in section 9-10-115(d)(2). The trial court committed error by ordering the paternity test. I respectfully dissent.

Lisa STEVENS *v.* HERITAGE BANK,
Estate of Walter E. Stevens, III, Deceased, Ashley Stevens,
Blair Stevens Renner

CA 08-40 289 S.W.3d 147

Court of Appeals of Arkansas
Opinion delivered November 12, 2008

Womack, Landis, Phelps & McNeill, P.A., by: *Tom D. Womack* and *J. Nicholas Livers*, for appellant.

Rita Reed Harris, P.A., by: *Rita Reed Harris*, for appellee Estate of Walter E. Stevens, III, Deceased.

Friday, Eldredge & Clark, LLP, by: *Allison J. Cornwell* and *Bruce B. Tidwell*, for appellees Ashley Stevens and Blair Stevens Renner.

JOSEPHINE LINKER HART, Judge. Lisa Stevens, the surviving spouse of Walter E. Stevens, III (decedent), appeals from the declaratory-judgment order of the St. Francis County Circuit Court that directed the co-administrators to reduce her dower interest for certain claims against the estate. She argues that the court's decision was erroneous because of the general rule that the widow takes her dower free of her husband's debts and that the estate was not entitled to a setoff in that she was not indebted to the decedent's estate. We agree and reverse and remand for further proceedings consistent with this opinion.

The decedent died intestate on October 9, 2003, survived by Lisa Stevens and two adult children, appellees Ashley Stevens and Blair Renner (collectively, the children). On January 15, 2004, co-personal representatives were appointed to administer the estate. Two claims against the estate are relevant to this appeal.

The first claim concerned a note owed to appellee Heritage Bank in the principal amount of $60,066.50. The note was signed by Stevens, individually and as president of Antique Warehouse of Jonesboro, Inc., a business she owned. The note was also signed by the decedent, individually and as guarantor, although he had no ownership interest in the business. The bank filed a claim against the estate on August 2, 2005, alleging that, as of July 19, 2005, the balance owed was $39,497.69.

The second claim involved a commission owed to a real estate agent for the lease of real property to a pharmacy. The real estate was owned twenty-five percent by the decedent in his

individual capacity and seventy-five percent by other members of the decedent's family. Stevens and the decedent ultimately acquired the other seventy-five percent interest as tenants by the entirety. Charles White served as broker for the real estate transaction and was to be paid a commission for his services. On April 8, 2002, prior to the death of the decedent, White filed suit alleging the decedent's failure to pay the real estate commission. Lisa Stevens was not made a party to that action. Although the decedent made an unsuccessful attempt at settlement during his lifetime, the case was ultimately settled after the decedent's death for $67,500, paid from the decedent's estate. In addition, the estate incurred attorney's fees of $2,975.76 in defending against White's claim.

On February 16, 2006, the personal representatives filed a petition seeking direction from the court as to the calculation of Stevens's dower interest and whether the two claims should be paid out of the estate's general assets or be set off against Stevens's dower interest. Stevens denied the material allegations of the petition. Stevens later amended her answer to assert that the proceeds of the note to the bank were used to purchase furnishings for the home she and the decedent shared. She also asserted that the decedent was a joint maker of the note and that the estate should bear one-third of the liability for the debt. She denied that her dower interest should be reduced by any sum for the settlement of Charles White's claim. In their response, the children denied that the claims should be paid from the general assets of the estate but, instead, should be set off from Stevens's dower interest.

A bench trial was held on September 25, 2006. Jeff Brecklein, executive vice president of the bank, testified that the loan at issue was made in June 2003 in the principal sum of $60,000 to Antique Warehouse of Jonesboro, Inc., the decedent, and Stevens. The loan was secured by accounts receivable and inventory. Brecklein said that the loan was extended twice, once in July 2005 and again in December 2005. At the time of the extensions, Brecklein knew that the decedent had died in 2003. He stated that the current balance owed on the note was $39,128.38. He was aware that there were time limitations for filing claims against estates but could not otherwise explain why the bank's claim was not filed until May 2005. He described the loan as current, never having gone into default.

On cross-examination, Brecklein said that he was looking to the decedent for repayment based on the fact that the decedent

called to arrange the meeting about the loan and outlined the intended use of the funds. The decedent signed the note individually and as guarantor. Brecklein said that he did not know if the decedent received any direct benefit from the loan proceeds. He said that the loan would not have been made if the decedent had not guaranteed it.

Lisa Stevens testified that the note at issue was signed by three borrowers, including herself and the decedent. The proceeds were used to help her start an antique business by purchasing inventory. She described the extensions of the note after the decedent's death as necessary because the attorney for the estate omitted the note as a debt of the estate. She said that she made the payments on the note before asking the bank to convert the note to a single-payment note. According to Stevens, the estate never paid on this note. She said that most of the inventory had been sold and the proceeds used to pay bills, including payments on the note at issue. Finally, Stevens admitted that some of the items purchased with the loan proceeds were used in her home, although she could not identify all of those items from memory. She also said that the decedent was not an officer or director of the corporation but did attend antique sales with her.

Stevens said that she and her husband purchased the seventy-five percent interest in the property at issue in the White claim in 2000, after the lease was executed. She said that they held title as tenants by the entirety and that she now owned the entire seventy-five percent interest. She said that the tenant paid $9,300 per month in rent, while the payment on the note was $6,000 per month. She said that the purchase price was $719,313.21, and that she was obligated on the note. She said that she was able to receive the rental income after she obtained new financing for the property in September 2005. She did not sign the original lease but signed a new lease after she refinanced the property.

Charles White testified that the lawsuit he filed against the decedent arose from a complicated process where White introduced the decedent to representatives of a national pharmacy chain. He said that he was the broker on a transaction where the decedent would build a building before leasing the building to the pharmacy chain. According to White, the decedent individually owned a twenty-five percent interest in the property. His compensation for the transaction was to be an assignment of ten percent of the monthly rental. He said that a draft settlement agreement was negotiated but that the decedent changed his mind,

believing that White's fee was too high and that White should receive six percent for his commission. It was this disagreement and change of mind that led to the lawsuit. He said that it was undisputed that the decedent owed him his commission; rather, the dispute was over the amount of the commission. White said that he was never paid during the decedent's lifetime, but that the claim was ultimately settled and that the estate paid him $67,500. White said that the lease was executed in 1999 between the decedent, individually, and the pharmacy, despite the fact that the decedent only owned a twenty-five percent interest in his individual capacity. White was aware that the decedent acquired the outstanding seventy-five percent interest but was unaware of how the decedent took title. He also did not know if Stevens was obligated on the note to fund the construction.

Buddy Billingsley, one of the co-personal representatives, testified that the decedent attempted to settle the Charles White litigation during his lifetime. Billingsley did not believe that any of the settlement of the White claim should be charged to Stevens's dower interest. He and the other personal representative disagreed over the issue. He also said that Stevens should be charged with some portion of the note owed to Heritage Bank.

On March 8, 2007, the circuit court, stating that it was not satisfied with its earlier decision, issued another letter opinion addressing the claims anew. The court found that the estate's obligation on the note was not discharged pursuant to Ark. Code Ann. § 4-3-605(d) because the estate failed to prove that it suffered a loss as a result of the extension and modification of the note. Even though the court found that the decedent was an accommodation maker, the court found that the bank could still look to the decedent or his estate for payment of the note and that any amount paid by the estate should be set off against Stevens's dower. The court noted that Stevens and the bank both expected the estate to pay only one-third of the note.

As for the Charles White settlement, the court found that Stevens, through her attorney, approved the settlement without consenting to any of the settlement being attributable to her. Stevens was found to have benefitted and ratified the lease between the decedent and the pharmacy by accepting the lease payments. The court also found that Stevens was aware that her husband and White were negotiating the lease. The circuit court concluded that Stevens would be unjustly enriched if she were not responsible for some portion of the White settlement. Accord-

ingly, the court allocated seventy-five percent of the settlement and attorney's fees to her. The circuit court then proceeded to address other issues not relevant to this appeal.

The court calculated Stevens's total dower in the decedent's personal property at $302,843.84. The court then subtracted the amount of distributions made, one-third of the bank's claim, seventy-five percent of the White claim, and other amounts, some of which were still undetermined, to arrive at Stevens's final dower.[1] A decree memorializing these findings was entered on September 26, 2007. This appeal followed.

Our standard of review in matters such as this is well settled:

> [P]robate cases are reviewed de novo . . . [and] we will not reverse the probate judge's findings of fact unless they are clearly erroneous. . . . A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed.

Remington v. Roberson, 81 Ark. App. 36, 39, 98 S.W.3d 44, 46 (2003) (citations omitted) (alterations in original). Furthermore, as it may pertain to findings of fact, we defer to the superior position of the probate judge to weigh the credibility of the witness. *See Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000).

Because the decedent died leaving a surviving spouse and children, Stevens, as the surviving spouse, is entitled to one-third of the decedent's real property and one-third of the personal property. Ark. Code Ann. §§ 28-11-301, 28-11-305 (Repl. 2004). The surviving spouse is entitled to dower without deduction for any debts, claims, or expense of administration. *Dolton v. Allen*, 205 Ark. 189, 167 S.W.2d 893 (1943).

Stevens first argues that the circuit court erred in setting off seventy-five percent of the settlement in the Charles White litigation against her dower. We agree. Arkansas Code Annotated section 28-53-111 allows a debt a distributee owes to the decedent's estate to be set off against any property of the estate

[1] Schedule C of the decree calculated Stevens's net dower interest in the decedent's personal property at $141,870.57. She was also entitled to interest on her dower of $24,717.38 through August 31, 2007.

to which the distributee may be entitled.[2] However, this is not a debt Stevens owes to the estate. Rather, it is a debt the estate paid to settle White's claim against the decedent. Stevens was not made a party to the litigation between White and the decedent. Prior to settlement and subsequent to the opening of the estate, the estate's representatives did not file a claim seeking contribution from Stevens, either in the White litigation or in the estate proceedings. There was never a determination that Stevens owes the estate for any part of the White settlement. Instead, the circuit court merely decided that Stevens would be unjustly enriched if some portion of the settlement were not set off against her dower.

Unjust enrichment has no application in this case. To find unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore. *El Paso Prod. Co. v. Blanchard*, 371 Ark. 634, 269 S.W.3d 362 (2007). One who is free from fault cannot be held to be unjustly enriched merely because he or she has chosen to exercise a legal or contractual right. *Id.* Here, Stevens is not receiving something to which she is not entitled. She and the decedent owned the property as tenants by the entirety and, upon the decedent's death, the property passed to her by operation of law.[3] The contract between the decedent and White was entered into prior to Stevens acquiring any interest in the property. At that time, he was acting solely in his individual capacity. While arguably Stevens may have been aware of her husband's activities, she was not made a party to the lawsuit and, therefore, her acquiescence to the settlement can have no binding effect on her right to her dower. Thus, the debt was solely that of the decedent and, therefore, Stevens takes her dower free from the White claim. *Dolton, supra.* Therefore, the circuit court erred in allowing a portion of the White settlement to be set off against her dower.

Stevens next argues that the circuit court erred in allowing a portion of the note owed to the bank to be set off against her dower. Stevens devotes much time to the proposition

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[2] Stevens is a "distributee" of the estate within the meaning of the probate code. A distributee "denotes a person entitled to real or personal property of a decedent, either by will, as an heir, or as a surviving spouse . . . ." Ark. Code Ann. § 28-1-102(a)(7) (Repl. 2004).

[3] She also acquired the outstanding twenty-five percent interest the decedent owned individually as a partial distribution of the estate.

that the decedent was a maker of the note instead of an accommodation party as found by the circuit court. That effort is misplaced because an accommodation party can sign the note as a maker. *See* Ark. Code Ann. § 4-3-119(b); *Camp v. First Fin. Fed. Sav. & Loan Ass'n*, 299 Ark. 455, 772 S.W.2d 602 (1989). Although the circuit court was correct in stating that the estate could seek reimbursement for any amount it must pay on the note, *see* Ark. Code Ann. § 4-3-419(f) (Supp. 2007), that is not the same as finding that Stevens owes a debt to the estate. As discussed above, section 28-53-111 allows a setoff when a distributee is indebted to the estate. Where there is only a contingent claim, still subject to, as yet, unasserted defenses available to Stevens, we hold that it would be wholly inappropriate for the estate to retain any portion of Stevens's dower to satisfy such a claim. This is not to say that the bank and the estate are without remedies. They can file suit directly against Stevens for repayment of the note.

Reversed and remanded.

GLADWIN, ROBBINS, BIRD, GRIFFEN, and HUNT, JJ., agree.

BBAS, INC. d/b/a S & R Equipment, and J. Burel Schaberg *v.* MARLIN LEASING CORPORATION

CA 08-531 289 S.W.3d 153

Court of Appeals of Arkansas
Opinion delivered November 12, 2008

Milligan Law Offices, by : *Phillip J. Milligan*, for appellants.

Jack Nelson Jones Fink Jiles & Gregory, P.A., by: *Tony A. Dicarlo, III*, and *John W. Fink*, for appellee.

DAVID M. GLOVER, Judge. Appellee, Marlin Leasing Corporation, purchased $20,000 of restaurant equipment by

check from appellant BBAS, Inc. d/b/a S&R Equipment. Appellant J. Burel Schaberg, the primary shareholder of S&R Equipment, dealt with appellee in the sale/purchase of the equipment. Appellee purchased the equipment in furtherance of an equipment-lease contract between appellee and an entity known as Wings-N-Things (WNT), together with its partners, none of whom are parties to this action, for use in WNT's restaurant operation. When WNT defaulted on its equipment lease, appellee tried to repossess the property but learned in the process that WNT had only received $2,578.30 worth of the contemplated equipment and that it had received a "refund" of the $17,421.70 balance from S&R Equipment.

Appellee filed an original complaint against appellants for fraud, but the complaint was amended on April 23, 2007, to assert a cause of action for conversion when appellee learned that S&R Equipment gave the refund to WNT, rather than returning it to appellee. On August 31, 2007, appellee filed its motion for summary judgment, contending that there were no genuine issues of material fact, and that those facts established conversion of the $17,421.70 by appellants. Both responsive and reply briefs were filed, and a hearing on the motion was held on February 1, 2008. Following the hearing, the trial court granted summary judgment to appellee and ordered both appellants to submit schedules of real and personal property. In doing so, the trial court noted that additional discovery would have no effect on the granting of summary judgment. On February 13, 2008, appellants filed a motion to reconsider, and on February 28, 2008, the appellants filed their notice of appeal from the trial court's February 5, 2008 order granting summary judgment. The notice of appeal was not amended to appeal from the deemed denial of their motion to reconsider. Consequently, our review does not encompass the motion to reconsider.

Appellants contend in this appeal that the trial court erred in granting summary judgment because 1) they breached no duty to appellees, 2) there were factual issues of whether appellants were liable for conversion or damages, 3) appellant J. Burel Schaberg did nothing of a personal nature to subject himself to individual liability, and 4) discovery was continuing. We affirm summary judgment with respect to the corporate appellant, BBAS, Inc. d/b/a S&R Equipment, but reverse with respect to the individual appellant, J. Burel Schaberg.

Standard of Review

Summary judgment may 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. *Lee v. Martindale*, 103 Ark. App. 36, 286 S.W.3d 169 (2008). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* On appeal, we need only decide if 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. *Id.* In making this decision, we view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

I. Appellants breached no duty to appellees.

For their first point of appeal, appellants contend that they had no contractual, legal, or fiduciary duty to appellee and that without a duty and a breach thereof, the trial court erred in finding them liable for the tort of conversion. Appellants did not raise this specific argument below and therefore our discussion of the issue is limited to whether the trial court erred in concluding that the elements of conversion had been demonstrated by appellee. We find no basis for reversal.

Conversion is defined as:

> the exercise of dominion over property in violation of the rights of the owner or person entitled to possession. Conversion can only result from conduct intended to affect property. The intent required is not conscious wrongdoing but rather an intent to exercise dominion or control over the goods that is in fact inconsistent with the plaintiff's rights.

Alvarado v. St. Mary-Rogers Mem'l Hosp., 99 Ark. App. 104, 108, 257 S.W.3d 583, 587 (2007). Thus, the "duty" imposed by law upon appellants, if it is to be discussed in those terms, would simply be *not* to exercise dominion over property in violation of the rights of the owner or person entitled to possession.

Here, the undisputed facts revealed that S&R Equipment submitted an invoice to appellee for $20,000 of equipment; that appellee paid S&R Equipment $20,000; that only $2,578.30

worth of equipment was actually delivered to WNT by S&R Equipment; and that S&R Equipment refunded the $17,421.70 balance to WNT, rather than to appellee.

Appellants contend that once appellee's check was delivered to them, dominion over those monies was surrendered to appellants, *i.e.*, that any rights to those monies were relinquished by appellee, despite the fact that only $2,578.30 worth of equipment was actually delivered to WNT. In making their argument that appellee had relinquished its rights to the monies at issue, appellants contend that Mr. Schaberg believed he was authorized to refund the money to WNT. However, the only support they give for that assertion is that appellee failed to instruct him "as to what to do if the lessee changed an order after payment" by appellee. This argument is not convincing to us, and appellants have cited no legal authority demonstrating that this argument should prevail. The sale of equipment was between S&R Equipment and appellee. Accordingly, the refund amount of $17,421.70 rightfully belonged to appellee, not WNT. By giving the money to WNT, S&R Equipment exercised dominion or control over the money that was in fact inconsistent with appellee's rights to it.

II. There were factual issues of whether appellants were liable for conversion or damages.

For their second point of appeal, appellants first contend that because conversion is an intentional tort, "one must determine whether the alleged tortfeasors had a necessary scienter, namely whether they intentionally and wrongfully took funds belonging to another." They argue that their actions of refunding the money to WNT were not wrongful. In making this argument, they reiterate positions that they took under their first point of appeal. In addition, they expand and change the nature of the arguments that were actually made to the trial court.[1] A party cannot change his argument on appeal. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 66 Ark. App. 22, 988 S.W.2d 25 (1999). It is well settled that an appellant may not change the grounds for objection on appeal, but is limited by the scope and nature of his or her objections and arguments presented at trial. *Southern College of Naturopathy v. State*, 360 Ark. 543, 203 S.W.3d 111 (2005). Therefore, our discussion

[1] For example, appellants make an agency argument in this appeal that was not made below.

of this point is limited to the issues that were before the trial court and that have not been previously discussed in this opinion.

■ Conversion is a common-law tort action for the wrongful possession or disposition of another's property. *Schmidt v. Stearman*, 98 Ark. App. 167, 253 S.W.3d 35 (2007). The tort of conversion is committed when a party wrongfully commits a distinct act of dominion over the property of another that is inconsistent with the owner's rights. *Id.* The intent required is not conscious wrongdoing but rather an intent to exercise dominion or control over the goods that is in fact inconsistent with the plaintiff's rights. *Id.* A person can be held liable to the true owner of stolen personal property for conversion notwithstanding that he or she acted in the utmost good faith and without knowledge of the true owner's title. *Id.* In discussing the tort of conversion, the Restatement (Second) of Torts provides the following pertinent illustration: "1. On leaving a restaurant, A *by mistake* takes B's hat from the rack, believing it to be his own. . . . And as A reaches the sidewalk and puts on the hat a sudden gust of wind blows it from his head, and it goes down an open manhole and is lost. This is a conversion." § 222A (1965) (emphasis added). In this illustration, A clearly takes B's hat by mistake, *i.e.*, he intends no wrongdoing, yet conversion is nevertheless established under those facts. Therefore, the fact that appellants here did not directly benefit from the conversion is not material in determining whether they converted the funds. *Reed v. Hamilton*, 315 Ark. 56, 864 S.W.2d 845 (1993) (an act of conversion may occur even when the alleged converter derives no personal benefit from the transfer).

■ Appellants next contend under this point that they were promised that there would be no recourse against them, as vendors, if WNT defaulted on the equipment lease with appellee. Schaberg's affidavit included as an attachment a document obtained from appellee, which provided in pertinent part: "Marlin Leasing Corp. offers effective, simple, point-of-sale financing programs to assist in closing sales and increasing profits. Marlin Leasing specializes in transactions from $1,000 to $150,000 and there is *no recourse* back to the vendor." (Emphasis added.) Appellants argue that this promise raises a material question of fact that should have prevented the award of summary judgment. We dispose of the argument quickly by noting that the language seems to clearly envision a situation in which a vendor would be paid for

any equipment the vendor provided to a lessee, regardless of whether the lessee defaulted with the lessor. Here, what happened was that appellants did *not* deliver the invoiced equipment to WNT for which appellants had received money from appellee — yet appellants refunded the money for the undelivered equipment to WNT rather than to appellee. In short, appellants did not provide sufficient proof to support their position regarding this "no-recourse" language to defeat the motion for summary judgment. Moreover, as will be discussed under Point IV *infra*, appellants' assertion of necessary discovery on this issue came in a motion to reconsider, which is not the subject of this appeal.

III. Appellant J. Burel Schaberg did nothing of a personal nature to subject him to individual liability.

Appellants' third point of appeal challenges the trial court's grant of summary judgment against both appellants, S&R Equipment and J. Burel Schaberg, individually. We hold that the trial court erred in finding Schaberg individually liable.

Appellant Schaberg denied individual liability from the outset of this cause of action. Paragraph 4 of appellants' answer to appellee's first amended complaint provided: "Defendants deny the material allegations contained in Paragraph 4 to the extent Paragraph 4 attempts to identify Schaberg as an agent of S&R Equipment and as an effort to establish personal liability of Defendant Schaberg." Nothing in appellee's motion for summary judgment, nor its supporting materials, satisfied appellee's initial burden of demonstrating Schaberg's personal liability. *Lee, supra.* Consequently, the trial court erred in granting summary judgment against J. Burel Schaberg, individually.

IV. The trial court erred in granting summary judgment since discovery was continuing.

For their final point, appellants, in opposition to the trial court granting summary judgment against S&R Equipment company, argue that discovery was ongoing and that the trial court acted prematurely. We disagree.

When the appellants made this argument to the trial court during the hearing on the motion for summary judgment, the trial court specifically asked, "What discovery do you want to do, and how long would it take, and how would it affect you?" Appellants

candidly acknowledged uncertainty about whether discovery would affect the issue of summary judgment. They specifically stated that they needed to explore and find out who in appellee's offices was available for a deposition "to determine if they received anything back and maybe what efforts have been made on receiving back from the sureties on these contracts with Wings and Things. Maybe there is an offset, or maybe they have received some of the benefits from it." The trial court responded: "It could affect the damages issue." Although appellants initially agreed, the hearing concluded with appellants stating that they could not imagine that there was going to be anything that they could obtain with regard to the issue of a material fact question that would go to damages. More importantly, they do not raise the offset argument in their appeal to this court.

In this appeal, appellants acknowledge that when asked by the trial court, they were not able to "delineate precise names" but that shortly thereafter, in the motion to reconsider, they stated that upon reflection they wished to depose two individuals, Kirk Myers of WNT and a representative of appellee. They explained in that motion that the deposition of the company representative was needed with respect to the "no recourse" promise and that Myers's deposition was needed to establish appellee's knowledge of Myers's decision to purchase elsewhere the equipment originally bid by appellants. Thus, at the conclusion of the hearing on the motion for summary judgment, the only possible discovery asserted by appellants dealt with the possible offset of damages, and appellants do not pursue that argument in this appeal. The discovery that appellants do argue in this appeal was asserted below only in the motion to reconsider, which we cannot address because it is not the subject of this appeal.

Affirmed in part; reversed and remanded in part.

ROBBINS and HEFFLEY, JJ., agree.

A TEAM TEMPORARIES *v.*
DIRECTOR, DEPARTMENT of WORKFORCE SERVICES
and Jennifer L. Fraze

E 08-33 289 S.W.3d 158

Court of Appeals of Arkansas
Opinion delivered November 12, 2008

No briefs filed.

KAREN R. BAKER, Judge. Appellant A Team Temporaries appeals the Board of Review's decision to grant appellee Jennifer Fraze benefits. There is no dispute that Ms. Fraze voluntarily quit her employment assigned through the temporary agency to the client firm. The Board based its decision upon the question of whether her voluntarily leaving the available assignment fell within the definition of "conclusion of an assignment" for purposes of benefits in accordance with Ark. Code Ann. § 11-10-513 (Repl. 2002 & Supp. 2007) and § 11-10-514 (Repl. 2002 & Supp. 2007). We hold that the Board improperly applied the law and reverse and remand for further findings of fact.

Through her employment with A Team, Ms. Fraze was assigned to A Team's client, Wing Stop, in a long-term position as manager. After expressing her desire to resign on various occasions, Ms. Fraze quit her assignment August 28, 2007, stating that she felt that she could not meet the expectations of the owner of Wing Stop, Mr. Cheatwood. On August 30, she turned in her Wing Stop uniforms to the Staffing Coordinator of A Team and stated that she needed another job. On September 4, she returned to A Team and requested another assignment; however, despite the employer's attempts to find other acceptable positions, there were no other jobs available for her at that time.

In a notice dated September 14, 2007, the Arkansas Department of Workforce services disqualified Ms. Fraze from receiving benefits pursuant to Arkansas Code Annotated section 11-10-513(a)(4) because she left her work voluntarily and without good cause connected with the work. Ms. Fraze appealed that decision and a hearing was conducted on October 2, 2007. After receiving testimony, the hearing officer reasoned that when Ms. Fraze resigned her long-term assignment for Wing Stop that she expected to report for other assignments available through A Team; therefore, she was laid off due to a lack of work when no assignments, other than the one she quit, were available. The hearing officer then reversed the Department's denial of benefits under Ark. Code Ann. § 11-10-513(a) and awarded benefits under section 11-10-514(a), finding that claimant was discharged from last work for reasons other than misconduct connected with the work. The Board affirmed that decision on review.

During the hearing, Mr. Cheatwood testified that Ms. Fraze would still be working at Wing Stop had she not quit and, in fact,

he had made arrangements for additional training assistance for Ms. Fraze prior to her quitting. Throughout the discussions, A Team stated that it was its position that Ms. Fraze left an available assignment without completing it.

We agree with the employer that the assignment did not end. Rather, Ms. Fraze did not complete her assignment because she refused to continue in the position available to her through the temporary agency, and there was no indication that Ms. Fraze would not still be in her assigned position had she not voluntarily left. However, whether Ms. Fraze voluntarily left her position is only the first question of fact that the Board had to determine. The next fact question is whether she left her last work "without good cause connected with the work."

Our statute providing for disqualification of benefits for voluntarily leaving work provides in relevant part as follows:

> (a)(1) If so found by the Director of the Department of Workforce Services, an individual shall be disqualified for benefits if he or she voluntarily and without good cause connected with the work left his or her last work.
>
> (2)(A) An individual working as a temporary employee will be deemed to have voluntarily quit employment and will be disqualified for benefits under this subsection if upon conclusion of his or her latest assignment, the temporary employee without good cause failed to contact the temporary help firm for reassignment, provided that the employer advised the temporary employee at the time of hire that he or she must report for reassignment upon conclusion of each assignment and that unemployment benefits may be denied for failure to do so.

Ark. Code Ann. § 11-10-513.

Here the record reflects that Ms. Fraze voluntarily left available work by leaving an ongoing, open-ended assignment that remained available after she quit. The fact that she returned to A Team and requested a new assignment does not negate the fact that the position as manager, in which she had been placed, was still available and, accordingly, not concluded.

■ The Board misapplied the law when it, in effect, ignored subsection (a)(1) of section 11-10-513 to determine whether Ms. Fraze should be disqualified for benefits if she

voluntarily and without good cause connected with the work left her last work. Ms. Fraze's last work was her position as manager at Wing Stop. The fact that A Team was her employer for the available work as manager does not change the nature of her last work. Before the Board may consider subsection (a)(2)(A), it must first make findings of fact concluding whether or not Ms. Fraze's resignation was without good cause connected with her work as manager at Wing Stop. If the Board finds that she left without good cause, then Ms. Fraze is disqualified from benefits. If the Board finds that she left with good cause, then it may resume its analysis to determine whether Ms. Fraze was deemed to have voluntarily relinquished her employment with A Team.

Subsection (a)(2)(A) imposes a duty upon the temporary employment agency to inform an individual working as a temporary employee that the failure to report for reassignment may result in a denial of unemployment benefits and states that the employee's failure to report for reassignment shall be deemed to be a voluntary relinquishment of employment. This subsection recognizes that assignments through a temporary agency are often short in duration and that the agency may quickly reassign the employee to a different position. Furthermore, strong public-policy considerations support the role that temporary agencies hold in our community. *Jones v. Sheller-Globe Corp.*, 487 N.W.2d 88, 92 (Iowa App.1992).

Our court, in *Weaver v. Director, Employment Sec. Dep't*, 82 Ark. App. 616, 120 S.W.3d 158 (2003), explained that whether there was good cause to leave is irrelevant if the departure was not voluntary. In *Weaver*, the employee did not voluntarily quit when she was hired for a part-time, temporary position at the school, and, she not only completed her deadline in December, but accepted an extension of her position until the end of the school year. The employee was entitled to benefits in that case because she fulfilled the obligations of the position until the position was no longer available.

The focus in *Weaver* was whether the employee had voluntarily left the position. The temporary nature of the position was dispositive of the issue of voluntariness. The Board in this case, however, stated that "no matter the manner in which the client firm accepted the claimant's resignation from the assignment, the result was the 'conclusion' or end of the assignment." The Board was mistaken in beginning its analysis from the temporary agency's

willingness to find another available position for Ms. Fraze. The availability of the work is the determinative factor in determining the disqualification of benefits, not whether an agency is willing to find an assignment more to the liking of the claimant. Because the Board failed to make a finding of fact as to whether Ms. Fraze voluntarily and without good cause left the position as manager at Wing Stop that remained available for her continued assignment, we reverse and remand for the Board to make that factual determination on the record in this case. *See Southwestern Bell Tel., L.P. v. Director of Ark. Employment Sec. Dep't*, 88 Ark. App. 36, 36, 194 S.W.3d 790, 791 (2004). If the Board then determines that Ms. Fraze left for good cause connected with the work as manager, then it may proceed to apply the provisions of subsection (a)(2)(A) and section 11-10-514 to award or deny benefits.

Reversed and remanded.

GLOVER, VAUGHT, and HEFFLEY, JJ., agree.

ROBBINS and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. The Arkansas Board of Review (Board) awarded unemployment benefits pursuant to Arkansas Code Annotated § 11-10-514(a) (Supp. 2007) because it found that claimant Jennifer Fraze's separation from her last work was due to a layoff caused by the unavailability of work, rather than misconduct in connection with the work. I would affirm the Board's decision, which is supported by substantial evidence. *See* Ark. Code Ann. § 11-10-529(c)(1) (Supp. 2007). In reversing and remanding for the Board to determine under a *separate* statute, Arkansas Code Annotated § 11-10-513 (Supp. 2007), whether Fraze voluntarily left her employment without good cause, the majority opinion ignores the dispositive finding that the Board made under § 11-10-514(a), and seeks to require the Board to make an unnecessary finding.

Through A Team, a temporary employment agency, Fraze accepted a long-term assignment as a manager with Wing Stop. Fraze was unhappy with her assignment for various reasons and threatened to quit several times before she finally quit. She ultimately left that assignment before she completed it. Fraze explained that she resigned because she could not satisfy Wing Stop's owners with her job performance; thus, she felt it would be best if she quit. Wing Stop's owners accepted Fraze's resignation

and another A Team employee was hired to fill the vacancy. As the terms of Fraze's employment with A Team dictated, she reported to A Team within five days of ending her assignment with Wing Stop, at which time, the employer did not have any available suitable work.

Although we review only the Board's findings, the procedural history of this case demonstrates the majority's error in requiring the Board to make separate findings under § 11-10-513. The Department of Workforce Services (Department) initially denied Fraze unemployment benefits based on § 11-10-513. That statute denies unemployment benefits to a claimant who voluntarily leaves work. *See* Ark. Code Ann. § 11-10-513(a)(1). The same statute also disqualifies a temporary employee who, without good cause, fails to contact the temporary help firm for reassignment upon conclusion of his or her latest assignment. *See* Ark. Code Ann. § 11-10-513(a)(2). The Arkansas Appeal Tribunal reversed the Department's denial of benefits under § 11-10-513, and modified the Department's determination to specifically award benefits under § 11-10-514(a), which disqualifies a claimant who is discharged from his or her last work due to misconduct in connection with the work.

The Board affirmed the Appeal Tribunal's decision, awarding benefits under § 11-10-514(a). In so doing, the Board rejected the employer's claim that Fraze "quit the employment when she quit the assignment" to Wing Stop. The Board determined that Wing Stop's acceptance of Fraze's resignation resulted in the conclusion of Fraze's temporary assignment with Wing Stop but did not end her employment with A Team. The Board found that Fraze's employment with A Team continued because A Team considered Fraze eligible for reassignment when her assignment with Wing Stop ended. Accordingly, the Board concluded that Fraze's separation from her last work was due to lack of work, rather than due to misconduct connected with work within the meaning of Ark. Code Ann. § 11-10-514(a).

I would affirm the Board's decision. While Fraze did not *complete* her assignment with Wing Stop, § 11-10-513 does not define a temporary employee as one who completes a temporary assignment. A temporary employee is an employee assigned to work for the clients of a temporary help firm. Ark. Code Ann. § 11-10-513(a)(2)(C) (Repl. 2003). A temporary help firm means a firm that *hires its own employees and assigns them to clients* to support or supplement the client's work force in work situations such as

employees' absences, temporary skill shortages, seasonal workloads, and special assignments and projects. Ark. Code Ann. § 11-10-513(a)(2)(B)(i) (emphasis added). Providing that the temporary employee has been so informed, he will be deemed to have voluntarily quit employment and will be disqualified for benefits if, *upon conclusion of his latest assignment*, the temporary employee without good cause failed to contact the temporary help firm for reassignment. Ark. Code Ann. § 11-10-513(a)(2)(A) (emphasis added).

The Board here specifically found that Fraze's assignment was *concluded*; upon conclusion of her temporary assignment to Wing Stop, she contacted her employer as required, and no suitable work was available. That is all that § 11-10-513(a)(2)(A) requires. The majority opinion fails to explain why Wing Stop's acceptance of Fraze's resignation did not result in the conclusion of her assignment; it also sweeps aside the fact that Fraze's employment with A Team *thereafter continued* because A Team considered Fraze eligible for reassignment when her assignment with Wing Stop ended. Obviously, Fraze did not "quit" her employment with the temporary agency when she "quit" Wing Stop because her employer thereafter attempted to find her another temporary job.

Accordingly, because the requirements of § 11-10-513 were satisfied, that statute cannot be used as a basis for denying Fraze unemployment benefits. Moreover, because the Board's decision to award benefits under § 11-10-514 is supported by substantial evidence, there is no need to reverse and remand for it to determine whether Fraze voluntarily quit or had good cause to quit under § 11-10-513. To do so would require the Board to engage in an exercise that is both futile and improper given our standard of review and the plain meaning of the Board's finding and the pertinent statute.

The practical effect of the holding set forth in the majority opinion is to judicially nullify the very real distinction between temporary employees assigned by temporary-help firms, and other employees. It is one thing for the Arkansas General Assembly to rescind that distinction; after all, the General Assembly created it. It is judicial legislation for our court to do so.

I am authorized to state that Judge Robbins joins in this opinion.

Clifford Joe PULLAN *v.* STATE of Arkansas

CA CR 08-67 289 S.W.3d 180

Court of Appeals of Arkansas
Opinion delivered November 19, 2008

Barry D. Neal, for appellant.

Dustin McDaniel, Att'y Gen., by: *Valerie Glover Fortner*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. A Crawford County jury convicted Clifford Joe Pullan of possession of marijuana, possession of marijuana with intent to deliver, possession of drug paraphernalia, and felon in possession of a firearm. The consecutive sentences he received for these crimes totaled seventy years in the Arkansas Department of Correction. On appeal he argues that the trial court erred in denying his motion to suppress evidence seized during his warrantless arrest and search incident to arrest because the search was unreasonable under the Fourth Amendment of the United States Constitution, article 2, section 15 of the Arkansas Constitution, and Rules 3.1, 4.1, and 12.1 of the Arkansas Rules of Criminal Procedure. Pullan also argues that without the evidence that he sought to suppress, there would be insufficient evidence to support the verdict. We affirm.

Most of the legally significant facts are not in dispute. On January 28, 2006, Pullan was arrested for delivery of marijuana. The arrest was the culmination of an operation conducted by the Twenty-first Judicial District Drug Task Force undertaken to determine whether Pullan was the supplier for a lower-level drug dealer, John Nick. Prior to the start of the operation, a confidential informant (CI) who had made three marijuana purchases from Nick told the drug task force that Nick claimed that Pullan was his supplier. In December 2005, the task force had arrested Pullan for drug trafficking the previous summer. This alleged activity was not connected to his suspected involvement with Nick.

On the day in question, the drug task force set up surveillance on Pullan's residence. Drug task force investigator Lanny Reese and Crawford County Sheriff's Department narcotics officer Shawn Firestine then sent the CI to Nick's residence to purchase marijuana with marked currency. The CI had been given approximately $2,000 so that he could buy all of Nick's existing stock of marijuana. Nick sold him eight ounces of marijuana for $640. While the CI was present in Nick's home, the drug task force heard Nick's wife, Kim Mereshka, call an unnamed person and ask "Can you bring me something?" Reese identified this request, based on his experience, as a "dope deal." Immediately after the telephone call, Pullan left his residence carrying a pack-

age. Pullan drove directly to Nick's residence, and he entered without knocking. Pullan only stayed inside a few minutes before leaving without the package. The drug task force intended to follow Pullan back to his home. However, when Pullan took a different route, going instead to his daughter's house, Reese decided to stop and arrest Pullan.

Upon making contact with Pullan, both Reese and Firestine noticed a large wad of bills in Pullan's shirt pocket. They seized the cash, and it proved to be most of the "buy money." A search of Pullan's vehicle failed to uncover any marijuana, and an ion test found only trace amounts of the drug around Pullan's shirt pocket. The drug task force then obtained a warrant and searched Pullan's residence where they discovered marijuana and additional marked "buy money" in a safe. The drug task force also obtained and executed a search warrant for Nick's residence where the approximately two pounds of marijuana that was allegedly delivered by Pullan was discovered.

Pullan moved to suppress the evidence seized in his warrantless arrest and in the subsequent execution of the search warrant for his home. After a hearing, the motion was denied. The case proceeded to a jury trial where the evidence, along with testimony from Nick and Mereshka, as well as the arresting officers, was presented. Nick and Mereshka testified that they obtained the marijuana from Pullan, who was their regular supplier. Pullan timely appealed from the jury verdict.

We are obligated to first address Pullan's sufficiency of the evidence argument because of double-jeopardy considerations.[1] *See Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005). He argues that save for the testimony of Nick and Mereshka, who he asserts have "obvious credibility problems," the $620 in buy money seized from his person, and the marijuana and buy money seized from his safe, there is no evidence to connect him with the two pounds of marijuana that he allegedly delivered. We find this argument unpersuasive.

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[1] Although Pullan was convicted of four charges, possession of marijuana, possession of marijuana with intent to deliver, possession of drug paraphernalia, and felon in possession of a firearm, he only made a specific directed-verdict motion that addressed the possession with intent to deliver charge. Accordingly, we may only consider the sufficiency of the evidence argument as it relates to that conviction.

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. *Stewart v. State*, 88 Ark. App. 110, 112, 195 S.W.3d 385, 386 (2004). We do not re-weigh the evidence but determine instead whether the evidence supporting the verdict is substantial. *Id.* Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion without having to resort to speculation or conjecture. *Id.* We do not, however, weigh the credibility of the witnesses. *Id.* When we review sufficiency-of-the-evidence challenges, we consider evidence both properly and improperly admitted. *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998).

Under our standard of review, we cannot address whether or not Nick and Mereshka were credible; that determination is reserved for the jury. *Id.* Inasmuch as they both testified that Pullan delivered the marijuana, giving that testimony its highest probative value, as we must, we hold that there is substantial evidence to support the jury verdict. Furthermore, evidence concerning the time line of Pullan's movements obtained by the drug task force during its operation, although circumstantial, substantiated the testimony of Nick and Mereshka.

We therefore turn to Pullan's suppression arguments. In reviewing the denial of a motion to suppress evidence, this court conducts a de novo review based upon the totality of the circumstances, reversing only if the circuit court's ruling is clearly against the preponderance of the evidence. *Sheridan v. State*, 368 Ark. 510, 247 S.W.3d 481 (2007).

In support of his argument that the trial court erred in denying his motion to suppress evidence seized during his warrantless arrest and search incident to arrest, Pullan first contends that law enforcement did not have reasonable cause for his warrantless arrest. He acknowledges that under Rule 4.1 of the Arkansas Rules of Criminal Procedure, a police officer may arrest a person without a warrant if the officer has reasonable or probable cause to believe that the person committed a felony. However, he asserts that the State lacked probable cause because there was no "direct evidence" that he had committed a criminal offense because he was not present at any of the controlled buys at Nick's residence, the police could not determine the content of the package he was carrying and did not "personally observe" or otherwise monitor the alleged delivery to Nick in exchange for the

buy money. Further, he contends that the police did not conduct a controlled buy at his residence, he did not have any marijuana on his person or in his vehicle at the time of the arrest, and the police surveillance did not sufficiently corroborate the informant's tip. Regarding the latter point, he further states that there was not a sufficient basis for establishing that the informant's information was reliable because the CI's report that Pullan was Nick's supplier was based solely on Nick's unsubstantiated hearsay statement. Citing *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986), he contends that the police only had a suspicion that he had engaged in criminal conduct, which was insufficient to establish probable cause. We disagree.

At the time the drug task force initiated its operation, it knew from its prior arrest of Pullan that he had been involved with delivering marijuana. In subsequent controlled buys from John Nick, the CI was told by Nick that Pullan was his supplier. While the identification of Pullan as his supplier was unsubstantiated hearsay, the operation mounted by the drug task force provided corroboration. As we noted earlier, on January 28, 2006, the drug task force placed Pullan's house under surveillance. It then conducted a controlled buy that prompted Nick to seek resupply of his stock of marijuana. The drug task force heard a telephone conversation that, based on Investigator Reese's training and experience, was identified as a request to purchase drugs. Immediately after that request, Pullan left his house carrying a package. He drove directly to Nick's house and went inside without knocking. Approximately five minutes later, Pullan left Nick's house without the package.

[redacted] In our view, these facts would cause a person of reasonable caution to believe that delivery of marijuana had taken place. In essence, this was a call by a known drug dealer requesting a delivery of narcotics from a supplier, immediate movement by a known drug supplier who was the suspected supplier, direct travel by that suspected supplier to the source of the resupply request, and the apparent delivery of a package. While this proof may not have risen to the quantum of proof required to convict Pullan, we nonetheless conclude that there was probable cause sufficient to make the arrest; it is axiomatic that probable case relating to whether a crime was committed requires a lesser degree of proof than does a conviction for committing the offense. *See Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994).

Pullan next argues because the warrantless arrest was made without probable cause, the search incident to arrest was invalid. He argues that the police had, at best, reasonable suspicion, which would only have supported an investigatory stop pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure. Likewise he argues that the affidavit for the search warrant for his residence was deficient because it is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." We reject these arguments. For the reasons stated previously, we held that there was probable cause to arrest. Accordingly, the search incident to arrest is valid. Ark. R. Crim. P. 12.1.

Regarding the affidavit that was submitted in support of the application for a search warrant, we will uphold its validity if it, when viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure may be found. *Fouse v. State*, 73 Ark. App. 134, 43 S.W.3d 158 (2001). Here, the affidavit recited the same facts that we determined were sufficient to constitute probable cause for the warrantless arrest. Moreover, the affidavit also recited that $620 of buy money, which was given to John Nick by the CI approximately fifteen minutes earlier, was seized during the arrest. The affidavit also stated that when Nick's residence was searched, the police found approximately two pounds of marijuana. Additionally, it recited that the police recorded statements made by Nick to the CI that Pullan was Nick's supplier. While these statements, standing alone, would not have had a sufficient indicia of reliability for us to uphold the search warrant, the subsequent observations made by the police of Pullan's movements, apparently in response to Nick's request to make a drug deal provided sufficient corroboration. In this way, we believe this case is analogous to *Fouse*. In *Fouse*, an informant told police that the appellant was manufacturing methamphetamine. 73 Ark. App. at 142-43, 43 S.W.3d at 164-65. Police followed up this information, and through investigation and surveillance, they detected the strong smell of ether originating from the residence and the presence of an unusually large number of automobiles. *Id.* We held that these observations provided sufficient corroboration of the informant's tip. *Id.* Likewise, in the instant case, we have the recorded statements by Nick to the CI, and corroboration based on police work in the form of the drug task force's operation. Accordingly, we affirm on this point as well.

Affirmed.

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

Thomas G. CARMODY and Dr. Norman C. Savers Jr., as Co-administrators of the Estate of Helen Virginia *v.* George Philip BETTS as Executor of the Estate of Linnie Betts, et al

CA 07-1286 289 S.W.3d 174

Court of Appeals of Arkansas
Opinion delivered November 19, 2008

[Rehearing denied January 7, 2009.]

Wilkinson Carmody Gilliam, by: *Arthur R. Carmody, Jr.*; *Marshall & See*, by: *Pat Marshall*; and *Katherine Savers McGovern*, for appellants.

Harrell, Lindsey & Carr, P.A., by: *Paul E. Lindsey*, for appellee Michael P. Gaughan.

Allen P. Roberts, for appellee Estate of Joseph William Patrick Coan, Jr., Deceased.

Dover Dixon Horne PLLC, by: *Gary B. Rogers*, for appellee Metropolitan Opera Association, Inc.

James M. Pratt, Jr., for appellee George P. Betts, Administrator of the Estate of Linnie Betts, Deceased.

Eugene D. Bramblett, for appellee BancorpSouth, Inc.

Wright, Lindsey & Jennings LLP, by: *Bettina E. Brownstein* and *James R. Van Dover*, for appellee Western Surety Company.

ROBERT J. GLADWIN, Judge. Thomas Carmody and Dr. Norman Savers, as co-administrators of the Estate of Helen Coan, deceased, and on behalf of her heirs, have appealed from a circuit court's order construing the 1984 will of Ms. Coan's brother, Joseph Coan, Jr. Because Ms. Coan was disabled and remained incompetent all of her life, Mr. Coan served as guardian of her person and estate and set up a testamentary trust for her support in his will. Ms. Coan also had substantial assets of her own. Mr. Coan's will directed that, upon his sister's death, the remainder of the trust, after certain specific bequests, was to be distributed equally to appellee Metropolitan Opera Association, Inc., and Georgetown University, his alma mater, to be used by them in his memory.

The will stated:

> (a) During the lifetime of my sister, Helen Virginia Coan, my Co-Trustees are authorized and directed to pay for the above beneficiary any part of the annual income from said trust necessary to provide for her care, welfare, and maintenance. I direct that such payment shall be made at least monthly. It is my intention herein to provide for the care, welfare, and maintenance of my incompetent sister for the remainder of her life, specifically from the income from said trust, if possible.
>
> (b) My Co-Trustees are directed that the principal of the trust may be encroached upon and may be invaded if necessary, to provide for the care, welfare, and maintenance of my sister, but my Co-Trustees are directed to provide for the needs only from the income of said trust, if possible. My Co-Trustees are directed that any undistributed income shall become a part of the principal of the trust.

After Mr. Coan's death in 1984, Linnie Betts (now deceased), an employee of the bank where the Coan siblings' funds

were held, was appointed successor guardian of Ms. Coan and her estate. Ms. Betts also served as a co-administrator of Mr. Coan's estate and as a co-trustee of his testamentary trust with John Gaughan. After Ms. Coan died in 2005, appellants alleged that the trustees had violated the terms of the trust by considering Ms. Coan's personal assets in determining the necessity of using the money in the trust for her support. Appellees, George Betts, Administrator of the Estate of Linnie Betts; Michael Gaughan, Administrator of the Estate of Joseph Coan; Bancorpsouth, Inc.; Western Surety Company; Metropolitan Opera; and the Estate of Joseph Coan, argued that the will gave the trustees discretion to consider Ms. Coan's personal assets in determining her need of support from the trust.

At the hearing on the will's construction, all parties agreed that the will was unambiguous. The circuit court construed the will as giving the trustees discretion in determining Ms. Coan's need of the trust's income and principal:

> The Court recognized that the cardinal rule in construing a will or trust instrument is that the intention of the settlor must be ascertained. In order to properly interpret a will or trust the intent of the testator or settlor must be determined and that intent should govern. This intention is to be determined by examination of the four corners of the instrument, considering the language used, giving meaning to all of its relevant provisions whenever possible.
>
> Upon examination of the entire instrument it appears clear that JWC had three primary objectives in mind at the time of the execution of his will and trust. First, he wanted to ensure that HVC, his severely mentally retarded sister with whom he was obviously very close, would continue to receive the very best care and support that could be provided. JWC had obviously committed himself to this effort through his adult life and fully accepted this responsibility following the death of his parents. The substantial assets within JWC's mother's estate were never severed but remained commingled as a source of revenue and assets which were used for the care of HVC during her lifetime.
>
> Secondly, the language contained in the will and trust clearly indicates that JWC had a strong desire to preserve the family home and contents as well as at least $125,000 to be distributed to specific deserving individuals upon the death of HVC.

Finally, there are two nonprofit institutions, the Metropolitan Opera of New York and his alma mater, Georgetown University, which the testator strongly desired to give the remainder of his estate equally in his remembrance.

The Court is well aware of the line of Arkansas cases concerning the construction of will and trust language dealing with the distribution of income and principal that have held that, unless something appears in the will indicating a different purpose, it is ordinarily presumed that the testator intended the beneficiary to be supported and maintained from estate income or from the sale of part of the corpus. *Cross v. Farr* [sic], 215 Ark. 463, 221 S.W.2d 24 (1949); *Bailey v. Sanford Trustee* [sic], 281 Ark. 242, 663 S.W.2d 174 (1984). Arguably, the rulings in these cases indicate that in a circumstance similar to the situation before us, the co-trustees had no discretion and could not consider the assets of the incompetent HVC in determining whether income or principal assets of the trust were to be expended for her care.

However, the Court is of the opinion that these cases can be distinguished from that of the present case. Those cases basically dealt with whether or not the trustee had the right to liquidate certain assets for the purpose of providing funds of the support of the beneficiary, though the beneficiary had individual assets which could be used for said purpose. In both cases the settlor specifically pledged all income and principal in the trust for the support of the beneficiary.

The language as contained in the testamentary trust within the will of JWC contains language of limitation, which would strongly indicate his desire to preserve the principal assets of his estate for distribution as per the terms of the will and trust, which were not absolutely necessary for the purpose of the continuing care of his sister. The will and trust clearly instruct the co-trustees to use only that part of the income "necessary" for his sister's care. In addition he expected there to be income in excess of that necessary to sustain her, as the undistributed income was to become a part of the principal. This language demonstrates a clear intention by JWC for the preservation and distribution of the assets remaining following his sister's death. It is only reasonable that the settlor's intention was that the substantial assets in his sister's name were to be taken into consideration and used for her support when possible.

Restatement (Third) Trust, Section 50, Comment e, contains language that supports the position that the assets of the trust

> beneficiary (HVC) are to be considered by a trustee in determining what expenses were to be paid from trust assets.
>
> When considering all of the language contained in the trust and will, the Court is convinced that this language indicates the intention of JWC was that his sister's assets must be taken into consideration in order to make the stated gifts to individuals and institutions that he cared for so deeply. The co-trustees, therefore, did not violate this intention or the terms of the document by considering the assets of HVC or her guardianship as a source of payment for her care.

On appeal, appellants argue that the circuit court failed to follow precedent and misconstrued the will. We review probate cases de novo and affirm the circuit court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Taylor v. Woods*, 102 Ark. App. 92, 282 S.W.3d 285 (2008). In the interpretation of wills, the paramount principle is that the intent of the testator governs. *Id.* The testator's intent is to be gathered from the four corners of the instrument itself. *Id.* In construing a trust, we apply the same rules applicable to the construction of wills. *Bailey v. Delta Trust & Bank*, 359 Ark. 424, 198 S.W.3d 506 (2004). This intention is to be determined from viewing the four corners of the instrument, considering the language used, and giving meaning to all of its provisions, whenever possible. *Id.* We will construe the words and sentences used in a will or trust in their ordinary sense in order to arrive at the testator's true intention. *Id.* In order to determine the intentions of the testator, consideration must be given to every part of the will. *Id.* When the purpose of a trust is ascertained, that purpose will take precedence over all other canons of construction. *Wisener v. Burns*, 345 Ark. 84, 44 S.W.3d 289 (2001).

Extrinsic evidence may be received on the issue of the testator's intent only if the terms of the will are ambiguous. *Taylor v. Woods*, *supra*. The determination of whether there is an ambiguity is a matter of law. *Thinn v. Parks*, 79 Ark. App. 20, 83 S.W.3d 430 (2002). Absent a finding of ambiguity by the court, testimony about the settlor's intent should not be considered. *Id.* When the terms of a trust are unambiguous, it is the court's duty to construe the written agreement according to the plain meaning of the language employed. *Bailey v. Delta Trust & Bank*, *supra*. Here, all parties agreed at the hearing and on appeal that the will was unambiguous, and we concur.

Prior Arkansas cases construing trust language about the distribution of income and principal for the support of a beneficiary have held that phrases such as "necessary for support" were presumed to mean that the trustee was to use the money for that purpose regardless of the beneficiary's ability to pay unless the trust contained language indicating a contrary intent. *Cross v. Pharr*, 215 Ark. 463, 221 S.W.2d 24 (1949) (relying on the *Restatement of Trusts* § 128, comment e (1935)). *See also Bailey v. Delta Trust & Bank, supra*; *Estate of Wells v. Sanford*, 281 Ark. 242, 663 S.W.2d 174 (1984); *Martin v. Simmons First Nat'l Bank*, 250 Ark. 774, 467 S.W.2d 165 (1971).

The *Restatement (Second) of Trusts* section 128 (1959) was also in line with Arkansas cases. This presumption changed, however, in the *Restatement (Third) of Trusts*, section 50 (2003), as explained in comment e:

> *e. Significance of beneficiary's other resources.* It is important to ascertain whether a trustee, in determining the distributions to be made to a beneficiary under an objective standard (such as a support standard), (i) is *required* to take account of the beneficiary's other resources, (ii) is *prohibited* from doing so, or (iii) is to consider the other resources but *has some discretion* in the matter. If the trust provisions do not address the question, the general rule of construction presumes the last of these.
>
> Specifically, with several qualifications (below), the presumption is that the trustee is to take the beneficiary's other resources into account in determining whether and in what amounts distributions are to be made, except insofar as, in the trustee's discretionary judgment, the settlor's intended treatment of the beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so.

Noting that the cases are in conflict on this issue, the Reporter's notes about comment e stated that the *Restatement (Third) of Trusts* reflects a recent trend that is more realistic as a reflection of probable settlor objectives. In *Bailey v. Delta Trust & Bank, supra*, which was decided after the adoption of the *Restatement (Third) of Trusts*, the court did not address whether section 50 should be adopted on this issue. The supreme court and this court have relied upon some sections of the *Restatement (Third) of Trusts*, but have not yet expressly adopted section 50. *See Alexander v. McEwan*, 367 Ark. 241, 239 S.W.3d 519 (2006); *Taylor v. Woods, supra*; *Trott v. Jones*, 85 Ark. App. 526, 157 S.W.3d 592 (2004).

We need not decide, however, whether the circuit court erred in relying on section 50 of the *Restatement (Third) of Trusts*. Instead, this case can, in line with Arkansas precedent, be affirmed as a situation in which "something appear[ed] in the will indicating a different purpose" than an intention that the beneficiary would be supported from the estate income and principal without regard to Ms. Coan's personal resources. *See Cross v. Pharr*, 215 Ark. at 467, 221 S.W.2d at 26. In Article Six, section (C)(a), the will stated that the co-trustees were authorized to pay for Ms. Coan "any part of the annual income from said trust necessary to provide for her care, welfare and maintenance." This section treated the current income differently from principal. Section (C)(b)'s provision that the principal "may be encroached upon if necessary" was not mandatory and implied some discretion by the co-trustees. Section (C)(b) added, "but my Co-Trustees are directed to provide for the needs from the income of said trust, if possible," emphasizing the settlor's intent to protect the principal. Section (C)(b) concluded with "My Co-Trustees are directed that any undistributed income shall become part of the principal of the trust." This language indicated that Mr. Coan believed that current income would be more than sufficient to meet Ms. Coan's needs and also reflected an intent to protect the principal. Further, the next subsection provided for the distribution of the principal and all undistributed income upon the termination of the trust, without adding the qualification "if any remains." For these reasons, we find no error in the circuit court's construction of the will or in its adherence to precedent.

Affirmed.

VAUGHT and HUNT, JJ., agree.

Vang LEE *v.* Monzer MANSOUR

CA 08-406 289 S.W.3d 170

Court of Appeals of Arkansas
Opinion delivered November 19, 2008

[Rehearing denied December 17, 2008.]

Henry Law Firm, by: *Mark Murphy Henry* and *Adam L. Hopkins*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Robert L. Henry* and *Cynthia W. Kolb*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Vang Lee appeals the entry of summary judgment against him in his legal malpractice lawsuit against his former attorney, appellee Monzer Mansour,

entered by the Benton County Circuit Court. Appellant argues that the trial court erred by (1) following a bright-line rule that a prior order granting counsel permission to withdraw insulates the attorney from any legal malpractice claim after the attorney is relieved; and (2) finding as fact that appellee attorney did not mislead the trial court in his request to be relieved as counsel. We hold that appellee was not entitled to judgment as a matter of law at this juncture, rendering summary judgment in error. We reverse and remand for further proceedings.

The course of events leading to this legal malpractice lawsuit is not in serious dispute. We set them forth here, noting where the parties differ in their beliefs as to what happened.

Appellant, a resident of northwest Arkansas, hired a construction company to construct an addition to his house and to alter and repair poultry barns on his property. A dispute arose over the performance of this contract, and as a result, the construction company filed suit on September 29, 2004, to recover the full contract price from appellant in Benton County Circuit Court. Appellant met with appellee in appellee's Springdale, Arkansas, office to discuss the complaint. Appellant brought an interpreter to assist in communicating because appellant's native tongue is an Asian dialect. Appellee declined representation and encouraged appellant to find an attorney who spoke appellant's language.

Appellant found and hired an attorney in Minnesota, named Vang Pao Lee, who could speak appellant's language. Appellant gave Attorney Lee a $2000 retainer, of which Attorney Lee sent appellee $1000. Attorney Lee prepared an answer and counterclaim, which was sent to appellee for filing in the Benton County Courthouse. On November 15, 2004, appellee filed a modified version of Attorney Lee's drafted answer. While the answer reserved the right to plead further, it did not include the affirmative defenses and counterclaim that were included in Attorney Lee's draft. Attorney Lee formally sought and was granted permission to practice in Benton County Circuit Court on November 17, 2004, with appellee serving as local counsel.

In June 2005, Attorney Lee notified appellee that he would be leaving the country for the month of July and requested appellee to attend a status/scheduling hearing in appellant's case on July 15, 2005. Appellee appeared and chose the latest trial date offered by the trial court, May 19, 2006. The court set a pretrial

conference for April 19, 2006. Thereafter, Attorney Lee was unresponsive to appellee's attempts by facsimile, letter, and telephone to discuss the case.

On January 4, 2006, appellee wrote to Attorney Lee stating that if Lee did not respond, he (appellee) would have no choice but to ask the court for leave to withdraw. Appellee did not copy appellant with this letter. On January 31, 2006, appellee wrote another letter to Lee, enclosing $250 in unearned and unused funds but declaring that he had earned the remaining $750. Appellee did not copy appellant with this letter.

On February 1, 2006, appellee filed a formal motion with the trial court asking permission to withdraw, including a proposed order for the judge to sign. In the motion, he noted that his last communication with Attorney Lee was in June 2005, that Attorney Lee had not responded to any of appellee's numerous attempts to communicate, and that "[appellant] and Attorney Mansour do not communicate." Appellee asserted that appellant "should not suffer prejudice" as a result of appellee's withdrawal because appellant remained represented by Attorney Lee, who speaks appellant's language, and because Attorney Lee had or should have all relevant papers regarding his litigation. Appellee stated that he possessed no unearned fees but had tendered $250 back to Attorney Lee. The motion was mailed to Attorney Lee and opposing counsel, but not appellant. There was no hearing on this motion. On February 9, 2006, the trial court signed the proposed order permitting appellee to withdraw and noting that appellant remained represented by Attorney Lee.

Thereafter, the contract case went forward and appellant's answer was struck for failure of him or Attorney Lee to appear at the pretrial conference in April. Appellant hired new counsel at that point, but new counsel's attempt to assert defenses or counterclaims was barred by the trial court. Judgment was rendered against appellant and in favor of the construction company. A request to set the judgment aside was denied.

Appellant then sued Attorney Lee and appellee for legal malpractice. Attorney Lee did not respond, resulting in a default judgment, and appellant was awarded a sizable judgment against Attorney Lee, which is not the subject of this appeal.

Appellee defended against the legal malpractice case by moving for summary judgment, arguing that he was no longer appellant's attorney after February 9, 2006, before any damages

were sustained, and that appellant remained represented by another attorney whose failings were the proximate cause of any damages to appellant.

Appellant responded and reasserted his allegation of malpractice by failing to plead defenses or counterclaims that resulted in a large judgment against him, and by not informing him (the client) of the pretrial or hearing dates or the motion to withdraw. Appellant challenged the propriety of allowing appellee to withdraw under these circumstances, particularly where appellee did not notify appellant of his motion or communicate with him directly. Appellant asserted that appellee had misled the trial court in stating that he and appellee "do not communicate," inferring that appellant was uncooperative or incapable of understanding any English. To the contrary, even appellee's notes indicated his belief that appellant had a ten-to-twenty-percent command of English. Appellant stated by affidavit that he telephoned appellee before the withdrawal and was assured by appellee that he would send relevant paperwork to appellant, but nothing arrived. Appellant further stated in his affidavit that he called appellee after withdrawal was granted, and that appellee told him he had withdrawn and immediately hung up on him. At the core, appellant challenged whether appellee had committed malpractice by failing to assert counterclaims and defenses, by not notifying appellant of the impending motion to withdraw, by not notifying appellant of any upcoming trial or pretrial dates, and by failing to tender any paperwork or monies back to him as the client.

The trial judge granted summary judgment in appellee's favor, finding that appellee substantially complied with Ark. R. Civ. P. 64 regarding the motion to withdraw, that appellee did not mislead the trial judge, and that appellant remained represented by other counsel whose errors were not proximately caused by appellee. An order entering summary judgment on this separate defendant followed, and this appeal resulted. Appellant asserts that the trial court's entry of summary judgment was improper because, while appellee was allowed to withdraw, such withdrawal was granted in violation of Rule 64, preventing the application of any immunity that proper withdrawal would have provided him. Appellant also asserts that summary judgment was improper because the trial court erroneously found facts instead of adhering to the parameters of summary judgment. We agree with appellant, and therefore this case is reversed and remanded.

Summary judgment is no longer considered a drastic remedy but is rather an efficiency tool. The purpose of summary judgment is not to try the issues but to determine if there are issues to be tried. *City of Barling v. Fort Chaffee Redevelopment Authority*, 347 Ark. 105, 60 S.W.3d 443 (2001). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof to demonstrate the existence of a material issue of fact. *See Spears v. City of Fordyce*, 351 Ark. 305, 92 S.W.3d 38 (2002). On appellate review, we determine whether summary judgment was appropriate based on whether the evidentiary items presented by the moving party leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the non-moving party, resolving all doubts and inferences against the moving party. *Id. See also Bomar v. Moser*, 369 Ark. 123, 251 S.W.3d 234 (2007).

Appellant asserts that he rebutted appellee's claim of entitlement to summary judgment by showing that there were irregularities in the grant of appellee's motion to withdraw, specifically lack of notice to the client and prejudice to the client where the other attorney was nowhere to be found. Arkansas Rule of Civil Procedure 64 governs the addition and withdrawal of counsel, and it states in pertinent part in subsection (b) that a lawyer may not withdraw without permission of the trial court, which may be granted if it is shown that he "has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel," and has tendered or stands ready to tender any client papers and unearned fees. This section is aimed at protecting the client's interests. *See Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996). The trial court must play an active role in determining whether the requirements of the rule have been met. *Id.*

The question here is whether reasonable steps were taken by appellee to avoid foreseeable prejudice to appellant's rights as a client. There was no notice of this motion to withdraw served on the client, there was no assertion of wrongdoing by the client to warrant withdrawal, and to the extent any funds or properties were to be returned to the client, they were sent to the non-responsive attorney. While it is true that appellant was represented by another attorney and remained so at the time of the withdrawal, this other attorney's unresponsiveness was a source of foreseeable prejudice to the client. Appellee asserted the other attorney's failure to

respond as the basis to withdraw. Clearly, appellant should have been given notice of appellee's request to withdraw. *Compare Snowden v. Riggins*, 70 Ark. App. 1, 13 S.W.3d 598 (2000). The non-responsive attorney did not respond to his co-counsel's motion to withdraw, and there was no hearing on this motion.

This brings us to the real point on appeal, which is whether the trial court's permitting appellee to withdraw insulates appellee from legal malpractice liability. We agree with appellant that under these circumstances, the trial court's grant of the motion to withdraw cannot serve as an *absolute* shield to a separate cause of action for legal malpractice; however, we do not see the grant of summary judgment here as necessarily sanctioning the idea of an absolute shield. The order granting summary judgment recites that the established case law in *Bright v. Zega*, 358 Ark. 82, 186 S.W.3d 201 (2004), was controlling in that, absent counsel presenting misleading information to the court in acquiring permission to withdraw, whatever acts or omissions that might have arisen after the court-approved withdrawal cannot be the basis for a legal malpractice claim. However, this does not insulate appellee from malpractice leading up to withdrawal, nor does it create a blanket rule if there is misfeasance or malfeasance in acquiring permission to withdraw. We hold that the permission granted to withdraw was flawed, because it lacked notice to the client and because any funds and paperwork held by appellee were not tendered to the client. Thus, this withdrawal cannot be a basis for granting appellee judgment as a matter of law before trial.

The summary judgment was also improper because it "found facts." This is not the purpose of summary judgment, which is to determine if there are issues of fact to be tried. *City of Barling v. Fort Chaffee Redevelopment Authority*, 347 Ark. 105, 60 S.W.3d 443 (2001). The summary judgment order specifically stated that the trial court "makes the following findings of fact," including that appellee did not mislead the trial court in asking to withdraw and that appellee complied in all relevant ways with Rule 64. These were not agreed or stipulated facts, but were instead directly conflicted by appellant through affidavit and allegation. Given the posture of summary judgment, viewing the evidence and all inferences deducible from the evidence in the light most favorable to the non-moving party, it was error to enter judgment as a matter of law upon summary judgment.

Reversed and remanded.

GLOVER, J., agrees.

HEFFLEY, J., concurs.

Jessica NEAL *v.* SPARKS REGIONAL MEDICAL CENTER and Management Claims Solutions

CA 08-557 289 S.W.3d 163

Court of Appeals of Arkansas
Opinion delivered November 19, 2008

Walker, Shock & Harp, PLLC, by: *Eddie H. Walker, Jr.*, for appellant.

Smith, Maurras, Cohen, Redd & Horan, PLC, by: *R. Scott Zuerker*, for appellees.

DAVID M. GLOVER, Judge. This is a workers' compensation case in which appellant, Jessica Neal, suffered an admit-

tedly compensable injury on May 8, 2006, while working for Sparks Regional Medical Center. The parties agreed that appellant injured her shoulder; however, they disagreed about a neck injury, and appellee medical center denied that claim. In addition, appellant claimed entitlement to either temporary-total or temporary-partial disability benefits for the period May 10, 2006 to September 8, 2006. The ALJ found that appellant sustained her burden of proving that she suffered a compensable neck injury, but concluded that she failed to prove entitlement to either temporary-total or temporary-partial disability benefits for the designated period. The Commission affirmed and adopted the ALJ's decision. In her appeal to this court, appellant contends that the Commission erred in concluding that she is not entitled to either temporary-total or temporary-partial disability benefits. Appellees did not cross-appeal the compensability of the neck injury. We affirm.

Point of Appeal

The Commission erred in determining that the claimant failed to prove by a preponderance of the evidence entitlement to additional temporary disability benefits when the claimant was under active medical treatment and under activity restrictions placed on her by her treating physician and Sparks's benefits person testified that Sparks made no attempt to make work available in regard to a component of the claimant's job that the claimant testified accounted for at least seventy percent (70%) of her earnings.

The hearing before the ALJ took place on November 16, 2006. Neal testified that she was thirty-one years old; that she was a registered nurse; that on May 8, 2006, she was assisting with a patient when she felt an electrical shock in the back of her shoulder; that in addition to shoulder pain, she also experienced cervical spasms; and that on May 10, 2006, Dr. Duane Lukasek put her on light duty. She denied being offered any light duty on May 10, 2006, but testified that she was offered an office job the next day. She explained that she had worked a twelve-hour shift before she saw Dr. Lukasek and that she did not get the message about the office job because she was asleep. She stated that she worked for Dr. Sills in the clinic on May 21, taking vital signs and performing other clinic tasks; and that she was not supposed to work there the next day because she was supposed to work in the laundry room. She stated that she was sent to the laundry room because she was "unable to make" the first day (May 10) of the clinic work. She

testified that the laundry-room job was excruciatingly painful; that it was hard for her to function because her left shoulder was "spasming"; that she finished as much as she could before her scheduled physical-therapy appointment; that the required movements in the laundry room caused severe spasms in her shoulder and neck; and that she reported that fact to Tina Good, the benefits specialist, but they did not offer her a different job. She said that she was still under active medical treatment at the time.

Appellant explained that she was a critical-care nurse at the time of her injury and that she had been employed at Sparks for four years. She stated that she had seen other injured RNs placed in the monitor room and in secretarial and unit-nurse jobs; she said that she was told the laundry-room job was the only available light-duty assignment. She stated that from the first day they offered her the laundry-room job until when she returned to work in September, they never offered her anything other than the laundry-room job and that she was under active medical treatment during that entire period of time.

Appellant explained that she made $82,000 a year as an RN the year before her injury and that she made that amount of money by working more than sixty hours a week. She stated that she was losing $1500 to $1800 a week by being off work; that after she saw Dr. Lukasek, he referred her to Dr. Edward Rhomberg; that Dr. Rhomberg took her off work on June 15, 2006; that he wrote her a note later in June returning her to work but that no one from his office examined her after June 15, 2006; that her condition did not get any better in that period of time; and that she did not know how he came up with the return to work without seeing her again.

Appellant said that she contacted Dr. Rhomberg in September and asked him to let her go back to work. She stated that she was allowed to go back to work after she completed a functional capacity evaluation. She stated that she was still not completely recovered from the injuries that she sustained in May 2006 because she was still having pain in her shoulder, numbness, tingling, radiculopathy in her hands and arms, and cervical spasms.

Appellant stated that she has never seen a slip from any of her doctors that specifically said she was released to go to work in the laundry room. She acknowledged that Dr. Lukasek released her to light-duty work when she saw him on May 10. She stated that she did not recall being offered a clinic job at Preferred South on May 20 but that she did work with Dr. Sills on May 21. She confirmed

that she was scheduled to work Saturday and Sunday at the clinic, but that she called and let them know that she could not make it Saturday because she was in pain and had to take Flexeril and Lorcet. She also stated that she did not recall being contacted to work as a clinic nurse in Dr. Jackson's office. She said there was nothing about her physical condition that would prevent her from doing that kind of job. She recalled that she was contacted by Sharon Beecham about a clinic assignment in July but that she told Beecham she could not do the job because of everything that was going on. She said part of her problem was that she had migraines from the spasms and that she told Beecham she could not do the job unless they gave her a dark place to lie down.

Appellant testified that during the period from May 10 to September 8, Sparks made the laundry-room job available, and that during various periods of time certain clinic jobs were available. She said that she could not do the laundry-room job because of her pain and spasms and that she did not do the clinic jobs because she was on prescription narcotics every four hours, which still did not relieve the pain. She denied painting a fence during that period of time but did acknowledge painting a mail box. She stated that her restrictions "were something about not using her left shoulder or a certain weight limit," which she thought started at ten pounds and was then raised to fifteen. Her testimony was that the repetitive motion, not the weight of the quilts, caused her pain in the laundry-room job.

Appellant explained that the majority of her income in the prior year came from per diem shift work, and that she was not eligible for per diem shifts from the minute she was hurt. Specifically, by her testimony, the work Sparks made available during the period in question was only to replace her normal hourly work; no effort was made to replace her per diem earnings, which accounted for the majority of her income. She testified that she cannot do patient care under her licensure while she is under the influence of narcotics. She stated that she was not able to work during the period from May 10 to September 8; that the pain got worse and she was not able to function without the pain medications; that she had done physical therapy; that her condition gradually improved to where she could start weaning herself off the narcotic pain medications; and that she was off them by the end of August.

Tina Good, the benefits specialist, who also scheduled light-duty work at Sparks, testified that the first time she offered appellant light duty was shortly after her injury; that she left a

message for appellant to report to the Van Buren clinic at 8:00 a.m. on Thursday morning; that she heard from appellant around 1:30 p.m.; and that appellant told her she had been asleep the entire time. She said that she found another clinic job for appellant at Preferred South; that she called appellant, who told her she would do that job; that she scheduled appellant to work Saturday and Sunday (May 20 and 21); that appellant did not show up to work the shift on May 20; and that when she called appellant, appellant told her she had contacted the nursing office and told them she was too sick to come to work. Good testified that she told appellant the clinics found her too unreliable and that the only alternative was laundry-room work. She said appellant worked in the laundry room for six hours one day but did not show up the next day; that when she called appellant, appellant told her she could not do the laundry-room job.

Good testified that she offered appellant another clinic job in Dr. Jackson's clinic on June 1 or 2; that she explained to appellant that the job would last a couple of months; and that appellant told her she did not feel that she could do that job. She said that during the middle of July, another clinic position was offered to appellant by Ms. Beecham, and that appellant did not accept that position either. Good explained that per diem shifts are not available until a person works thirty-two hours every two weeks; that appellant never satisfied that requirement during the period of time in question; and that even if she had satisfied that requirement, she could not have gone back to her normal nursing duties to do the per diem shifts. She testified that it was never Sparks's intention to replace the per diem shift component of appellant's wages when they offered her the various post-injury jobs.

Standard of Review

When reviewing a decision of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Finley v. Farm Cat, Inc.*, 103 Ark. App. 292, 288 S.W.3d 685 (2008). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm. *Id.* Where the Commission denies benefits because the claimant has failed to meet his burden of proof, the substantial-evidence standard of review requires us to affirm if the Commis-

sion's decision displays a substantial basis for the denial of relief. *Parson v. Arkansas Methodist Hosp.*, 103 Ark. App. 178, 287 S.W.3d 645 (2008). A substantial basis exists if fair-minded persons could reach the same conclusion when considering the same facts. *Id.*

In rejecting appellant's claim for temporary-total and temporary-partial benefits, the ALJ explained:

> I further find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability from May 10, 2006 to September 8, 2006. The claimant has testified, and it has been stipulated by the parties, that she did work six (6) hours for the respondent on May 25, 2006 and four and a half (4½) hours on May 21, 2006. The claimant testified that she was able to do the clinic work when she worked on May 25, 2006, and the respondent had offered her work in the clinic at least twice according to the testimony. It is further noted that one of these clinic jobs had an estimated time of employment of at least two months which the claimant turned down without even trying. There has been some discussion about the laundry room work which the claimant was assigned to initially. The claimant testified that she was not able to do this work because of its repetitive nature. This laundry room job certainly fell within the weight restriction which was imposed upon her and it could be done using one hand if the claimant would have allowed herself time to adjust to the job. Although the claimant has exhibited an outstanding work ethic prior to her May 8, 2006 injury, her willingness to return to light duty jobs offered to her was notably negative. Therefore, no additional temporary total disability will be awarded in this matter.
>
> The claimant during testimony raised the issue of whether she would be entitled to temporary partial disability from May 10, 2006 to September 8, 2006. The claimant testified that by choice she had contracted to work less than forty hours a week, but even with this reduced rate it would qualify her for working the per diem shifts. It was my understanding from the testimony that these per diem shifts are not guaranteed and would not be considered a part of an individual's contract of hire.
>
> . . . .
>
> It seems quite clear that [section 11-9-520] was written in contemplation of a person returning to work but at lesser hours or at a lesser hourly rate than what their contract of hire was at the time of her injury. In the claimant's case she refused to return to work at all.

. . . .

> I have previously found that the claimant was not entitled to temporary total disability because she would not accept employment offered to her by the respondents. Therefore, I find that the claimant has refused employment offered to her by the respondent which was within her restrictions and which she has even testified that she was capable of performing such as the clinic work. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability from May 10, 2006 to September 8, 2006.

Appellant contends that the "two (2) issues in this case revolve around whether Neal was physically able to perform a job that Sparks provided in the laundry room and whether Ark. Code Ann. § 11-9-526 bars Neal from receiving temporary partial disability benefits if the laundry room job was one that she was able to perform." She argues that there is no question that she could not perform the laundry-room job because she actually tried it and was not able to do so and that she knew of no doctor's slip that specifically released her to perform the laundry-room job. Therefore, she argues that there was no substantial evidence to support a conclusion that the laundry-room job was within her physical capabilities.

Temporary-total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Owens Planting Co. v. Graham*, 102 Ark. App. 299, 284 S.W.3d 537 (2008). In addition, however, Arkansas Code Annotated section 11-9-526 provides:

> Compensation for disability — Refusal of employee to accept employment.
>
> If any injured employee refuses employment suitable to his or her *capacity* offered to or procured for him or her, he or she shall not be entitled to *any* compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

(Emphasis added.) In *Coleman v. Pro Transp., Inc.*, 97 Ark. App. 338, 348, 249 S.W.3d 149, 156-57 (2007), our court explained:

> Pro Transportation contends that the Commission's decision was supported by substantial evidence. Pro Transportation points

out that Coleman was offered modified-duty employment via certified letter dated November 27, 2002, and that he never reported for work and never provided any medical justification for his refusal. Arkansas Code Annotated section 11-9-526 (Repl. 2002) makes it clear that:

> If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of his refusal, unless in the eyes of the Workers' Compensation Commission, the refusal is justifiable.

Coleman offered no persuasive evidence or argument regarding his refusal to return to light-duty employment in November 2002.

Here, appellant's argument focuses on the laundry-room job that was offered to her and her contention that it was not within her capacity to perform that job. She tries to minimize the fact that clinic jobs were also offered to her, by contending that she was taking narcotic medications and could not perform patient care while under the influence of those medications. The problem with her argument is that, regardless of her contention that she could not physically perform the laundry-room job, she testified that the clinic jobs involved tasks that she *could* perform physically,. *e.g.*, taking vital signs and escorting patients to exam rooms. While her narcotic-medication argument might carry greater weight if she were trying to return to the tasks of critical-care nursing, we agree that it is not convincing under the circumstances without more of a demonstration that her prescribed medications would pose a danger to patients in the clinic settings in which she was offered jobs.

Appellant further contends that even if it were somehow determined that she was able to do the work that was made available to her, she should still be entitled to temporary partial-disability benefits because of the difference between the wages she would have earned doing the work that Sparks offered her and the wages she was earning at the time of her injury. We disagree.

Arkansas Code Annotated section 11-9-520 provides:

> Compensation for disability — Temporary partial disability.
>
> In case of temporary partial disability resulting in the decrease of the injured employee's *average weekly wage*, there shall be paid to the

> employee sixty-six and two-thirds percent (66 2/3%) of the difference between the employee's *average weekly wage* prior to the accident and his or her *wage-earning capacity* after the injury.

(Emphasis added.) This section contemplates a situation in which an employee returns to work but, because of a temporary-partial disability, is not earning the same wages as before the injury. Here, as previously discussed, section 11-9-526 barred appellant from receiving temporary-total-disability benefits for the designated period of time because she refused suitable employment that was within her capacity to perform. That same rationale applies to bar her from receiving temporary-partial disability. In short, the ALJ's decision, which was affirmed and adopted by the Commission, displays a substantial basis for the denial of relief and therefore the decision is supported by substantial evidence and must be affirmed.

Affirmed.

ROBBINS and HEFFLEY, JJ., agree.

Artis DAVIS *v.* Lorell McKINLEY
and Ladell Brown

CA 08-785 289 S.W.3d 479

Court of Appeals of Arkansas
Opinion delivered December 3, 2008

Phil Stratton, for appellant.

Henry & Henry, by: *Robert W. Henry*, for appellee Ladell Brown.

JOHN MAUZY PITTMAN, Chief Judge. Appellant Artis Davis sought and was granted a declaratory judgment by default against appellee Lorell McKinley on February 16, 2006. The declaratory judgment upheld the validity of a deed filed September 26, 2003, by which appellee McKinley purported to transfer a one-quarter undivided interest in an eighty-acre tract to appellant. On October 25, 2006, appellee Ladell Brown filed a motion to vacate the declaratory judgment. The trial court granted the motion and vacated the judgment by an order entered April 10, 2008. Appellant argues on appeal that the trial court erred in vacating the judgment because appellee Brown had no standing to challenge the deed. We affirm.

Arkansas Code Annotated section 16-111-106(a) (Repl. 2006) provides that, when declaratory relief is sought, all persons shall be made parties who have or claim any interest that would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. Arkansas Code Annotated section 16-111-108 (Repl. 2006) states that the court may refuse to render or enter a declaratory judgment or decree where the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

In the present case, appellant's declaratory judgment action was filed during the pendency of another lawsuit, to which Brown was a party, seeking partition and division of the eighty-acre tract, and in the context of which Brown had asserted that appellant's purported deed from McKinley was a forgery. The effect and,

apparently, the design of appellant in so doing was to obtain prior determination of the validity of the deed in a separate action to which Brown had not been made a party and of which Brown was not notified. Appellant seems to have believed that a declaratory judgment would foreclose Brown from asserting his forgery defense in the ongoing partition suit. This supposition is incorrect. Because section 16-111-106(a) expressly states that no declaratory judgment shall prejudice the rights of a person not a party to the proceeding, the declaratory judgment in this case would not bar Brown, who was not a party, from asserting in the partition action that the deed from McKinley was a forgery. Clearly, the uncertainty or controversy giving rise to the declaratory judgment action was the ongoing partition action, and, because Brown was not made a party, the declaratory judgment action could not terminate the controversy, and the trial judge could properly refuse to grant declaratory relief. *See* Ark. Code Ann. § 16-111-108.

Finally, we note that the Arkansas Supreme Court has for half a century denounced the sort of practice attempted by the appellant in this case:

> " 'We condemn the practice of a person after being charged with violating the law . . . then asking for a declaratory judgment in an independent cause, with the result that two cases involving the same subject matter are pending at the same time. If such a practice were permitted, it would cast an unnecessary burden on the courts and the law enforcement authorities. [*Updegraff v. Attorney General*, 298 Mich. 48, 998 N.W. 400, 401 (1941).]' In the New York case of *Wooddard v. Schaffer Stores Co.*, reported in 272 N.Y. 304, 5 N.E.2d 829, 832, 109 A.L.R. 1262, 1265, the Court said: 'When, however, another action between the same parties, in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction.' "

City of Cabot v. Morgan, 228 Ark. 1084, 1085-86, 312 S.W.2d 333, 334 (1958) (quoting *City of Johnson City v. Caplan*, 194 Tenn. 496, 253 S.W.2d 725, 726 (1952)).

■ ■ Declaratory judgment statutes are intended to supplement rather than supersede ordinary causes of action. Consequently, when another action between the same parties, in which all issues could be determined, is actually pending at the

time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction. *UHS of Arkansas, Inc. v. Charter Hospital of Little Rock, Inc.*, 297 Ark. 8, 759 S.W.2d 204 (1988). Here, in light of appellant's clear attempt to supersede the pending partition action by obtaining a declaratory judgment, the trial court would have abused its discretion in granting the declaratory judgment had it been aware of all of the particulars of the ongoing lawsuit. Under these circumstances, we hold that the trial court did not abuse its discretion in vacating the default declaratory judgment. *See Henry v. Gaines-Derden Enterprises, Inc.*, 314 Ark. 542, 863 S.W.2d 828 (1993).

Affirmed.

HART and GRIFFEN, JJ., agree.

Robert Shannon FOSTER *v.* STATE of Arkansas

CA CR 08-421 289 S.W.3d 476

Court of Appeals of Arkansas
Opinion delivered December 3, 2008

Charles E. Smith, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Robert Shannon Foster was convicted of theft by receiving on October 3, 2007, and was given a five-year suspended imposition of sentence. On October 30, 2007, the State filed a petition to revoke on the basis that Mr. Foster committed a new offense, an aggravated assault upon an employee of a correctional facility. Arkansas Code Annotated section 5-13-211 (Repl. 2006) provides:

> A person commits aggravated assault upon an employee of a correctional facility if, under circumstances manifesting extreme indifference to the personal hygiene of the employee of the correctional facility, the person purposely engages in conduct that creates a potential danger of infection to an employee of any state or local correctional facility while the employee of the state or local correctional facility is engaged in the course of his or her employment by causing the employee of the state or local correctional facility to come into contact with saliva, blood, urine, feces, seminal fluid, or other bodily fluid by throwing, tossing, or expelling the fluid or material.

After a revocation hearing, the trial court revoked appellant's suspended imposition of sentence and sentenced him to three years in prison followed by a seven-year suspended imposition of sentence. Mr. Foster now appeals, arguing that the trial court erroneously found that he violated a condition of his suspended sentence because the State failed to prove that he committed aggravated assault upon an employee of a correctional facility. We affirm.

To revoke a probation or suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension.

Peterson v. State, 81 Ark. App. 226, 100 S.W.3d 66 (2003). On appeal, the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id.* Since 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 court's superior position. *Id.*

Deputy John Hicks testified for the State at the revocation hearing. He stated that on October 22, 2007, he was working at the Sebastian County Detention Center, where Mr. Foster was being detained. Deputy Hicks testified:

> I did come into contact with Robert Foster. I entered his cell and searched for items that he was not allowed to have. I handed him a sufficient amount of toilet paper so that he could use that. He leaned directly towards my hand and he spit at the toilet paper and my arm. Spit did get on me; it struck me on my left arm right by the wrist. He stood up and told me that it was a piece of cookie.

Deputy Hicks stated that the substance on his arm appeared to be brown phlegm. He indicated that Mr. Foster had been upset at both him and Deputy Nate Underwood since being fired from the kitchen. Deputy Hicks did not know whether or not Mr. Foster had any kind of infection.

Deputy Underwood was present when the alleged incident occurred. He testified that Deputy Hicks handed a large amount of toilet paper to Mr. Foster. Deputy Underwood further stated that Mr. Foster "looked at him and leaned in and spit directly on the toilet paper and his arm." Deputy Underwood indicated that Mr. Foster was mad at him and had filed grievances against him and several other deputies. He further testified that appellant became upset that day because of the items that he and Deputy Hicks had removed from appellant's cell.

Mr. Foster testified on his own behalf, and he stated that he was never released from jail after receiving his suspended sentence because he was "sitting out fines." He acknowledged that, "I had a piece of cookie or something off my mouth and hit his arm." However, Mr. Foster indicated that he was trying to spit on the toilet paper and not on Deputy Hicks. Mr. Foster explained:

> I walked back to the end of the cell and Hicks told me, "Hey, look, you spit on my arm." I walked back to the front of the cell and I said, "I didn't spit on you." I said, "That's cookie, Hicks." I told him I didn't spit on him. Obviously he thought I did. If there was any saliva that got on him, I did not intend for it to be there. I don't spit on people.

Mr. Foster stated that he had no reason to be mad at the deputies. He did admit that he had been mad at a few people before, and stated, "I will hit somebody, I will kick them, I will ram them up against the wall, but I will not spit on nobody."

The following exchange occurred during the State's cross-examination of Mr. Foster:

> Q: So, you made it quite obvious that you were upset with Deputies Hicks and Underwood before this whole incident with the spitting, is that right?
>
> A: Yes, sir.
>
> Q: And then they come into your room, they took your stuff out and then Deputy Hicks is handing you some toilet paper and then you spit on him, right?
>
> A: Yes, sir.
>
> Q: When somebody hands you something, is that what you always do is spit on them? Why on earth would you do that? Why didn't you spit on the toilet paper?
>
> A: Because at the time I didn't want nothing from Hicks.
>
> Q: You were mad?
>
> A: Oh, I was pretty upset.
>
> Q: So, you spit out of anger and he had this toilet paper in his hand, right? Yes or no, you spit out of anger?
>
> A: Yes, sir.

Mr. Foster testified that he thought that his spit only hit the toilet paper, and maintained that the piece of cookie that hit Deputy Hicks was a result of appellant's throwing his sack lunch against the wall.

On appeal, Mr. Foster argues that the State failed to prove by a preponderance of the evidence that he committed aggravated assault upon an employee of a correctional facility. Mr. Foster makes a two-prong argument. First, appellant contends that the State failed in its proof because no evidence was introduced to show that he suffered from any infection, and the offense requires a danger of infection as one of the elements. Next, Mr. Foster argues that there was insufficient evidence of his purposeful intent or manifestation of extreme indifference to the personal hygiene of Deputy Hicks because he tried to spit onto toilet tissue held by Deputy Hicks, and not on Deputy Hicks himself. Mr. Foster submits that the State's proof only showed an accidental spitting resulting in a small amount of saliva or cookie crumb to fall onto the deputy's arm. Appellant argues that this proof was insufficient to demonstrate a violation of Ark. Code Ann. § 5-13-211 (Repl. 2006), and thus that the revocation of his suspended sentence must be reversed.

We hold that the trial court's decision to revoke appellant's probation was not clearly against the preponderance of the evidence. The testimony of the deputies indicated that Mr. Foster was angry and spit in the direction of Deputy Hicks's arm, resulting in brown phlegm coming in contact with Deputy Hicks's skin. Mr. Foster's own testimony at times contradicted itself, but on cross-examination he agreed that he was upset at the time and that he spit out of anger. The testimony showed that Deputy Hicks was trying to hand appellant some toilet paper and that appellant spat in the direction of the toilet paper and the deputy's arm. Because of the obvious difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his acts. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004). While Mr. Foster claims it was an accident, there was ample evidence that he purposely spat on Deputy Hicks, resulting in his saliva coming in contact with the deputy under circumstances manifesting an extreme indifference to the deputy's personal hygiene.

While Mr. Foster also argues that there was no evidence that he suffered from any infection at the time of his conduct, this argument is misplaced. The requirement of the statute is that the person's conduct "creates a *potential* danger of infection" to the correctional-facility employee. Mr. Foster's act

of purposely expelling his bodily fluid onto the deputy's person satisfied the "potential danger" requirement of the offense.

Affirmed.

GLOVER and HEFFLEY, JJ., agree.

Virgil HAUSMAN, Dorothy Hausman, Dwain Hausman, and Vernon Hausman *v.* Dale THROESCH, Tonya Throesch, Thomas Throesch, Teresa Throesch, Paul Throesch, and Mary Throesch

CA 08-478 289 S.W.3d 493

Court of Appeals of Arkansas
Opinion delivered December 10, 2008

Roy E. Meeks, for appellants.

Don R. Brown, for appellees.

D.P. MARSHALL, Judge. Does a servient landowner ever have the right to change, without the easement holder's permission, the location of an established easement if the landowner provides an alternate route? We cannot answer that interesting legal question for want of appellate jurisdiction.

The Hausmans plowed up a road that ran through the middle of their field. The Throesches had an implied easement to use that road to get to their adjoining field. The Hausmans moved the road to the edge of their field so that they could level and better utilize their land for growing rice. The circuit court found that the Hausmans had no legal right to either move the easement or insist that the Throesches use an alternate route. The court entered a final order resolving all the issues. It directed the Hausmans to rebuild the road in its original location. The Hausmans filed a post-trial motion under Rule of Civil Procedure 52. They asked the court to amend its findings, or to make additional findings, about the specifications for rebuilding the original road. The court held a hearing on the motion. Ruling from the bench, the court modified its original order slightly. The court later entered an amended order, which embodied its original order and its oral ruling making the change in specifications. The Hausmans appeal the amended order.

"Timely filing of a notice of appeal is jurisdictional, and we are required to raise the issue of subject-matter jurisdiction on our own motion." *Stacks v. Marks*, 354 Ark. 594, 599, 127 S.W.3d 483, 485 (2003). The time-line of filings and events illuminates the jurisdictional issue:

14 September 2007:	Court entered original order[1]
19 September 2007:	Hausmans filed Rule 52 motion

[1] The signature page of this order is missing from the addendum and the record. The parties assume and premise their arguments, however, on the circuit court's entry of a signed order on 14 September 2007.

29 October 2007:	Court held hearing on Rule 52 motion and made an oral ruling
4 January 2008:	Court entered amended order
22 January 2008:	Hausmans filed notice of appeal

The Hausmans' Rule of Civil Procedure 52 motion for amended or additional findings was timely. Ark. R. App. P.–Civ. 4(b)(1). It therefore tolled their time to file a notice of appeal from the original final order. *Ibid.* But the circuit court neither granted nor denied the motion within thirty days. Thus the motion was deemed denied by operation of law on 19 October 2007. *Ibid.* The circuit court lost jurisdiction on that date because it had entered no decision of record on the motion within the thirty-day period. *Ark. State Highway Commission v. Ayres*, 311 Ark. 212, 214, 842 S.W.2d 853, 854 (1992). The Hausmans then had thirty days to file their notice of appeal. Ark. R. App. P.–Civ. 4(b)(1). The Hausmans did not file their notice, however, until 22 January 2008 — well after their thirty-day deadline had passed. We therefore do not have jurisdiction and must dismiss this appeal. *Seay v. C.A.R. Transportation Brokerage Co.*, 366 Ark. 527, 530-31, 237 S.W.3d 48, 51 (2006).

Even if we construe the Hausmans' motion as arising under Rule of Civil Procedure 60(a), thus expanding the circuit court's window to amend its final order to ninety days, we still do not have jurisdiction. The court held its late October 2007 hearing on the Hausmans' motion within ninety days of entering the original order. The court ruled from the bench at the end of that hearing. But "[p]ursuant to Administrative Order 2(b)(2), an oral order announced from the bench does not become effective until reduced to writing and filed." *Community Bank of North Ark. v. Tri-State Propane*, 89 Ark. App. 272, 279, 203 S.W.3d 124, 128 (2005). The court did not reduce its bench ruling to writing, and enter its amended order, within the ninety-day period of jurisdiction provided by Rule 60(a). The Hausmans' appeal, therefore, cannot be salvaged by looking to Rule 60 and the amended order.

Dismissed.

ROBBINS, BIRD, GLOVER, and HEFFLEY, JJ., agree.

BAKER, J., dissents.

KAREN R. BAKER, Judge, dissenting. The majority interprets the phrase "if the court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day" to require a trial court to memorialize its action in writing and file an order of record or lose its jurisdiction. This language appears in Rule 52(b) of the Arkansas Rules of Civil Procedure addressing the amendment of findings and the judgment and in Arkansas Rule of Appellate Procedure–Civil 4(b)(1) regarding the extension of time for filing a notice of appeal. The plain language of the rule merely provides that if the trial court fails to act, the motion will be deemed denied for purposes of determining the timeliness of an appeal. The provision contains no restriction regarding the method or means by which the court may act. The majority's interpretation restricts the trial court's inherent authority to protect the integrity of the proceedings and to safeguard the rights of the litigants before it.

In this case, the record contains no written order granting the Rule 52(b) motion; however, the court held a hearing forty days after the written motion was filed and modified the original order. No party objected to the trial court's jurisdiction at either the trial level or on appeal.

Two principles lead me to the conclusion that the trial court had jurisdiction to enter the amended order. Each of these principles is premised upon the trial court's inherent authority to protect the integrity of the proceedings and to safeguard the rights of the litigants before it. *Reid v. Frazee*, 72 Ark. App. 474, 41 S.W.3d 397 (2001); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990).

First, as an appellate court, we are required to presume that a trial court's findings are correct in the absence of a record to the contrary. *See, e.g.*, *Turner v. Brandt*, 100 Ark. App. 350, 268 S.W.3d 924 (2007); *Argo v. Buck*, 59 Ark. App. 182, 954 S.W.2d 949 (1997). In cases falling within the usual powers of the court the rule is that, where the record is silent with respect to any fact necessary to give the court jurisdiction, it will be presumed that the court acted within its jurisdiction. *Oliver v. Routh*, 184 S.W. 843 (1916) (distinguishing usual from special powers in probate court). Furthermore, when the record is silent regarding the trial judge's findings, the appellate court presumes that the trial judge made all the findings necessary to support the action taken. *Coon v. State*, 76 Ark. App. 250, 65 S.W.3d 889 (2001). When applying this

presumption, we should be mindful of the inherent authority of the trial court to control court records. *Ward v. State*, 369 Ark. 313, 253 S.W.3d 927 (2007).

Neither Rule 52(b) nor Rule 4 limits the trial court's ability to act by requiring the court's action be in writing or that a written memorialization of the action be filed with the clerk. Applying our general deference to the trial court's inherent authority, we should presume that it acted within its jurisdiction absent evidence to the contrary. In the case before us, the record is silent as to when the trial court granted the Rule 52(b) motion. Accordingly, we should presume that the trial court acted within its jurisdiction when it granted the motion and when it held the hearing.

Second, once the trial court reasserted its active contemplation of the case, the "deemed denied" provision of Rule 4(b)(1) can no longer be applicable. *See First Nat'l Bank of Lewisville v. Mayberry*, 366 Ark. 39, 233 S.W.3d 152 (2006) (holding that because the motion to vacate was not filed within ten days of the order appealed from it did not fall within the "deemed denied" provision of Rule 4(b)(1); accordingly the motion was still pending and, with no Rule 54(b) certification, the court had no jurisdiction to entertain appeal until there was a final, appealable order). Once the trial court granted the Rule 52(b) motion, the deemed denied provisions of either rule could no longer be applied to the motion. Furthermore, once the trial court asserted its jurisdiction pursuant to Rule 52(b), its jurisdiction continues. Nothing in Rule 52(b) limits the court's jurisdiction once it reasserts it by granting the motion. Any limitation is inconsistent with the trial court's inherent authority.

We must presume that the trial court in this case granted the Rule 52(b) motion because the trial court held a hearing pursuant to the motion and nothing in the record demonstrates that the trial court granted the motion outside of the thirty days. This case is unlike cases where a trial court granted or denied a new trial after the thirty days and the grant or denial in the record was itself evidence that the trial court acted outside of its jurisdiction. *See McCoy v. Moore*, 338 Ark. 740, 1 S.W.3d 11 (1999); *Ark. State Highway Comm'n v. Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992).

The majority's interpretation essentially rewrites Rule 52(b) to require that the court enter a written order granting the motion within thirty days of the filing of the motion or forfeit its jurisdiction. It is inappropriate for us to interpret Rule 52(b) as

limiting the trial court's inherent authority without a clear expression of that intent within the rule itself or by the supreme court. Accordingly, I would find that the trial court had jurisdiction to enter its modified order and reach the merits of the case.

Ronnie ELLIS *v.* J.D. & BILLY HINES TRUCKING, INC. and Cypress Insurance Company

CA 08-688 289 S.W.3d 497

Court of Appeals of Arkansas
Opinion delivered December 10, 2008

Moore & Giles, LLP, by: *Greg Giles*, for appellant.

Michael E. Ryburn, for appellee.

D.P. MARSHALL, Judge. Ronnie Ellis was involved in an automobile accident while driving a truck for J.D. & Billy Hines Trucking, Inc. Ellis swerved to avoid an oncoming car; his truck's brakes locked up; and the truck skidded off the road, landing on its side. Ellis claimed that he injured his neck, left shoulder, and left knee in the accident. His employer accepted the neck injury as compensable, but refused to pay benefits for Ellis's alleged shoulder and knee injuries. The Commission adopted the administrative law judge's opinion and found that Ellis failed to prove that he suffered compensable left knee and shoulder injuries. Ellis appeals.

To receive benefits for his shoulder and knee injuries, Ellis had to prove these facts: (1) that he suffered an injury arising out of and in the course of his employment; (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 his 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), (D) (Supp. 2007). The Commission found that Ellis failed to prove either a left knee or left shoulder injury because the injuries were not established by medical evidence supported by objective findings. Under our substantial-evidence standard of review, we must affirm if fair-minded persons with the same facts before them could have reached the Commission's conclusion. *Smith v. County Market/Southeast Foods*, 73 Ark. App. 333, 336, 44 S.W.3d 737, 739 (2001).

The Commission acknowledged two pieces of medical evidence supporting Ellis's claims: (1) an Emergency Nursing Record from the date of Ellis's accident with a checkmark beside the words "tenderness/swelling" and "L shoulder" handwritten to the side; and (2) a Texas Workers' Compensation Work Status Report bearing the date of the accident (a Report which, according to testimony, may have been created several days later), where Ellis's doctor noted "contusion L shoulder & L knee." But the Commission concluded that neither record constituted an objective medical finding.

We agree with the Commission that the first record — noting "tenderness/swelling" — is ambiguous. We do not know whether the nurse intended to note "tenderness" (a subjective finding), "swelling" (an objective finding), or both. In the absence of evidence explaining the ambiguity, Ellis did not meet his burden of proving that this was an objective medical finding.

We disagree, however, with the Commission's conclusion about the second piece of medical evidence — the "contusion" diagnosis by Ellis's doctor. The Commission decided that the "diagnosis of contusions in the knee and shoulder, without more, do not satisfy in this case the requirement of an objective finding" and that a contusion "can itself be based either on objective findings or subjective complaints." The Commission relied on *Rodriguez v. M. McDaniel Co.*, 98 Ark. App. 138, 252 S.W.3d 146 (2007), in reaching its conclusion.

In *Rodriguez*, the claimant was twice diagnosed with a hip contusion. First, in the emergency room on the date of her injury, Rodriguez was diagnosed with a "hip contusion on the right." 98 Ark. App. at 143, 252 S.W.3d at 150. Three weeks later, Dr. Timothy Yawn evaluated Rodriguez and also diagnosed a contusion. Dr. Yawn later testified that "his diagnosis of a contusion did not necessarily mean that he had viewed a disturbance in the skin and tissue." 98 Ark. App. at 142, 252 S.W.3d at 150. Dr. Yawn also testified about the emergency-room contusion note. He said that "the notation in the record most likely referred to tenderness and not to visible darkening or bruising." 98 Ark. App. at 144, 252 S.W.3d at 152. Various tests failed to reveal any internal injury. 98 Ark. App. at 141-44, 252 S.W.3d at 149-52. In *Rodriguez*, the Commission thus had to weigh conflicting medical evidence about a contusion. As this court acknowledged, "the Commission chose to believe the testimony of Dr. Yawn," 98 Ark. App. at 144, 252 S.W.3d at 152, and not the emergency-room record. We therefore affirmed the Commission's finding that Rodriguez failed to prove objective medical findings. 98 Ark. App. at 143-45, 252 S.W.3d at 151-52.

This case is different. Here we have a contusion diagnosis with no conflicting testimony about the nature of the contusion.

In their brief, the appellees quote a medical dictionary that defines a "contusion" as an injury to tissues without breakage of skin: a bruise. MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH 375 (6th ed. 1997). The appellees' definition echoes those in other medical reference books. *E.g.*, THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 165 (1987); STEDMAN'S MEDICAL DICTIONARY 390 (26th ed. 1995); TABER'S CYCLOPEDIC MEDICAL DICTIONARY 479 (20th ed. 2005). It is substantially the same as the standard definition of a contusion. 3 OXFORD ENGLISH DICTIONARY 857 (2nd ed. 1998). Our cases, moreover, use the words "contusion" and "bruise" interchangeably. *Parson v. Arkansas*

Methodist Hospital,103 Ark. App. 178, 182, 287 S.W.3d 645, 648 (2008). For example, this court has specifically referred to a doctor's diagnosis of a shoulder contusion as a bruise. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 268, 272-73, 19 S.W.3d 36, 38, 41 (2000). And we have held that a contusion is an objective medical finding. *Parson*, 103 Ark. App. at 182, 287 S.W.3d at 648; *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 67, 61 S.W.3d 856, 858 (2001). We must follow our precedent in this case.

The parties do not discuss contusions to internal organs, which may raise external-visibility issues. *Compare Meister v. Safety Kleen*, 339 Ark. 91, 92-95, 3 S.W.3d 320, 321-22 (1999) (addressing diagnosis of contusion to internal body part); *see also* ATTORNEY'S ILLUSTRATED MEDICAL DICTIONARY C74 (West Publishing Company 1997) (defining contusions of the heart, brain, and spinal cord). And we do not address that type of contusion. This case is about Dr. Nix's unequivocal diagnosis of contusions to Ellis's left shoulder and left knee. We are convinced that reasonable persons with the same facts before them could not have arrived at the Commission's conclusion about Ellis's contusions. *Smith*, 73 Ark. App. at 336, 44 S.W.3d at 739. We therefore reverse and remand for the Commission to re-examine its decision about the compensability of Ellis's shoulder and knee injuries in light of our conclusion that Ellis satisfied the statute's objective-findings requirement. Ark. Code Ann. § 11-9-102(4)(D).

On remand, the Commission should consider all relevant medical evidence, including the spasms noticed by Ellis's chiropractor and the "soft-tissue swelling" noted in an emergency-room record. Ellis did not emphasize it, and neither the ALJ nor the Commission addressed this other medical evidence. At the hearing, Ellis's attorney directed the ALJ's attention to "two primary references" — the Emergency Nursing Record and the Texas Workers' Compensation Work Status Report. Though it is the province of the Commission to weigh conflicting medical evidence, it may not arbitrarily disregard medical evidence. *Coleman v. Pro Transportation, Inc.*, 97 Ark. App. 338, 346-47, 249 S.W.3d 149, 155-56 (2007). We make no comment on the effect of this evidence; we merely direct that the Commission consider it when it revisits compensability.

Reversed and remanded.

BIRD and BAKER, JJ., agree.

TERMINIX INTERNATIONAL CO., LLC, Terminix International Co., LP, Employer's Unity, Inc., Service Master Terminix International Co., LP, Mike Steed, and Larry Pruitt *v.* Mandy TRIVITT and Josh Trivitt

CA 08-233 289 S.W.3d 485

Court of Appeals of Arkansas
Opinion delivered December 10, 2008

Marshall & Owens, A Professional Association, by: *W. Lance Owens*; and *Weintraub, Stock & Grisham, P.C.*, by: *James H. Stock, Jr.*, for appellants.

Stewart K. Lambert, for appellees.

SARAH J. HEFFLEY, Judge. Appellants Terminix International Company and others (Terminix) bring this appeal from an order denying their motion to compel arbitration of tort claims brought against them by appellees Mandy Trivitt, a former Terminix employee, and Josh Trivitt, her husband. For reversal, Terminix argues that the trial court erred in ruling that the question of arbitration was controlled by the Arkansas Uniform Arbitration Act (AUAA) rather than the Federal Arbitration Act (FAA). We find merit in this argument and reverse and remand.

On November 18, 2004, Ms. Trivitt filed suit against Terminix asserting claims of defamation and outrage and seeking both compensatory and punitive damages. Trivitt's husband, Josh, joined in the complaint to assert a loss of consortium. As the factual predicate for these claims, Trivitt alleged that she held the position of Office Supervisor at Terminix's local office in Sharp County when in November of 2003 Mike Steed, the district manager, accused her of stealing office monies. Trivitt maintained that Steed communicated the accusation to persons in the local office and others in the regional office, both verbally and in writing. She alleged that Steed later suspended her and ultimately fired her based on the theft of office monies. Trivitt further alleged that the accusation was false and that no evidence was ever produced proving that she stole any money. She added that Terminix filed a police report that resulted in no charges being brought against her.

Terminix responded with a motion to compel arbitration in accordance with the terms of an employment agreement and arbitration agreement entered into by the parties. Terminix attached both agreements, which were signed by Trivitt in November 2001, as an exhibit to the motion. The employment agreement contained the following provision:

> Agreement to Mediate and Arbitrate. The Employer and Employee agree that, to the fullest extent permitted by law, any and all disputes will be submitted to mediation upon terms mutually agreeable to both parties. In the event the parties do not resolve such controversies through mediation, then the Employer and Employee agree that, to the fullest extent permitted by law, any and all controversies between them will be submitted for resolution to binding arbitration in accordance with the attached Arbitration Agreement, which is incorporated herein by reference. The parties understand and agree that in the event mediation is unsuccessful, then arbitration will be the exclusive forum for resolving disputes arising out of the employment relationship and the termination of such relationship. The Employee and Employer expressly waive their entitlement, if any, to have controversies between them decided by a court or jury.

The arbitration agreement provided in pertinent part:

> Arbitrable Claims. The parties understand that, except as otherwise provided by law, this Agreement applies to all claims, including, but by no means limited to, claims for breaches of contract (express or implied), discrimination, torts, and/or claims based upon any federal, state, or local ordinance, statute, regulation, constitutional provision, or any other law.
>
> Governing Law. This Agreement will be governed and construed in accordance with the Federal Arbitration Act.

Terminix also included the affidavit of Bill Young, its vice president of human resources. He asserted that Terminix is a national termite and pest control company engaged in interstate commerce with branch offices throughout the United States, including the State of Arkansas. He stated that the corporate office is located in Memphis, Tennessee, and that payroll checks for employees were issued from the corporate office and that employee benefits were also administered through that office. He also averred that its service technicians apply chemicals and other products that come from outside the State of Arkansas.

In its brief and at the hearing, Terminix argued that the FAA applied because the parties chose it as the governing law in the agreement and because of the interstate character of its business. Trivitt argued primarily that the AUAA applied and that Arkansas

law prohibits arbitration of tort matters and employer-employee disputes, as reflected by Ark. Code Ann. § 16-108-201(b)(2) (Repl. 2006). The trial court denied the motion to compel, ruling that the AUAA was the controlling law and thus Trivitt's tort claims of defamation and outrage were not arbitrable. Terminix appeals this determination, contending that the trial court erred by not applying the FAA to compel arbitration.

At the outset we note that an order denying a motion to compel arbitration is an immediately appealable order. Ark. R. App. P.–Civil 2(a)(12). We review the trial court's order denying a motion to compel de novo on the record. *Advance America Servicing of Arkansas, Inc. v. McGinnis*, 375 Ark. 24, 289 S.W.3d 37 (2008). In a de novo review, we review the evidence and the law without deference to the trial court's rulings. *Wyatt v. Giles*, 95 Ark. App. 204, 235 S.W.3d 522 (2006).

We observe that Congress enacted the FAA in 1925 as a response to hostility of American courts to enforce arbitration agreements. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Section 2 of the FAA provides:

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

9 U.S.C. § 2. With the enactment of section 2, Congress declared a national policy favoring arbitration and withdrew the power of states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The Act, which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration. *Preston v. Ferrer*, 128 S. Ct. 978, 169 L.Ed.2d 917 (2008). The primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms. *Volt Information Sciences, Inc. v. Leland Stanford Junior University*, 489 U.S.

468 (1989). To this end, the Supreme Court recognizes that parties are generally free to structure their arbitration agreements as they see fit. *Id.*

Arbitration is a matter of contract between parties. *Lehman Properties v. BB & B Construction Co.*, 81 Ark. App. 104, 98 S.W.3d 470 (2003). In addressing whether a party has entered into an agreement to arbitrate under the FAA, courts are to apply state-law principles, giving due regard to the federal policy favoring arbitration. *A.G. Edwards & Sons, Inc. v. Myrick*, 88 Ark. App. 125, 195 S.W.3d 388 (2004). The same rules of construction and interpretation apply to arbitration agreements as apply to agreements generally, thus we will seek to give effect to the intent of the parties as evidenced by the arbitration agreement itself. *E-Z Cash Advance, Inc. v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001). When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. *Artman v. Hoy*, 370 Ark. 131, 257 S.W.3d 864 (2007).

The arbitration agreement at issue plainly states that it is to be governed under the FAA and not Arkansas law. We have held that, where the parties designate in the arbitration agreement which arbitration statute they wish to have control, the court should apply their choice. *Pest Management, Inc. v. Langer*, 96 Ark. App. 220, 240 S.W.3d 149 (2006).[1] As in our decision in *Langer*, we hold that the trial court erred by not honoring the parties' choice-of-law provision in the agreement.

Even without the choice-of-law provision, we would still hold that the FAA applies to the arbitration agreement. The FAA applies to contracts evidencing a transaction "involving commerce." The Supreme Court has interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce" — words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (citing *Allied-Bruce Terminix Companies v. Dobson*, 513

[1] In *Pest Management, Inc. v. Langer*, 369 Ark. 52, 250 S.W.3d 550 (2007), the supreme court upheld our decision that the FAA applied on a related ground without expressing an opinion on our conclusion concerning the choice-of-law provision in the contract.

U.S. 265 (1995)). In *Allied-Bruce*, the Supreme Court read the FAA's language "as insisting that the 'transaction' in fact 'involv[e]' interstate commerce, even if the parties did not contemplate an interstate commerce connection." *Allied-Bruce*, 513 U.S. at 281. Based in part on the *Allied-Bruce* interpretation of the term "involving commerce" as an expression of Congressional intent to regulate to the full extent of its commerce powers, the Court has held that employment contracts, except those of transportation workers, come within the purview of the FAA. *Circuit City Stores, Inc. v. Adams, supra.*

Here, there is no dispute that the contract involved interstate commerce. In fact, Trivitt has chosen to ignore this aspect of the case in her brief, and she does not deny the interstate character of Terminix's business. Based on Bill Young's affidavit, the record shows that Terminix is a national concern that engages in interstate commerce. The chemicals and products used by its service technicians are shipped across state lines. Its headquarters are in Memphis, and it has branch offices throughout the United States. Trivitt was employed as an office supervisor at its branch in Sharp County. Her payroll checks were processed and issued out of the corporate office in Memphis, and her employee benefits were administered from the Memphis office as well. The connection with interstate commerce is evident. *See, e.g., Baer v. Terminix International Co.*, 975 F.Supp. 1272 (D. Kan. 1997).

The next question we decide is whether this dispute falls within the terms of the arbitration agreement. The FAA establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*,460 U.S. 1 (1983). It is generally held that arbitration agreements will not be construed within the strict letter of the agreement but will include subjects within the spirit of the agreement. *E-Z Cash Advance, Inc. v. Harris, supra.* Here, the employment agreement mandates binding arbitration in accordance with the arbitration agreement, providing that "arbitration will be the exclusive forum for resolving disputes arising out of the employment relationship and the termination of such relationship." The arbitration agreement provides that arbitrable claims include "all claims, including, but by no means limited to, claims for . . . torts . . . ." Trivitt's complaint is grounded in the torts of defamation and outrage based on alleged mistreatment that she endured while

employed at Terminix. These tort claims thus grew out of the employment relationship and are subject to arbitration according to the terms of the agreement.

In conclusion, the FAA is controlling in this case because the parties chose it to be the governing law and because of the connection with interstate commerce. Although the claims would not be arbitrable under Arkansas law, the FAA preempts state laws that require a judicial forum for the resolution of claims that the contracting parties agree to resolve by arbitration. *Allied-Bruce Terminix Co. v. Dobson, supra*; *Volt Information Sciences, Inc. v. Leland Stanford Junior University, supra*; *Southland Corp. v. Keating, supra. See also Lehman Properties v. BB & B Construction Co., supra* (holding that the FAA applies, not the AUAA, when interstate commerce is involved). Because the trial court applied the AUAA instead of the FAA, we reverse and remand for proceedings consistent with this opinion.

We note that Terminix makes the argument that Josh Trivitt's claim for loss of consortium is also subject to arbitration. The trial court did not rule on this matter, so we decline to address it. *IGF Ins. Co. v. Hat Creek Partnership*, 349 Ark. 133, 76 S.W.3d 859 (2002).

Reversed and remanded.

PITTMAN, C.J., and BIRD, GLOVER, MARSHALL, and HUNT, JJ., agree.

HART, GLADWIN, and BAKER, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. This case is like an onion — the issues have several layers. I submit that one's conclusion to either affirm or reverse depends on how deeply you probe these layers. If you stop at the thin, brittle outer shell, i.e., analyze the case superficially, you will conclude that the trial judge erred and it should be reversed. However, if you delve deeper into the issues, and acquire a better understanding of the law and facts, you will inevitably conclude that the trial court's finding that the Arkansas Uniform Arbitration Act (AUAA), not the Federal Arbitration Act (FAA), was the governing law in this case and its decision not to compel arbitration should be affirmed.

I find no merit in Terminix's argument that, because the parties agreed to apply the FAA as the governing law in the arbitration agreement, the circuit court erred as a matter of law in

denying the motion to compel arbitration. I am mindful that it is settled law that arbitration is a matter of contract between the parties, and the same rules of construction and interpretation apply to arbitration clauses as apply to agreements generally. *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001). The construction and legal effect of a written contract to arbitrate are to be determined by the court as a matter of law, and we must give effect to the parties' intent as evidenced by the arbitration agreement itself. *Id.* I am also aware that our supreme court has stated that in light of the policy favoring arbitration, such agreements will not be construed strictly but will be read to include subjects within the spirit of the parties' agreement and that any doubts and ambiguities of coverage will be resolved in favor of arbitration. *Id.*

The agreement to arbitrate, however, is merely the starting point. It appears in a provision styled "Agreement to Mediate and Arbitrate," which is paragraph 5 of the Employment Agreement. It states:

> The Employer and Employee agree that, to the fullest extent permitted by law, any and all disputes between them will be submitted to mediation upon terms mutually agreeable to both parties. In the event the parties do not resolve such controversies through mediation, Employer and Employee agree that, to the fullest extent permitted by law, any and all controversies between them will be submitted for resolution to binding arbitration in accordance with the attached Arbitration Agreement, which is incorporated herein by reference. The parties understand and agree that in the event that mediation is unsuccessful, then arbitration will be the exclusive forum for resolving disputes between them, including statutory claims and all disputes arising out of the employment relationship and the termination of such relationship. The Employee and Employer expressly waive their entitlement, if any, to have controversies between them decided by a court or jury. The attached Arbitration Agreement is incorporated herein.

The first rule of construction requires that the court read the words as written and give them their plain and ordinary meaning. *Coleman v. Regions Bank*, 364 Ark. 59, 216 S.W.3d 569 (2005). Accordingly, while the agreement to submit to alternative dispute resolution is obviously quite broad, it is limited by the phrase "to the fullest extent permitted by law." This phrase is of paramount importance in this case because the AUAA has an express provision proscribing arbitration of tort claims. Ark. Code Ann. § 16-108-201(b)(2) (Repl. 2006).

The courts of this state will not enforce contracts that violate our statutes. *See, e.g.*, *Williams v. Johnson Custom Homes*, 374 Ark. 457, 288 S.W.3d 607 (2008) (declaring void and unenforceable a choice of law provision in an employment contract where an Arkansas worker agreed to be bound by the Workers' Compensation laws of the state of Ohio).

Terminix favors the application of the FAA in this case because the FAA has no express provision that proscribes the arbitration of tort claims. I am mindful that the parties have apparently made a choice-of-law agreement in the appended Arbitration Agreement. It states, "Governing Law. This Agreement will be governed and construed in accordance with the Federal Arbitration Act." However, as in *Williams v. Johnson Custom Homes*, that should not end our analysis.

First, because our legislature unequivocally declared in the AUAA that tort claims are not subject to arbitration, this fact would support a holding that the offending portion of the Terminix employment contract is void and unenforceable. But even without this court declaring the contract provision void, this would not mean that the trial court erred because the facts and circumstances of this case fail to establish that the FAA applies, notwithstanding the agreement.

The FAA expressly states that for an arbitration agreement to be valid and enforceable, it must be "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." These are clear words of limitation. Put in the context of this case, at issue are the torts of outrage and defamation. In *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980), the supreme court first recognized the tort of outrage or intentional infliction of emotional distress and defined it as extreme and outrageous conduct, meaning conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." I simply cannot accept that such conduct can properly be considered to have arisen from an employment contract.

Moreover, the FAA also requires that the contract be one "involving commerce." Amazingly, Terminix asserts that the "transaction involving commerce" was the interstate communication of the alleged defamatory statements. I cannot accept the

notion that defamation is commerce. Hitherto, I thought it was axiomatic that appellants are bound by the scope and substance of their arguments. I lament that the majority now has either overruled this practice *sub silentio* or held that defamation can be interstate commerce. I would hold that while the parties have ostensibly made a choice of law, the law (FAA) has not chosen them.

Even assuming that the AUAA did not bar arbitration, I would likewise hold that the parties' ostensible agreement to arbitrate "torts" is of no effect. By compelling arbitration, Terminix was in effect limiting its financial exposure in a tort case. While an award of punitive damages is not precluded by the FAA, *see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), such an award would be left to the discretion of the arbitrator to consider. Conversely, if any evidence supporting an award of punitive damages was presented in a jury trial, the jury *must* be instructed to consider an award of punitive damages. *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992).

As a general rule, exculpatory clauses in contracts are disfavored. *Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2001). Setting aside the fact that exculpatory clauses have only been approved in this state to limit a party's exposure to liability for ordinary negligence and not intentional torts, these clauses will only be enforced (1) when the party is knowledgeable of the potential liability that is released; (2) when the party is benefitting from the activity which may lead to the potential liability that is released; and (3) when the contract that contains the clause was fairly entered into. *Finagin v. Arkansas Development Fin. Auth.*, 355 Ark. 440, 139 S.W.3d 797 (2003). The so-called agreement to arbitrate torts in this case clearly fails to satisfy the knowledge factor because it does not explicitly state the type of torts that would be subject to arbitration. "Torts" could involve any conduct from spilling water on the floor to shooting one's co-workers. The "fairly entered into" factor also fails to pass muster because the agreement in question was strictly a contract of adhesion.

I also find no merit in Terminix's other arguments. I would reject its contention that public policy favors arbitration, that non-signatories to the arbitration agreement — in this case Josh — are likewise bound to arbitrate, and that the FAA preempts state law.

I am mindful that our supreme court has stated that, as a matter of public policy, arbitration is strongly favored in Arkansas.

See, e.g., *Ruth R. Remmel Revocable Trust, Inc. v. Regions Fin. Corp.*, 369 Ark. 392, 255 S.W.3d 453 (2007); *Pest Mgmt. v. Langer*, 369 Ark. 52, 250 S.W.3d 550 (2007). Further, it has also been said that ambiguities must be resolved in favor of arbitration. *Tyson Foods, Inc. v. Archer*, 356 Ark. 136, 147 S.W.3d 681 (2004). However, upon analyzing these pronouncements, I am unconvinced that they reach as far as Terminix would like us to believe. Significantly, the supreme court stated that it favored arbitration because arbitration is considered a "less expensive and more expeditious means of settling litigation and relieving docket congestion." *Cash In A Flash Check Advance v. Spencer*, 348 Ark. 459, 74 S.W.3d 600 (2002). Here, there is no indication that either goal is likely to be achieved in this case. Both parties are represented by counsel and have engaged in discovery, as due diligence would require. Although less formal than a judicial setting, both sides would be required to present there case to an arbitrator, so there is apparently no significant savings to be had here in terms of the expense of putting on the case. Likewise there is nothing in the record to suggest that relieving "docket congestion" is a pressing need.

Perhaps more significantly, while the supreme court has expressed its approval of arbitration, it has also repeatedly held that the determination of public policy lies almost exclusively with the legislature, and the courts will not interfere with that determination in the absence of palpable errors. *See, e.g.*, *Jordan v. Atlantic Cas. Ins. Co.*, 344 Ark. 81, 40 S.W.3d 254 (2001); *Norton v. Hinson*, 337 Ark. 487, 989 S.W.2d 535 (1999); *McDonald v. Pettus*, 337 Ark. 265, 988 S.W.2d 9 (1999). I cannot ignore that the legislature has clearly declared in the AUAA that tort cases shall not be submitted to arbitration.

While I can at least appreciate the validity of both sides of many of the issues that I have discussed, I find it simply untenable to hold that non-signatories to the arbitration agreement — in this case Josh — must likewise be bound to arbitrate. The majority dodges this point, asserting that it need not open this can of worms because the trial court did not rule on it. This procedural bar is disingenuous in the extreme. The trial court ruled that neither Mandy nor Josh was bound to arbitrate. Our review in this case is de novo on the record. *Sterne, Agee & Leach, Inc. v. Way*, 101 Ark. App. 23, 270 S.W.3d 369 (2007). We owe it to the litigants to decide the issues that are already before us and not create piecemeal appeals.

Finally, I cannot agree with Terminix's blanket contention that the FAA preempts state law. I submit that the majority has ignored our supreme court's decision in *Arkansas Diagnostic Center, P.A. v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884 (2007), where it seems to have squarely rejected this contention.

I respectfully dissent.

BAKER, J., joins.

ROBERT J. GLADWIN, Judge, dissenting. While I agree with Judge Hart that this case should be affirmed, I reject the insinuation that the majority analyzed this case superficially. This was a complicated and close case. The mere fact that I disagree with the majority does not mean that its opinion is not well reasoned and thorough. It is.

Further, I do not believe that the majority has overruled the requirement that an appellant is bound by his arguments below. I simply do not read that into the majority opinion.

Michael FICKLIN *v.* STATE of Arkansas

CA CR 08-593 289 S.W.3d 481

Court of Appeals of Arkansas
Opinion delivered December 10, 2008

Butler & Green, P.A., by: *Chad M. Green*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

KAREN R. BAKER, Judge. Appellant Michael Ficklin challenges the sufficiency of the evidence of his Pulaski County jury conviction of Class Y felony possession of methamphetamine with intent to deliver and Class B felony possession of ecstasy with intent to deliver, specifically claiming that the State did not prove that there was a usable amount of the controlled substances. We find no merit to appellant's argument and affirm.

Testimony at trial focused upon the execution of a search warrant at a home on #2 Bliss Circle. Little Rock Police Department detectives testified regarding the details of their respective roles and the inclusion of the SWAT team in this effort. Detective Vincent Lucio testified that he was the officer who applied for the search warrant and the officer in charge of the property being seized from the residence. Surveillance cameras were monitoring the outside of the home. He explained that to provide a tactical advantage for the team in the execution of the warrant, the warrant was executed at night. Sergeant Robert Mourot testified that he saw appellant coming out the front door then running back inside as the team approached the house. He described the area in which appellant was detained and restrained

within the house as an open living space with the kitchen, dining, and living areas as extending into one another.

Detective Lawrence Welborn testified that he found mail and other documents containing both appellant's name and the home's address on the kitchen counter, a loaded .38 caliber revolver on the dining table, and two operating television monitors in the living area on the fireplace that were connected to the outside cameras. He explained that in his experience and training, drug dealers use guns to protect the drugs and use surveillance equipment to see people, particularly law enforcement, coming to the door. Lieutenant David Hudson testified that he found a SAIGA .223-caliber rifle with a magazine containing seventeen live rounds on the living room couch near appellant. Detective Ryan Hudson found appellant's social-security card on the fireplace mantel in the living area and a police scanner in a dining-area cabinet.

Detective Willie Thomas described how he found pills in a plastic bag, labeled exhibit thirteen (13), in appellant's pants pocket, and Detective Carrie Mauldin, who searched appellant simultaneously with Detective Thomas, told how she discovered $737 in one of appellant's pockets. Reagan West, an Arkansas State Crime Laboratory forensic chemist, testified that State's exhibit thirteen (13) consisted of twenty-one tablets containing methamphetamine, ecstasy, caffeine and procaine. She explained that she commonly sees mixtures in pills and that "you never know what's going to be in [th]em. They have all kinds of different things that can be in there." West further explained that she did not measure the amounts of each particular substance in the tablets because it was not standard procedure to quantitate the exact measurements of the substances in pills.

Detective Michael Terry explained his participation in the search and that he found green pills in a plastic bag, labeled State's exhibit fourteen (14), next to a bag of ammunition shell casings, on top of a china cabinet in the dining area. He also found 634 tablets of various colors, labeled State's exhibit sixteen (16), in a cigar box on the dining table, which was located five feet from the living room couch. Detective Tim Stankevitz testified that he found two bullet-proof vests and a hand-held scale in the east bedroom.

The jury was instructed that it could consider the amount of the controlled substances with all the other facts and circumstances in determining the intent for which they were possessed. Appel-

lant's counsel moved for a directed verdict on the count of possession of methamphetamine with intent to deliver, specifically stating that the chemist did not quantify the amount of methamphetamine in each tablet. After the trial court denied that motion, counsel moved for a directed verdict on the count of possession of ecstasy with intent to deliver, stating that "I would again argue the jury is left to conjecture" regarding appellant's intent. While the State argues that appellant failed to preserve the challenge on appeal as to the ecstasy conviction, the motion in respect to the ecstasy count referenced counsel's earlier argument in which he asserted that the failure to quantitate the amount of the controlled substance resulted in a failure of proof of possession.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Kelley v. State*, 103 Ark. App. 110, 286 S.W.3d 746 (2008). 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. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. We defer to the jury's determination on the matter of witness credibility. *Id.* Jurors do not and need not view each fact in isolation, but rather may consider the evidence as a whole. *Id.* The jury is entitled to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. *Id.*

Our disposition of this case makes it unnecessary to determine whether counsel's reference to his preceding argument asserting the insufficiency of the evidence regarding the methamphetamine count was sufficient to apprise the trial court of the insufficiency in the State's proof regarding the ecstasy count. Both methamphetamine and ecstasy were present in the tablets found upon appellant. The fact that the drugs were present in the consumable form of a pill distinguishes this case from the line of cases where trace amounts of a controlled substance were presented as evidence of possession.

Appellant argues that the State cannot establish possession with intent to deliver a controlled substance if it does not first prove that the accused possessed a usable amount of the controlled substance. His argument focuses on that fact that the State failed to elicit testimony regarding the weight of the methamphetamine or ecstasy contained in the individual pills found in appellant's

possession. He reasons that the failure to elicit testimony regarding the weight results in a failure to establish a usable amount. The State responds that the "usable" amount requirement is inapplicable to delivery cases. *See Gregory v. State*, 37 Ark. App. 135, 825 S.W.2d 269 (1992). Neither argument directly addresses the circumstances of this case. Appellant's emphasis on the weight of the contraband ignores the concept of a contraband being in a usable form. The State's premise is correct as to the usable amount requirement being inapplicable to delivery cases; however, appellant was convicted of possession with intent to deliver the controlled substances, not actual delivery of the controlled substances.

Appellant focuses upon the weight of the contraband and relies upon the case of *Harbison v. State*, 302 Ark. 315, 322, 790 S.W.2d 146, 151 (1990), where the accused possessed a bottle containing a trace amount of dust residue. In *Harbison*, our supreme court held that possession of a controlled substance must be of a measurable or usable amount to constitute a violation of Arkansas Code Annotated § 5-64-401 (Repl. 2006). The court reasoned that legislation criminalizing the possession of controlled substances was aimed at preventing use and trafficking of prohibited substances, and then concluded that the possession of a trace or less than usable amount does not contribute to either of those purposes.

In the wake of *Harbison*, the limits of the concept of a usable amount have evolved with a fair degree of deference to the expertise of chemists and police officers familiar with drug use. In *Buckley v. State*, 36 Ark. App. 7, 816 S.W.2d 894 (1991), this court held that a chemist's testimony that small chips of crack cocaine were sometimes loaded into a pipe was sufficient evidence for a fact-finder to infer that pieces of that size constituted a usable amount. In *Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993), we held that 0.024 grams of cocaine was usable because the cocaine was (1) capable of quantitative analysis, (2) could be seen with the naked eye, and (3) was tangible and could be picked up. Then, in *Williams v. State*, 47 Ark. App. 143, 887 S.W.2d 312 (1994), we held that a marijuana cigarette dipped in PCP contained a sufficient amount of PCP to be usable where a police detective and a chemist both testified that smoking was the most common method of PCP use. Significantly, in *Williams*, this court noted that the evidence was substantial even without proof as to the weight of the PCP.

Following this line of cases, proof of a detectable amount of a controlled substance in a consumable form, such as a pill, is sufficient evidence for a fact-finder to infer that the accused possessed a usable amount of the controlled substance. In the case before us, the methamphetamine and ecstasy were contained in tablet form. The fact that each controlled substance was present in a pill form demonstrates its ability to be consumed and satisfies the usable amount requirement.

Here, the testimony established that appellant possessed twenty-one pills on his person which contained the controlled substances methamphetamine and ecstasy. Large amounts of methamphetamine and ecstasy tablets were found in the dining area inside the home. Surveillance equipment, scales, loaded guns, ammunition, and bullet-proof vests were found in plain view in appellant's home and a large amount of cash was found on appellant. Under these circumstances, the jury was entitled to draw the inference that appellant possessed the tablets containing the controlled substances with the intent to deliver those controlled substances.

Accordingly, we find no error and affirm.

BIRD and MARSHALL, JJ., agree.

Kurt BELUE *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 08-883 289 S.W.3d 500

Court of Appeals of Arkansas
Opinion delivered December 17, 2008

Melissa Dorn Bratton, Arkansas Public Defender Comm'n, for appellant.

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

Jo Ellen Carson, attorney ad litem for the minor children.

JOHN MAUZY PITTMAN, Chief Judge. Kurt Belue appeals from an order terminating his parental rights in four children: K.B. (born January 29, 2002), S.B. (born May 21, 2003), T.B. (born January 7, 2005), and H.B. (born March 5, 2006). He argues that there was insufficient evidence to support the termination order. We affirm.[1]

In March 2006, the Arkansas Department of Human Services (DHS) began providing the Belue family with caseworker services, homemaker services, and referrals for domestic violence and anger management. According to a DHS affidavit, a visit to the home in August 2006 revealed a serious roach infestation and foul odor. The children were found with "dirt caked upon the bottom of their feet, smelling as if not bathed recently, rashes from being unwashed, caked on feces in the youngest['s] diapers, and dead roaches in one child's hair." The DHS investigator also found that Kurt Belue was unemployed and that, although he professed the inability to afford a steam cleaner as DHS had requested, there was a large, flat-screen television on his living room wall. DHS filed a petition for emergency custody of the children, which the court granted on August 7, 2006. The court subsequently found probable cause for the children's removal and adjudicated them dependent-neglected, based on environmental neglect and medical neglect. The medical-neglect finding stemmed from three of the children being diagnosed with failure to thrive.

The adjudication order established a goal of reunification and required Kurt Belue to complete parenting classes; submit to a psychological examination and follow recommendations; submit to a drug-and-alcohol assessment and follow recommendations; maintain clean housing with working appliances; obtain stable

[1] The same order terminated the parental rights of the children's mother, Susie Belue. Mrs. Belue is not a party to this appeal.

transportation with valid tags, insurance, and driver's license; submit to random drug screens; and visit the children regularly. These requirements were later expanded to include attending counseling as recommended; resolving pending criminal charges; maintaining stable, appropriate, and smoke-free housing; maintaining employment; taking medications as prescribed; and cooperating with CASA and DHS. Review orders entered by the court in February and July 2007 found Belue in partial compliance with court orders and the DHS case plan.

On November 15, 2007, the court entered a permanency-planning order that changed the goal of the case to termination of parental rights and adoption. The order stated that Belue had failed to maintain appropriate housing, employment, and transportation; exhibited anger problems despite completing an anger-management class; failed to stop smoking; and had "current criminal charges," which the court did not specify. DHS filed a petition to terminate parental rights on December 6, 2007.

At the termination hearing in April 2008, Belue testified that DHS never offered to assist him in any way. He said he had complied with the case plan and court orders by acquiring transportation, attending counseling, and visiting the children. He was living in a one-bedroom apartment and saw no need to get a larger apartment while the children were out of his custody. He said he would be able to move into another place if the children were returned to him. Belue also testified that he had been unemployed since October 2007, though he had been filling out job applications. He had also filed a Social Security disability claim stemming from injuries he received in a May 2005 car accident. The claim was denied, but he continued to pursue the case, and he and his attorney hoped that he would begin receiving benefits within a year. In the meantime, he supported himself with food stamps and a $17,000 settlement, presumably a tort settlement pertaining to the car accident. At the hearing, Belue was unsure of the amount remaining from the settlement. However, the proof showed that he had lived on the funds for six months and had purchased approximately $1300 worth of furniture and a $2000 used car. By Belue's own admission, he could not manage his financial affairs, and his mother controlled his money and paid his bills for him.

Belue further testified that he was "gaining some ground" on his anger issues. He denied signing, or said he was "tricked" into signing a DHS case plan prepared in 2006, which provided that Belue needed anger-management classes but which contained

the following notation of a signatory's disagreement with the plan: "b/c I don't have problems with anger." Belue also testified at one point during the hearing that he did not believe he had anger issues.

Belue acknowledged that he still smoked outside his home. He further stated that he did not pay child support on his other five children, though his testimony was conflicting as to whether he owed support. He also said he was aware that his wife had abused the children "ever since [they] were born." Yet, as he explained, he did not call the authorities but "tried to get the police called on me" by standing on the front porch and yelling at Mrs. Belue to "get the hell out of the house."

Robin Sanders testified that she had been Belue's counselor since January 16, 2008, although Belue had been in counseling for "quite some time." She said Belue attended all of his appointments with her but had only made "minimal progress." Sanders testified that the first session in which she noticed any progress was on March 18, about three weeks before the termination hearing.

Cindy Farrell of Court Appointed Special Advocates (CASA) testified that Belue told her that he would be willing to "take a couple of the children" or "just whatever he could get." She said that he was apparently referring to the fact that he knew he did not have a lot of room in his apartment.

Glenda Evans of CASA testified that she recommended termination of parental rights based on the lack of progress over the history of the case. She said that Belue could not count on receiving disability benefits and that CASA's investigation turned up no evidence that he could not work. Evans observed that Belue would limp in the courtroom but not at other locations where she had seen him. She also said she had seen Belue get angry to the point of being "somewhat out of control." She expressed concern about his anger "with regard to putting the children back in his care." Evans additionally stated that Belue still owed support on at least one of his other children. According to her, Belue's contacts with her consisted mainly of his complaining about DHS rather than discussing the children.

DHS family service worker Tiffany May testified that Belue had completed parenting classes, but she was not sure how much he had learned from them. She said that he often spoke negatively about the children's mother in front of them, despite being told it was inappropriate. She further testified that Belue still had to be

prompted and monitored during his visits with the children. May additionally expressed concern that Belue had learned little from anger management classes, noting that he had difficulty controlling his anger while testifying at the hearing. She recited the numerous services that DHS had offered in the case, including transportation, homemaker services, housing, clothing, and counseling referrals, and one-on-one parenting instruction. According to May, the children were readily adoptable.

After the hearing, the court terminated Belue's parental rights as to all four children. The court found that termination was in the children's best interest, considering the likelihood of adoption and the potential harm in returning the children to Belue. *See* Ark. Code Ann. § 9-27-341(b)(3)(A)(i) and (ii) (Repl. 2008). The termination order specifically mentioned, among other factors, Belue's lack of stability and failure to make substantial progress in the case over twenty months; his failure to maintain stable and appropriate housing and employment; his failure to benefit from anger-management classes; his failure to stop smoking; and his inability to manage his own finances. The court cited as a ground for termination that the children had been out of Belue's custody for more than twelve months and, despite meaningful efforts by DHS to rehabilitate him and correct the conditions that caused removal, those conditions were not remedied. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(*a*) (Repl. 2008). Belue filed a timely notice of appeal and argues that there was insufficient evidence to terminate his parental rights.

Termination of parental rights is an extreme remedy and in derogation of the natural rights of parents. *Smith v. Arkansas Department of Human Services*, 100 Ark. App. 74, 264 S.W.3d 559 (2007). However, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.* An order terminating parental rights must be based upon a finding by clear and convincing evidence that (1) termination is in the best interest of the children, including consideration of the likelihood of adoption and the potential harm caused by returning the children to the parent, and (2) at least one statutory ground for termination exists. Ark. Code Ann. § 9-27-341(b)(3) (Repl. 2008). Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *Meriweather v. Arkansas Department of Human Services*, 98 Ark. App. 328, 255 S.W.3d 505 (2007). When the burden of proving a disputed fact is by clear and convincing

evidence, the appellate inquiry is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

We are not firmly convinced that the trial court was mistaken in terminating Belue's parental rights. At the time of the termination hearing, the children had been out of the home for twenty months. Belue was living in a one-bedroom apartment and had not secured stable employment. He had also been turned down for Social Security disability benefits, which he could only hope to receive within a year if his appeal proved successful. The intent of our termination statutes is to provide permanency in a juvenile's life in all instances in which the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective. Ark. Code Ann. § 9-27-341(a)(3) (Repl. 2008).

There was also evidence that Belue's disability claim was of questionable legitimacy. Glenda Evans testified that CASA's investigation turned up no evidence that Belue could not work, and she said he tended to limp in court but not at other times. Additionally, Belue's money-management skills were so lacking that he was unsure of the amount he had left from his car-accident settlement, and he relied on his mother to oversee his routine financial tasks.

The proof showed as well that Belue was observed by one witness to be angry to the point of losing control, and that he continued to have trouble controlling his anger, even on the witness stand. Belue's counselor said he had made only minimal progress in counseling, which is hardly surprising, given that he denied on more than one occasion having anger-management issues. These factors, along with Belue's inability to properly interact with the children during visits, despite being prompted and instructed; his failure to support another child; and his testimony that DHS had done nothing to help him, even though it had provided numerous services, evidence a potential harm in returning the children to Belue and an incapacity or indifference on his part to remedying the circumstances that prevent the children

from being returned to him. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(*a*) (Repl. 2008).[2] Moreover, Belue's compliance with certain aspects of the case plan does not warrant reversal of the termination order. What matters is whether his compliance made him capable of caring for his children. *See Wright v. Arkansas Department of Human Services*, 83 Ark. App. 1, 115 S.W.3d 332 (2003). We cannot say that the circuit court clearly erred in ruling that it did not.

The dissent states that this case bears a great similarity to *Strickland v. Arkansas Department of Human Services*, 103 Ark. App. 193, 287 S.W.3d 633 (2008), but *Strickland* is clearly distinguishable. There, this court reversed a termination order that rested on only one potentially supportable ground, which was Ms. Strickland's inability to obtain proper housing, despite her continuous attempts. She eventually acquired a one-bedroom apartment, as did Mr. Belue, but she had two children to his four. More importantly, Ms. Strickland's ability to financially support her children did not depend on the mere possibility of obtaining an income source a year or more in the future. At the time of her termination hearing, she had already established her entitlement to disability benefits and was regularly receiving them. There was also no evidence that Ms. Strickland suffered from anger-management issues.

Affirmed.

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

HART and HUNT, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. The circuit court terminated the parental rights of appellant, Kurt Belue, after finding that he failed to comply with the case plan. Specifically, the court found that he failed to maintain stable and appropriate housing, failed to maintain stable employment, failed to maintain stable and safe transportation, failed to benefit from anger-management classes, failed to quit smoking, failed to make progress in his counseling sessions, and admitted that he is not capable of managing his own finances. The court's findings on each were clearly

[2] Although the circuit court cited a separate ground for termination, in our de novo review, we may hold alternatively that other grounds for termination were met. *Smith v. Arkansas Department of Human Services, supra.*

erroneous. In fact, the evidence presented was similar to the evidence presented in *Strickland v. Arkansas Department of Human Services*, 103 Ark. App. 193, 287 S.W.3d 633 (2008),where we reversed a circuit court's termination order. Given the similarities, we are obliged to reverse here as well, and thus I respectfully dissent.

Stable and appropriate housing. Belue had a one-bedroom apartment, which he planned to upgrade when his four children were returned to him. Belue was similarly situated to the mother in *Strickland*. There, the mother also lived in a one-bedroom apartment, which she planned to upgrade to a three-bedroom apartment when her two children were returned to her.

Stable employment. Belue testified that he had been disabled in a 2005 car accident and was pursuing a Social Security disability claim that he and his attorney hoped to resolve within a year. In the meantime, he was living on food stamps and the proceeds from a car-accident settlement, and DHS did not put on any evidence suggesting that he could not provide for his children by relying on these resources. In *Strickland*, the mother could similarly support herself and her children on her disability income of $623 a month and food stamps. The majority challenges the legitimacy of Belue's disability claim by citing testimony from a case worker that Belue limped sometimes and at other times did not. His injury, however, was a brain injury, so the testimony regarding his limping is of no evidentiary value.

Stable and safe transportation. Belue acquired a car in the months before the termination hearing. In *Strickland*, the mother had a transportation system in place, although, unlike the father in this case, she did not even own a car. By owning a car, Belue was better situated than the mother in *Strickland*.

Anger management. The court also relied on Belue's supposed lack of benefit from anger-management classes. Belue, however, had only been seeing the counselor who testified for a little more than two months, he had made progress regarding his anger issues after just two months, and there was no proof that his anger had harmed his children. Similarly, in *Strickland*, though the mother suffered from limited cognitive abilities and depression, there was no evidence that it adversely affected her parenting skills.

Smoking. The circuit court also cited the father's failure to stop smoking as a reason for termination, but the court did not order the father to stop smoking. He was ordered to maintain smoke-free housing, and he testified that he smoked outside.

Counseling. Belue attended counseling, completed parenting classes, and visited his children regularly. In *Strickland*, the mother also had completed parenting classes and visited her children. While the majority notes that Belue had difficulty interacting with the children during visits, the case worker testified that this had improved in the last two months. The majority also notes that Belue complained at the hearing that DHS had not done enough to help him. Surely this does not support termination.

Managing finances. The court pointed to Belue's inability to manage his finances. But Belue said that he relied on a support system, his mother, to manage his money, which I think shows an intelligent use of his resources. While the majority also notes that he did not provide child-support to another child, Belue testified that he no longer owed any child support, and there is no evidence in the record to controvert this.

Given the similarities between this case and *Strickland*, we should reverse.

HUNT, J., joins.

ENTERGY ARKANSAS, INC. *v.*
ARKANSAS PUBLIC SERVICE COMMISSION

CA 07-949 289 S.W.3d 513

Court of Appeals of Arkansas
Opinion delivered December 17, 2008

Tucker Raney, Assistant General Counsel, Entergy Servs. Inc.; *Perkins & Trotter*, by: *Scott C. Trotter*; *Williams & Anderson, PLC*, by: *Philip E. Kaplan* and *JoAnn C. Maxey*; and *Wright, Lindsey & Jennings, LLP*, by: *N.M. Norton*, for appellant.

Valerie F. Boyce, Staff General Counsel, and *Lori L. Burrows*, Staff Attorney, Arkansas Public Service Comm'n; and *Dustin McDaniel*, Att'y Gen., by: *Sarah R. Tacker*, Ass't Att'y Gen., for appellees.

ROBERT J. GLADWIN, Judge. The Arkansas Public Service Commission (PSC) ordered a $5.67 million rate decrease for Entergy Arkansas, Inc., an electric utility that serves approximately 670,000 customers in the state. Entergy appeals on numerous grounds, one of which merits a partial reversal. In all other respects, we affirm the PSC's decision.

On August 15, 2006, Entergy petitioned the PSC for an increase in retail rates. The petition, as amended, sought approximately $106.5 million in additional revenue. A number of entities intervened in the case, including the Attorney General's Utilities Rate Advocacy Division. After the parties submitted voluminous

pre-filed testimony, a hearing was conducted from April 25, 2007, through May 4, 2007. Thereafter, the PSC issued Order No. 10, finding that Entergy's revenue requirement was excessive and should be reduced by approximately $5.67 million, effective June 15, 2007.[1] Entergy petitioned for rehearing, which the PSC's Order No. 16 denied in all pertinent respects. This appeal followed. Entergy asserts sixteen arguments (along with several sub-arguments) for reversal.

I. Standard of Review

The PSC has wide discretion in choosing its approach to rate regulation and we do not advise the Commission on how to make its findings or exercise its discretion. *Consumer Utils. Rate Advocacy Div. v. Ark. Pub. Serv. Comm'n*, 99 Ark. App. 228, 258 S.W.3d 758 (2007). Our review of PSC orders is limited by Ark. Code Ann. § 23-2-423(c) (Repl. 2002), which provides in part:

> (3) The finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive.
>
> (4) The review shall not be extended further than to determine whether the commission's findings are supported by substantial evidence and whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or of the State of Arkansas.

If an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, nor discriminatory, the appellate court must affirm the Commission's action. *See Consumer Utils. Rate Advocacy Div., supra*; *Bryant v. Ark. Pub. Serv. Comm'n*, 46 Ark. App. 88, 877 S.W.2d 594 (1994). To establish an absence of substantial evidence, the appellant must demonstrate that the proof before the Commission was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.* Administrative action may be regarded as arbitrary and capricious where it is not supportable on any rational basis, and something more than mere error is necessary to meet the test. *See Consumer Utils. Rate Advocacy Div., supra.* To set aside the Com-

[1] This amount was subsequently recalculated by the PSC Staff to approximately $5.13 million.

mission's action as arbitrary and capricious, the appellant must prove that the action was a willful and unreasoning action, made without consideration and with a disregard of the facts or circumstances of the case. *Id.*

II. Procedural Arguments

Entergy challenges three of the Commission's procedural rulings. It argues first that the PSC violated constitutional guarantees of due process by limiting the cross-examination of witnesses. A full and fair hearing is a fundamental requirement of due process in a utility rate case. *See Ark. Pub. Serv. Comm'n v. Continental Tel. Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978). In almost every setting, due process includes the right to confront and cross-examine witnesses. *See Ark. Dep't of Human Servs. v. A.B.*, 374 Ark. 193, 286 S.W.3d 712 (2008).

Entergy does not argue in this case that it was wholly deprived of the opportunity to cross-examine witnesses. Rather, it contends that it was prohibited from *further* cross-examination once the Commissioners had questioned the witnesses. We find that Entergy waived this argument by not making a timely objection below.

Prior to the hearing, the Commission informed all parties of its long-standing rule that, once cross-examination of a witness by counsel was completed and the Commissioners began the independent questioning, further examination by counsel was foreclosed. Entergy did not object to this rule prior to the hearing, nor did it object on the first day of the hearing when the Chairman asked if there were any procedural matters to be addressed. Thereafter, the Commission applied the rule over two days of testimony with no objection by any party and no requests for additional cross-examination. It was not until the third day of the hearing that Entergy asked to cross-examine a witness after the Commissioners had questioned him, and, upon being denied permission to do so, objected to the rule for the first time. It is well established that a party waives an argument by not objecting below at the first opportunity. *See Swink v. Lasiter Constr., Inc.*, 94 Ark. App. 262, 229 S.W.3d 553 (2006).

In any event, we cannot say that the Commission abused its discretion in enforcing the rule, which is clearly designed to bring an end to witness examination in these lengthy cases. The Commission has wide latitude in conducting and expediting its hearings. *See Continental Tel. Co., supra.* To that end,

it may prescribe rules of procedure and use its discretion to facilitate its efforts to ascertain the facts. *See* Ark. Code Ann. § 23-2-403 (Repl. 2002). Further, as the Commission observed, it would be unfair if Entergy were allowed to pursue additional cross-examination when all other parties had refrained from doing so in reliance on the rule. Given the circumstances, we decline to reverse on this point.

Next, Entergy argues that the Commission violated due process by restricting the subject matter of post-hearing briefs to two contested issues, and the length of post-hearing briefs to thirty pages for the initial brief and fifteen pages for the response. Entergy has not demonstrated that the Commission's action denied it a full and fair hearing. *See Ark. Elec. Energy Consumers v. Ark. Pub. Serv. Comm'n*, 35 Ark. App. 47, 813 S.W.2d 263 (1991) (holding that the appellant, in attacking a procedure as a denial of due process, has the burden of proving its invalidity). The briefs were filed at the conclusion of an eight-day proceeding, during which the issues were well defined and the parties' positions were made exceedingly clear. There is no indication that the Commission, having viewed the extensive pre-filed testimony and heard the live testimony and cross-examination of the witnesses, was not fully aware of Entergy's arguments for a rate increase. Moreover, the Commission gave due consideration to Entergy's desire to file a more extensive brief but chose to limit any post-hearing presentations, based on constraints of time and administrative necessity. In all, the Commission was in the best position to judge what additional arguments and information, if any, it needed to render a decision. *See* Pub. Serv. Comm'n Prac. & P. R. 3.14 (requiring the Chairman to set a briefing schedule "upon finding that the filing of briefs . . . is appropriate").

As a final procedural argument, Entergy contends that the Commission erred in failing to consider additional, post-hearing testimony, which Entergy submitted along with its petition for rehearing. The Commission's Practice and Procedure Rule 3.11 provides that, upon agreement of the parties, the Chairman may authorize the filing of specific documentary evidence within a fixed time after the hearing. Rule 3.16(b) provides that, if a party applies for rehearing based in whole or in part on "additional evidence which was not part of the original record," the party shall attach the evidence or state the subject of any testimony. Neither of these rules required the Commission to

accept additional, post-hearing evidence in this case. There has been no showing that the parties agreed to the filing of post-hearing evidence, as required by Rule 3.11. Further, the Commission determined that the material submitted by Entergy was not "additional evidence which was not part of the original record" but was "essentially little more than a rehash of the pre-filed evidentiary testimonies . . . ." The Commission also made the following finding:

> Further, the Commission could easily conclude that the [additional evidence is] more akin to a supplemental post-hearing brief in contravention of [the Commission's order]. Further, if the Commission now were to rely on said testimonies in whole or in part without allowing the other parties the opportunity to file responsive testimony, those parties could certainly assert a violation of their due process rights.

Upon reviewing the subject testimony, we cannot say that the Commission erred in reaching the above conclusions. The additional testimony differs in no material respect from the witnesses' hearing testimony and consists chiefly of the witnesses' disagreement with the Commission's ruling and their belief in its potential adverse effects. This lends credence to the Commission's finding that the "additional evidence" is in reality an overly-lengthy brief in support of the petition for rehearing. We therefore affirm the Commission's ruling.

III. Costs Disallowed

One of the primary objectives in a rate case is to set rates so the utility will be able to meet its legitimate operating expenses. *See Walnut Hill Tel. Co. v. Ark. Pub. Serv. Comm'n*, 17 Ark. App. 259, 709 S.W.2d 96 (1986). *See also* Robert Hahne & Gregory Aliff, *Accounting for Public Utilities*, § 7.01 (2007) (stating that it is generally assumed that a utility has a right to charge rates that will provide a reasonable opportunity to recover its costs prudently incurred in providing utility service). In this proceeding, the PSC disallowed certain costs that Entergy proposed to include in its revenue requirement. Entergy now argues that the Commission's disallowances were either arbitrary or not supported by substantial evidence.

A. Storm Restoration Costs

Entergy first challenges the Commission's disallowance of approximately $47 million in storm restoration costs. To put this

issue in historical context, Entergy was allotted $4.8 million per year as storm restoration expenses in its last rate case in 1996. Under normalized accounting procedures, Entergy would have placed the money in a designated account and expended it as storm costs arose. Any spending above the allotted amount would have been reflected as an income loss. However, between 2002 (or earlier according to some witnesses) and 2006, Entergy employed a reserve accounting method for storm costs. When the costs outstripped the annual expense allotment, the reserve account accrued a negative balance that reached approximately $47 million by 2006. In the current rate case, Entergy asked the Commission to include the $47 million in its revenue requirement and allow future recovery of it through amortization over a five-year period. The Commission declined, ruling that such a recovery would constitute single-issue ratemaking and retroactive ratemaking. Entergy argues on appeal that the Commission's decision was arbitrary. We disagree.

Ratemaking is a forward looking process in which the utility submits evidence of its costs, using test-year data with pro-forma year adjustments. *See* Ark. Code Ann. § 23-4-406 (Repl. 2002). The Commission views the evidence and other historical information to establish future rates that are just and reasonable. *See generally* Ark. Code Ann. §§ 23-2-301 and 23-4-102 to -104 (Repl. 2002). Retroactive ratemaking is generally beyond the power of a regulatory commission, and a utility ordinarily cannot, in a future rate case, recover for past deficiencies in meeting expenses. *See* Ellsworth Nichols & Francis Welch, *Ruling Principles of Utility Regulation* 315-19 (Supp. 1964).

Entergy did not ask in this case that the Commission view the $47 million in past storm expenses only as historical data for the purpose of establishing future rates. Rather, it asked the Commission to allow it to recoup cost overruns from previous years. In doing so, Entergy fell squarely within the general disfavor of retroactive ratemaking. We therefore cannot say that the Commission acted arbitrarily in declaring that recovery of the amount would constitute improper, retroactive ratemaking.[2]

Entergy nevertheless contends that the $47 million in storm costs was a proper component of its revenue requirement because the costs were legitimately incurred. Indeed, Entergy

[2] Our affirmance of the Commission's finding regarding retroactive ratemaking makes it unnecessary to address its additional finding that the recovery would constitute single-issue ratemaking.

witnesses testified to the utility's excellent record of speedy restoration following storm outages, and there is no evidence that the storm costs were imprudent or excessive. But, be that as it may, a ratemaking proceeding is generally not the place to satisfy past, unmet expenses, however prudently incurred. Normalized accounting procedures do not envision a utility's accruing costs with hopes of recovering them in a future rate case.

Entergy argues further that the Commission previously approved the reserve accounting method for storm costs. The evidence on this point is in conflict. Entergy witnesses testified that the reserve accounting method was sound and that Entergy had employed it for storm costs since at least 1996 without the Commission's objection. However, a PSC Staff witness testified that Entergy should have been treating storm restoration costs as a normalized expense rather than allowing a negative balance to accumulate in hopes of recovering it in a subsequent rate case. The Staff witness also denied that the Commission had approved Entergy's use of reserve accounting. Given this conflict in the evidence, it was the Commission's prerogative to accept the explanation of a Staff witness over the utility's witness. *See Associated Nat. Gas Co. v. Ark. Pub. Serv. Comm'n*, 25 Ark. App. 115, 752 S.W.2d 766 (1988). Entergy also references Commission orders from previous dockets, arguing that the orders imply approval of or acquiescence in the reserve accounting method. However, none of the orders expressly approve the use of reserve accounting for storm costs. In fact, one of the orders indicates to the contrary, stating that Entergy's 1996 storm-damage expenses were normalized to reflect a reasonable, allowable annual level based on historical weather data; that the 1996 rate proceeding contemplated only a normal level of storm-damage expense; and that Entergy "bore the risk of incurring some storm damage expenses in excess of the normalized allowed level . . . within a reasonable limit." With this evidence before it, the Commission's determination that it did not approve reserve accounting for storm expenses cannot be considered arbitrary. We therefore affirm on this issue.[3]

[3] Our ruling should not be read to say that the Commission is prohibited from approving a reserve method or other method to account for storm-restoration costs, or that

B. Blytheville Turbine Costs

In 1974, Entergy entered into a twenty-five-year lease of the Blytheville Turbine. Following the lease's expiration in 1999, Entergy incurred certain costs, which it attributed to removing the asset from its books. An Entergy witness testified that Entergy did not "expense" the removal costs but instead charged them to a capital account, resulting in a "regulatory asset," for which it could seek recovery in a future rate case. *See* 2 Leonard Goodman, *The Process of Ratemaking* 742-43 (1998). Entergy sought to include the costs in its revenue requirement in this case, but the Commission disallowed the costs. We cannot say that the Commission acted arbitrarily.

According to Entergy, the removal costs were capitalized in 2001 in connection with an earnings review, and the PSC Staff concurred in the capitalization treatment at that time. However, the Commission rejected Entergy's inference "that Staff's lack of objection to capitalization of this expense . . . provides assurance of future Commission approval of prospective rate treatment in a general rate case." The Commission ruled that it was Entergy's choice to capitalize the expenses and that, if Entergy had wanted the Commission to consider the costs as a future regulatory asset, it should have petitioned for such approval. Additionally, a PSC Staff witness testified that the Blytheville costs were non-recurring from six years earlier and should not be recovered from future ratepayers. The Commission agreed, ruling that the costs were "non-recurring and clearly out-of-period" and were "more appropriately deemed to be an expense and, thus, should have been recognized in the year incurred." As the trier of fact in rate cases, it is the Commission's function to decide on the credibility of the witnesses, the reliability of their opinions, and the weight to be given their testimony. *Sw. Bell Tel. Co. v. Ark. Pub. Serv. Comm'n*, 69 Ark. App. 323, 13 S.W.3d 197 (2000). The Commission was within its authority to rely on the PSC Staff witness.

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the Commission cannot permit recovery of past, extraordinary storm expenses. We simply hold that, given the circumstances of this case and our limited review of PSC orders, the Commission's decision was not arbitrary.

C. Director and Officer (D&O) Liability Insurance

Entergy proposed to recover the cost of D&O liability insurance premiums from its customer base rates. This type of insurance protects a corporation's directors and officers from loss in the event of a claim made against them in their official capacity. 9A Lee Russ & Thomas Segalla, *Couch on Insurance* § 131:31 (3d ed. 2005). An Entergy witness testified that the insurance was a legitimate expense and that it encouraged qualified individuals to serve as directors and officers. However, a PSC Staff witness and the Attorney General's witness testified that ratepayers and shareholders should share the cost of the insurance because shareholders were the major beneficiaries of a payout on D&O insurance. The Commission ruled that the cost of premiums would be split fifty-fifty between shareholders and ratepayers.

Entergy now contends that the Commission's decision was arbitrary. It argues that D&O insurance is a prudent and necessary cost of doing business and should therefore be included in its rates. The Commission obviously agreed with Entergy to an extent. However, the Commission relied on testimony from the PSC Staff and the Attorney General, who said that part of the expense should be borne by shareholders as the primary beneficiaries of insurance. The Commission gave credence to these witnesses' testimony, as it was entitled to do. *Sw. Bell Tel. v. Ark. Pub. Serv. Comm'n*, 69 Ark. App. 323, 13 S.W.3d 197 (2000). Accordingly, we decline to interfere with the Commission's wide discretion in its approach to rate regulation on this point. *Consumer Utils. Rate Advocacy Div., supra.*

D. Employee Incentive Compensation

Entergy also asked to include the cost of employee incentive compensation as part of its operating expenses. The Commission allowed incentives that were tied to operating performance but permitted only half the cost of incentives that were tied to the company's financial performance, and none of the costs that were tied to the stock performance of the parent company, Entergy Corp. Entergy argues that the disallowances were arbitrary because the incentives were not shown to be excessive and were a prudent cost of doing business.

Entergy witnesses did testify that incentives promote efficiency; are a reasonable cost of operation; are common in the industry; and attract and retain talented employees. However, the

Attorney General's witness testified that it is not good public policy to include one hundred percent of incentives in rates because, if employees earn their bonuses, shareholders are doing well and can afford to pay them. If they do not earn their bonuses, but one hundred percent of them are included in rates, shareholders are cushioned. He also said that the benefits of good performance flow to shareholders. A PSC Staff witness likewise recommended that the cost of incentives be split between ratepayers and shareholders, saying that predominantly financial incentives benefit ratepayers and shareholders equally. The Commission, citing this testimony, split the cost of financial incentives between shareholders and ratepayers and found no evidence that ratepayers would benefit from incentives tied to the performance of Entergy Corp. stock.

In its order, the Commission went to great lengths to analyze the testimony of all witnesses on this point and accepted the testimony of the Attorney General and Staff witnesses regarding a need for apportionment of the incentive costs. *See Associated Nat. Gas Co., supra.* We therefore decline to hold that the Commission acted arbitrarily. Further, we defer to the Commission's expertise in declaring that a legitimate operational expense should have a "direct ratepayer benefit" before being included in rates. *See generally Sw. Bell Tel. v. Ark. Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986) (holding that we defer to the Commission's expertise; that a specific finding of bad faith or imprudence is not a necessary predicate to the disallowance of costs; and that the Commission may determine whether expenses are reasonably necessary in providing utility service to ratepayers).

IV. Cost-Recovery Riders

In addition to recovering its costs from customer base rates, a utility may retrieve costs through a cost-recovery rider. This charge may appear as a separate line item on a customer's utility bill and is earmarked to cover a particular expense borne by the utility. For example, Entergy utilizes an ECR rider for exact recovery of fuel costs.

In this case, Entergy asked the Commission to implement another rider to allow exact recovery of payments it is legally bound to make under a Federal Energy Regulatory Commission (FERC) ruling. In 1985, the FERC determined that a System Agreement, which governed Entergy Arkansas and its sister com-

panies in other states, required a "rough equalization" of production costs among the companies. In 2001, the Louisiana Public Service Commission claimed that Entergy Arkansas's cost were too low and not roughly equal with those of the other companies. The FERC agreed and required Entergy Arkansas to subsidize some of the other companies' expenses beginning in 2007. It is estimated that the cost to Entergy Arkansas will be at least $265 million annually. The Arkansas PSC challenged the FERC's ruling, but the ruling was upheld by a federal appeals court. *See La. Pub. Serv. Comm'n v. Fed. Energy Reg. Comm'n*, 522 F.3d 378 (D.C. Cir. 2008). Entergy Arkansas has given notice that it will withdraw from the System Agreement, but the withdrawal will not take place until approximately December 2013. In the meantime, Entergy Arkansas is liable for the cost-equalization payments.

In the current case, the Commission implemented a PCA rider to allow exact recovery of the equalization payments. It also continued usage of the ECR rider. However, the Commission gave both riders a limited approval, through December 31, 2008, subject to the implementation of an Annual Earnings Review (AER), which the Commission directed the parties to expeditiously develop. The Commission also stated that its decision to continue the riders through 2009 would be influenced by Entergy's progress toward an amended System Agreement and the continuation of its notice to withdraw from the present Agreement.

Thereafter, a separate docket, No. 07-129-U, was apparently opened to implement the AER and for other purposes. However, the parties could not agree on the AER logistics, so the Commission decided not to go forward with the process. The Commission also, via Docket 07-129-U, dispensed with its December 31, 2008 "sunset" of the riders. It decided instead that the riders would be subject to eighteen months' advance notice of termination.

Entergy now argues that there was no substantial evidence to support the Commission's conditional approval of the riders. We observe first that the issue is very likely moot, given the Commission's modifications of its rulings in Docket 07-129-U. We do not review issues that are moot; to do so would be to render an advisory opinion. *Honeycutt v. Foster*, 371 Ark. 545, 268 S.W.3d 875 (2007). However, even if the issue is not moot, we conclude that reversal on this point is not warranted. Entergy appears to argue that, for the Commission to impose conditions on a utility,

there must be witness testimony that such conditions are required. Clearly, the Commission has greater discretion and flexibility in carrying out its duties. Here, the Commission agreed to the use of riders, which operated to Entergy's great advantage. But, the Commission was naturally concerned about how ratepayers and the utility would fare under the riders' implementation, particularly the new PCA Rider. It therefore instituted a trial period, accompanied by an Annual Earnings Review and a warning that it expected Entergy to maintain its withdrawal notice from the System Agreement. Entergy offers no persuasive argument why these conditions were unreasonable, especially given that the Commission was not bound to approve riders at all.

Entergy also asserts that the Commission erred in the amount of a carrying charge imposed in relation to the riders. The PCA Rider allows Entergy to recover the annual cost-equalization payments from its customers over twelve months. However, Entergy's payment obligations under the FERC ruling are spread over a shorter, seven-month period. This means that, for a portion of the year, Entergy is effectively advancing money to its customers for the PCA Rider payments. The Commission agreed that Entergy was entitled to a carrying charge to compensate it for the monies advanced, and it chose the same rate of interest used on customer deposits, about four percent. Entergy claims that the carrying charge should have been 5.58%, which is its overall rate of return on capital.

Through use of the riders, Entergy enjoys an automatic recovery of certain costs, as opposed to the mere "opportunity" to recover its costs from the ordinary rate base. As there is no risk involved with the riders, a carrying charge that mirrors Entergy's overall rate of return, which *does* include the element of risk, would, as the Commission determined, be incorrect. The Commission also cited testimony from Staff witnesses, who said that four percent was the reasonable carrying charge, or even that no carrying charge was necessary. Under these circumstances, we decline to reverse the Commission.

V. Rate of Return

A utility is entitled to recover the cost of financing its plant and working capital. It may therefore charge rates sufficient to permit it to recover a reasonable rate of return. *See Alltel Ark. v. Ark. Pub. Serv. Comm'n*, 76 Ark. App. 547, 69 S.W.3d 889 (2002).

In calculating the utility's cost of financing (cost of capital), expert witnesses look to the company's capital structure, which primarily consists of the percentage of common stock, preferred stock, and debt. The ratio of debt to equity (called the D/E ratio) is used to determine the overall cost of capital. *See generally Sw. Bell Tel. Co. v. Ark. Pub. Serv. Comm'n*, 24 Ark. App. 142, 751 S.W.2d 8 (1988). In instances where the utility's capital structure is unsound or out of step with industry standards, a regulatory commission may calculate the cost of capital based not on the utility's actual capital structure but on a hypothetical capital structure. *See Walnut Hill, supra.*

In the present case, Entergy's projected capital structure was 44/56 debt-to-equity. According to witnesses, the company was equity-heavy (and thereby costlier to finance), and the ratio represented a significant departure from comparable companies' as well as Entergy's own prior D/E ratios. The Commission therefore used a hypothetical D/E ratio of 52/48, as recommended by the PSC Staff and the Attorney General, to establish the cost of capital. Entergy now argues that the Commission miscalculated the D/E ratio because it used actual figures for some components and hypothetical figures for others.

According to Entergy, the hypothetical ratio recommended by the PSC Staff and the Attorney General was based on a sample of ratios from comparable utilities. Entergy complains that, while the Commission used these samples to establish the hypothetical D/E ratio, it incongruously used Entergy's actual, four percent preferred-stock figure as part of the capital structure. Entergy cites *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission,* 19 Ark. App. 322, 720 S.W.2d 924 (1986), for its statement that, when the Commission selects a particular method advocated by an expert witness, the methodology selected should be applied in a manner consistent with the rationale and theory underlying the methodology. In that case, we reversed the Commission for using a calculation that, in computing a utility's cost of capital, mixed Arkansas-only figures with total-company figures.

Entergy does not adequately explain to this court the relevance of the preferred stock percentage or why it affects the D/E ratio. In any event, use of a hypothetical capital structure should not foreclose the Commission's duty to utilize whatever reasonable figures, actual or hypothetical, it deems necessary in appropriately exercising its discretion, and the Commission is free, within the ambit of its statutory authority, to make the pragmatic

adjustments which may be called for by particular circumstances. *Walnut Hill, supra.* Further, we do not believe that a serious inconsistency exists here as it did in *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 19 Ark. App. 322, 720 S.W.2d 924 (1986). The Staff and the Attorney General in this case used numerous resources to arrive at the D/E ratio, and their efforts necessarily entailed some estimation and guesswork. *See Bryant v. Ark. Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995) (recognizing that utility ratemaking is an inexact art and necessarily involves judgment calls and educated surmise from time to time). Thus, some level of mixed figures was unavoidable. Further, the Staff and Attorney General relied not only on comparable samples but on other resources to calculate the D/E ratio.[4] The fact that the witnesses used comparable samples as one tool did not require them to mirror all of the samples' aspects. Under these circumstances, we cannot say that the D/E ratio adopted by the Commission was arbitrary or unsupported by substantial evidence.

Calculating the cost of capital also involves computing the cost of the individual debt and equity components. The cost of debt is readily ascertained by reference to the interest rates paid to creditors. However, the cost of equity (also called return on equity or ROE), reflects an investor's expected return and is generally calculated based on estimates provided by experts. The experts employ several formulas to compute a return on equity, and the Arkansas Public Service Commission primarily relies on the Discounted Cash Flow (DCF) method. The witnesses in this case utilized that method and others to arrive at return-on-equity figures ranging from 9.5% to 11.25%. The Commission established a ROE of 9.9%.

Entergy argues that the 9.9% ROE allowed by the Commission was not supported by substantial evidence because the Commission embraced the DCF method to the exclusion of all others. This is incorrect. The Commission discussed its primary reliance on the DCF method, but it also exhaustively discussed several other methodologies and noted the effect of reasonableness checks based on those methods. Additionally, the PSC Staff witness,

[4] In addition to samples from comparable companies, witnesses relied on Entergy's own historical D/E ratios and the ratios of the parent corporation.

whose ROE recommendation of 9.9% the Commission accepted, testified that she used other methodologies for reasonableness checks as well.

Entergy further asserts that the Commission erroneously premised its ROE decision on the notion that the risk of investing in Entergy was reduced by the use of automatic adjustment clauses, or riders, which allow a utility to recover certain exact costs. The PSC Staff witness and Entergy's own expert testified that riders mitigate a utility's risks of operation. However, Entergy asserts that, even if a reduced risk exists, it is offset by the increased risk necessitated by the Commission's ruling on the rider carrying charge. On this point, it is sufficient to say that we defer to the Commission's discretion and expertise and that our concern is not with the Commission's methodology but the total effect of the rate order, which we find to be fair, reasonable, and based on substantial evidence. *See Bryant v. Ark. Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

Entergy also argues that the Staff's calculations involving the DCF method were flawed. Entergy's expert testified that the DCF formula must be adjusted to account for quarterly payment of dividends rather than annual payments. The PSC Staff witness testified that she made the necessary adjustments, but Entergy asserts that she did so incorrectly. We see no basis for reversal. Staff's calculations yielded a *range* of 9.6% to 10.2%, for which the 9.9% figure adopted by the Commission was the mid-point. It is therefore difficult to say what effect Staff's alleged miscalculation had on the ultimate computation. Further, the Staff witness testified that her DCF calculations were supported by other methodologies. Thus, even if she erred in her DCF computation, her error was very likely negligible, given that other methodologies produced similar results. Additionally, other witnesses recommended returns on equity similar to Staff's.

VI. Working Capital

Working capital is part of a utility's rate base on which a return is allowed. It includes the cash and other non-plant investment in assets that a utility must maintain in order to meet its current financial obligations and provide utility service to its customers in an economical and efficient manner. *Associated Nat. Gas Co., supra.* No particular methodology is precise in calculating working capital, and a determination of working capital is in many

respects an exercise of discretion as to what particular method yields the most fair and equitable result in each case. *See Gen. Tel. Co. of Sw. v. Ark. Pub. Serv. Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988), *aff'd*, 295 Ark. 595, 751 S.W.2d 1 (1988). The particular amount of working capital allowance, along with the particular methodology used to derive that amount, is a matter of educated opinion, expertise, and informed judgment of the Commission and not one of mathematically demonstrable fact. *Id.*

In calculating the value of working capital, the Commission employs the Modified Balance Sheet Approach, in which values are assigned to the utility's assets and liabilities. In this case, Entergy argues that the Commission erred in its treatment of two asset components — coal inventory and undistributed stores expense — and four liability components: dividends payable, unfunded pension liability, storm reserve account, and transmission reserves.[5]

A. Coal Inventory

Entergy asked the Commission to adopt its method of valuing coal inventory, which was a forty-three-day average operational inventory level called the Coal Inventory Policy. The Commission did so "under the assumption that this level will be maintained prospectively, representing an average, normal level." It ordered Entergy to maintain an "average operational supply" and stated that failure to do so would be deemed imprudent. Entergy petitioned for rehearing, arguing that the Commission had ordered it to fix an absolute coal inventory level, despite the fact that such levels would naturally require adjustment. The Commission denied rehearing, ruling that it approved the Coal Inventory Policy based on Entergy's representations that the company would actually maintain the expected level. The Commission stated further that, if Entergy needed to make adjustments, it could seek relief from the Commission.

Entergy argues on appeal that the Commission arbitrarily required coal inventory to be "static and absolute." We do not believe the Commission's order so states. The Commission

[5] Entergy makes the same argument regarding the storm reserve account in this section as it did in the previous section on costs. We need not address the issue again in this context, as our previously stated reasons for affirming the Commission's treatment of the storm account apply equally here.

was aware, through testimony from Entergy's witness, that use of the Coal Inventory Policy did not mean that there would always be "43 days of coal on the ground," given that inventory levels are cyclic, based on outages or peak burn periods. The Commission's order consequently required Entergy to maintain an "average normal level" and an "average operational supply as indicated in [Entergy's] approved Inventory Policy." Further, the Commission's order embodied Entergy's representation that the forty-three-day level was an appropriate target level for ratemaking purposes. The Commission simply gave notice that, in assigning a balance to coal inventory, it was holding Entergy to the representation.

B. Undistributed Stores Expense

According to witnesses at the hearing, undistributed stores expense is the cost of housing materials, supplies, and other items pending their use on maintenance or construction projects. Witnesses also testified that the undistributed stores account is a temporary "clearing" account and that, once items in the account are assigned to a construction or maintenance project, the expenses associated with the project are moved to other accounts. They then become part of the value of physical plant or are accounted for as an operating expense.

Entergy proposed to include as an asset, for purposes of working capital, approximately $6.6 million of "undistributed stores expense." However, a PSC Staff witness testified that the amount should not be included in working capital assets because Entergy would receive a return on the materials in other ways, either as part of the physical plant after completion of construction or as an operational expense. The Commission relied on the Staff witness and did not include the undistributed stores expenses in calculating working capital.

Entergy argues that the Commission's decision was arbitrary and not based on substantial evidence. In particular, it claims that the Staff witness's testimony represents a misunderstanding of the stores accounting process. However, the Commission, in the exercise of its discretion and expertise, ruled to the contrary and accorded weight to Staff's opinion. Entergy has not convinced us that the Commission erred in doing so, and we therefore defer to the informed judgment of the Commission on this point.

Entergy also argues that, based on testimony from its witness, the undistributed stores balance should be included in working capital because the Commission authorized its inclusion in past dockets. Entergy's very limited argument does not warrant reversal, and we note that it cites no specific language from any prior order dealing with this type of account.

C. Dividends Payable

In employing the Modified Balance Sheet Approach, PSC Staff characterized certain short-term liabilities as Current, Accrued, and Other Liabilities (CAOL). These liabilities are also called zero-cost liabilities because the utility has use of the money in the accounts for a short time, at no cost, before discharging the obligation of the liability. Among the items included by the PSC in this case as a zero-cost liability were dividends payable.

Entergy argues first that dividends payable should not be considered a zero-cost liability. However, it cites no testimony from its witnesses to this effect. In fact, according to the Commission, the only issue at the hearing was the amount of the payables balance, and our review of the hearing testimony bears this out. In any event, two PSC Staff witnesses explained that dividends payable should be included as a zero-cost liability, and the Commission had the latitude to accept their testimony. *See Assoc. Nat. Gas Co., supra. See also Contel of Ark. v. Ark. Pub. Serv. Comm'n*, 37 Ark. App. 18, 822 S.W.2d 850 (1992) (affirming the inclusion of dividend payables as a zero-cost liability).

Entergy also argues that the dividends-payable balance was miscalculated. To explain, a company has use of dividends payable in the lag time between the declaration of dividends and the payment of dividends to shareholders. Entergy Arkansas is not a publicly-traded company and does not declare dividends to any shareholders other than its parent corporation, Entergy Corp. Therefore, the lag time between declaration and payment is only a few days, which, if used to calculate working capital, would result in a low dividends-payable balance in favor of Entergy Arkansas. However, Entergy Corp. declares and pays dividends to its shareholders in a more traditional manner, with a lag time of over thirty days. The PSC Staff used the parent company's lag time to calculate working capital, which resulted in a greater payables balance, to Entergy Arkansas's detriment. A Staff witness testified that he used the parent company's lag time to reflect normal dividend-payment practices. We agree with Entergy Arkansas that

the Commission's use of the parent company's lag time was unsupported by substantial evidence in this case.

The precise value of dividends payable as a zero-cost liability is, unlike many of the mathematical values in this case, easily and accurately computed by reference to a fixed, objective amount: the number of days the utility holds the dividend funds before paying them. There was no evidence before the Commission that Entergy Arkansas's lag time was historically abnormal or that it significantly diverged from other, similarly-situated companies (as in the case of Entergy Arkansas's D/E ratio); rather, the evidence was that it diverged from that of a company with more stockholders, its parent company. This is therefore a situation in which theory should give way to reality. *See Contel, supra.* We can discern no rational basis for using a proxy lag time instead of Entergy Arkansas's actual lag time to calculate the value of dividends payable as a zero-cost liability.

The Commission explained its use of the parent company's lag time by saying that it calculated Entergy's cost of equity based on parent-company figures. However, we see no logical basis in the evidence why the practice of using parent-company numbers, among several other factors, to ascertain the cost of equity of a non-publicly traded company, *see Contel, supra,* should apply to the simple matter of determining how long Entergy Arkansas had use of the dividends payable before disbursing them. Moreover, in *Contel,* this court held that the Commission should use the precise lag time to calculate a dividends-payable balance. Accordingly, we reverse and remand on this issue with instructions to the Commission to recalculate working capital accordingly.[6]

D. Unfunded Pension Liability

By the end of the test year in this case, Entergy had accumulated a large balance in a pension reserve fund, which it would eventually pay as pension expense. Shortly after the test year ended, Entergy disbursed $80 million from the account. As a result, an Entergy witness said, by the end of the pro-forma year in June 2007, the average balance for the account was a debit

[6] We recognize that, in *Contel,* the dispute concerned the value of dividends payable in the parent company's capital structure. However, the basic rationale of *Contel* applies here.

(negative) balance of $17.4 million. The witness testified that the negative balance should be included on the liability side of the balance sheet. However, a PSC Staff witness testified that the negative $17.4 million was not representative of the account's normal level. He said that the account had ordinarily reflected a credit (positive) balance of $20 million to $70 million between 2002 and 2005. He consequently recommended an average credit balance of approximately $30.1 million be assigned to the pension reserve account. The Commission did so, ruling that all components used in ratemaking should reflect an expected, normal level. On rehearing, the Commission stated that it relied on the Staff's "use of a standard and wholly appropriate method to set rates which rejects aberrant account balances and replaces them with the expected, representative, or normal levels for those accounts."

Entergy argues that, because a negative balance actually existed in the pension reserve account in 2006-07, Entergy should have the benefit of that balance, which would eliminate the account as a zero-cost liability. However, the Commission approved the approach used by the Staff witness, who established an average balance based on Entergy's past figures rather than one or two transactions. Understandably, the Commission did not want to set rates based on unusual accounting entries made during the pro-forma year. We therefore decline to reverse on this point.

E. Transmission Reserves

The PSC Staff witness included certain funds in CAOL relating to a transmission reserve account. The Commission approved the inclusion, which Entergy argues is the result of a "technical error."

An Entergy witness testified that the reserve amount included by Staff was related to an eliminated expense account and, therefore, the reserve amount should have been eliminated as well. However, the PSC Staff witness explained in detail why no error occurred, and the Commission exercised its prerogative in relying on his testimony. *See Associated Nat. Gas Co.*, *supra*. We therefore find no error.

VII. Billing Determinants

To predict a utility's revenues for purposes of a rate case, it is necessary to calculate billing determinants by ascertaining the number of customers and the amount of their usage during the test

year and the pro-forma year. Inappropriate calculation of billing determinants can result in over- or under-collection of revenues. *Bryant v. Ark. Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995).

In this case, Staff's calculation of billing determinants, as adopted by the Commission, was considerably higher for the pro-forma year than Entergy's calculation. Entergy's witness computed the pro-forma year figures by simply applying, to each pro-forma month, the amount that appeared in the last month of the test year. In short, Entergy predicted no reasonably known and measurable customer growth in the pro-forma year. By contrast, the Staff witness viewed data from several years preceding the test year to conclude that there was historical growth, which would continue into the pro-forma year. The Attorney General basically concurred with Staff's approach.

The Commission ruled that "the five year measure of growth impacts, using [Staff's] model, more reasonably measures and more accurately reflects expected growth than does [Entergy's] method, which takes the customer count from one isolated month and simply multiplies it by twelve." On appeal, Entergy argues that revenue growth in the pro-forma year was not reasonably known and measurable, as required by Ark. Code Ann. § 23-4-406 (Repl. 2002).

Where the Commission has cited reliable data, supported by substantial evidence, we have affirmed its determination that a particular revenue adjustment was reasonably known and measurable. *Bryant v. Ark. Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995); *Sw. Bell Tel. Co. v. Ark. Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986). Here, the Commission was presented with several years of historical figures by the PSC Staff. The Commission deemed the information a reliable measure of future revenue growth, and, in fact, superior to Entergy's method of multiplying one month's figure times twelve. We decline to invade the Commission's wide discretion on this matter.

Entergy argues alternatively that, if the pro-forma revenue adjustment is allowed to stand, Entergy should be allowed to increase its capacity costs to support the level of growth. The Commission rejected this idea, ruling that all costs had been updated to reflect known and measurable levels. Given the Com-

mission's reasoning and our limited standard of review, we are unwilling to reverse on this basis.[7]

VIII. Effective Date

The Commission declared that Entergy's rates, as established in Order No. 10, would be effective "for all bills rendered after June 15, 2007," which was the date the Commission issued Order No. 10. Entergy argued that the effective date should be delayed to "the first billing cycle following approval of those tariffs." The Commission declined to alter the effective date of its order.

Entergy cites Ark. Code Ann. § 23-4-202, which generally requires a utility to render bills in accordance with duly filed rate schedules. However, the Commission relied on Ark. Code Ann. § 23-4-410, which reads in part:

> Until rate schedules in compliance with the commission's order can be filed and approved, any rate increase allowed in the commission's order shall be apportioned among all classes of customers and *shall become effective on all bills rendered thereafter through a temporary surcharge or other equitable means, as shall be prescribed in the order.*

(Emphasis added.) This statute pertains to effective dates of rate increase, and the present case involves a rate decrease. However, Entergy presents no persuasive argument why the Commission should not apply the statute's basic notion of a rate change becoming effective prior to rate schedules being filed. Entergy argues that it could face certain logistical difficulties in immediate implementation of the decrease, but the Commission noted that those difficulties could be met by utilizing appropriate debits or credits to customer bills. Under these circumstances, we affirm the Commission's decision on the effective date of its order.

IX. Conclusion

For the reasons stated in this opinion, we reverse and remand the Commission's orders in part for recalculation of working capital in light of our ruling on dividends payable. We affirm the remainder of the Commission's orders.

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[7] Entergy also contends, as it has on other issues, that the Commission's decision in this case differs from its decisions in prior rate cases. However, ratemaking is a legislative function, and res judicata has little application; any rate order may be superseded by another. *Consumer Utils. Rate Advocacy Div. v. Ark. Pub. Serv. Comm'n*, 86 Ark. App. 254, 184 S.W.3d 36 (2004).

Affirmed in part; reversed and remanded in part.

PITTMAN, C.J., and HART, ROBBINS, VAUGHT, and BAKER, JJ., agree.

Cedric WALKER *v.* COOPER STANDARD AUTOMOTIVE, Crockett Adjustment, and St. Paul Travelers Insurance Co.

CA 08-519 289 S.W.3d 184

Court of Appeals of Arkansas
Opinion delivered December 17, 2008

Moore & Giles, LLP, by: *Greg Giles*, for appellant.

Bridges, Young, Matthews & Drake, PLC, by: *Michael J. Dennis*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Cedric Walker appeals the denial of temporary total disability (TTD) or temporary partial disability (TPD) benefits by the Workers' Compensation Commission in his claim against appellee Cooper Standard Automotive. Appellant asserts on appeal that while he continued to work light-duty after his compensable left knee injury, he was ultimately terminated due to a reduction in workforce, rendering him eligible for TTD or TPD while he remained in his healing period. Appellee employer resisted the claim in its entirety, and it cross-appeals the finding that the knee injury is compensable, arguing that any medical treatment required after he left employment was the result of a later independent intervening event. Thus, both employee and employer argue that the Commission's decision lacks substantial evidence to support it on their respective points.

We affirm on cross appeal, holding that substantial evidence supports the Commission's finding that appellant suffered a compensable knee injury on April 27, 2006, that included a medial meniscus tear. On direct appeal, we reverse and remand because appellant was not statutorily barred from receiving TTD or TPD.

This court reviews decisions of the Workers' Compensation Commission to determine whether there is substantial evidence to support it. *Rice v. Georgia-Pacific Corp.*, 72 Ark. App. 149, 35 S.W.3d 328 (2000). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if its findings are supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The issue is not whether we might have reached a different decision or whether the evidence would have supported a contrary finding; instead, we affirm if reasonable minds could have reached the conclusion rendered by the Commission. *Sharp County Sheriff's Dep't v. Ozark Acres Improvement Dist.*, 75 Ark. App. 250, 57 S.W.3d 764 (2001); *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996). It is

the Commission's province to weigh the evidence and determine what is most credible. *Minn. Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

In workers' compensation cases, the Commission functions as the trier of fact. *Blevins v. Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). The credibility of witnesses and any conflict and inconsistency in the evidence is for the Commission to resolve. *Warwick Electronics, Inc. v. Devazier*, 253 Ark. 1100, 490 S.W.2d 792 (1973). A majority of the Commission is required to reach a decision. *See* Ark. Code Ann. § 11-9-204(b)(1) (Repl. 1996); *see also S & S Constr., Inc. v. Coplin*, 65 Ark. App. 251, 986 S.W.2d 132 (1999). Two-to-one decisions are frequently issued by the Commission, and those are majority decisions. *S & S Constr., Inc. v. Coplin, supra*. Here, all three Commissioners agreed to affirm and adopt the ALJ's finding of compensability of the knee injury and reasonably related medical expenses. Two of the three Commissioners agreed to affirm and adopt the ALJ's finding of appellant being barred from TTD or TPD because of refusal of suitable employment.

To perform the proper review on appeal, we must examine the basis for the Commission's findings. Appellant, a man in his forties, had worked for Cooper Standard Automotive since 1997. Appellant was in a light-duty position[1] in the storeroom when he hurt his knee walking up stairs on April 27, 2006, in the middle of his shift. Appellant lost his balance, his weight shifted, and in an effort to protect his post-surgical right knee, he hurt his left knee. Appellant stated that although he finished his shift, his knee immediately began to hurt and swell. The next day, his knee was swollen so badly he could hardly walk. Appellant filed an incident report and was sent to the company doctor, who performed an x-ray and prescribed ice packs and anti-inflammatory medication. The nurse noted visible swelling upon physical exam. After that incident, his knee continued to bother him, but he continued in his light-duty job at work.

Appellant signed a severance agreement at the end of June 2006, because the plant was reducing its workforce and was

[1] Appellant had been on light duty intermittently for years with this employer as an accommodation for other work-based injuries. Those injuries were in 2000 to his shoulder, in 2001 to his right knee, in 2002 or 2003 to his hands (carpal tunnel syndrome), and in 2004 to his shoulder.

heading for closure. Appellant added that he probably could not continue to work as he had been doing because his knee was continuing to hurt. Appellant testified that he felt he had no alternative but to sign the severance form and take the severance money ($3,541.19) in order to pay for medical care, which was being declined by the workers' compensation carrier. The pre-printed form, signed by appellant, the employer's human resources manager, and the union representative, stated that appellant understood that he was "being terminated from employment at Cooper-Standard Automotive effective 7-5-06 due to reduction in workforce in accordance with the plant closure agreement." It acknowledged that he was being "terminated due to my seniority or that I have chosen to be voluntarily terminated." The form ensured that appellant had read "the El Dorado Plant closing termination agreement."

Appellant presented to an emergency room on August 2, 2006, wherein the report was that appellant had twisted his left knee while getting out of the bathtub, causing worsening pain that night. Appellant recalled going to the emergency room that night, but he denied any new injury, testifying that his knee was hurting before that night. Appellant challenged the accuracy of any written note saying he hurt his knee a couple days before August 2, 2006.

Appellant presented to another physician in late 2006, and appellant was prescribed a knee brace. Appellant said it helped but that he knew something was still very wrong with his left knee because it hurt all the time. An MRI performed in January 2007 demonstrated the existence of a medial meniscus tear, for which surgical repair was suggested. Appellant said he wanted the surgery but could not pay for it.

Appellee argued that the cause for the need for extensive medical treatment including surgery was just as likely the bathtub event in August, not the April work event. Appellee asserted that appellant failed to prove a compensable surgical injury. Appellee also argued that appellant's voluntary resignation barred any claim for TTD or TPD.

The ALJ found appellant's testimony credible as to the onset and severity of injury. The ALJ rejected appellee's theory as to the alleged later injury. The ALJ found that appellant suffered a compensable knee injury on April 27 and that all the medical treatment including surgical repair was reasonably necessary and causally related to the work injury. As to the request for temporary

disability, the ALJ found that appellant was barred because he took a voluntary severance with no knowledge of how long the plant would remain open. Thus, finding that appellant refused suitable employment offered to or procured for him in accordance with Ark. Code Ann. § 11-9-526. The ALJ did not find appellant's contention, that he would not have been physically able to continue to work light duty much longer anyway, to be persuasive where there was no physician's recommendation to cease light duty. Both parties appealed to the Commission.

After performing its de novo review, the Commission, by a unanimous vote, found that appellant had proven by a preponderance that he suffered a specific incident left knee injury at work on April 27, 2006, while walking up stairs and that all medical treatment was reasonably necessary in connection with that compensable injury. The majority of Commissioners also found that appellant had not proven by a preponderance of the evidence that he was entitled to any temporary disability benefits, total or partial, because he had voluntarily accepted a severance package after his work-related injury. The dissenting Commissioner asserted that he would have found that the employer did not offer suitable work available for its injured employee. Appellant filed a notice of appeal, and appellee filed a notice of cross-appeal.

First, we address the cross-appeal, challenging the substantiality of evidence to support that appellant's knee injury occurring in April 2006 caused the extensive tear. Appellee concedes that there might have been a minor injury causing swelling in April 2006, but that the eventual finding of a medial meniscus tear was just as likely caused by an incident on or about August 2, 2006, as noted in contemporaneous emergency room reports.

The Commission affirmed and adopted the ALJ opinion, in which this precise argument was raised and rejected. The ALJ determined that appellant had proven that he had not suffered left knee problems before the event described in April 2006, that there was evidence of swelling noted by the company doctor, and that the credible testimony was that appellant suffered knee problems ever since that event. This was a matter of weighing the evidence and fact finding, a function left to the Commission and not our court on appeal. *Minn. Mining & Mfg. v. Baker, supra.* Based upon the standard of review, we hold that substantial evidence exists to support compensability of this knee injury, to include the tear that requires surgical repair.

Moving to the direct appeal, appellant challenges the ALJ's (and the Commission's) finding that he was barred from receiving TTD or TPD because, even though he remained in his healing period and continued to work in his light-duty job, he voluntarily removed himself from the workplace.

Arkansas Code Annotated section 11-9-521 states that a claimant with a scheduled injury is entitled to temporary total disability benefits "during the healing period or until the employee returns to work, whichever occurs first." Appellant undisputedly remained in his healing period and continued to work.[2] Thereafter, pursuant to Ark. Code Ann. § 11-9-526, he was not entitled to any TTD or TPD if he "refused employment suitable to his or her capacity offered to or procured for him . . . during the continuance of the refusal, unless . . . the refusal is justifiable."

We hold that there is no substantial evidence of unjustifiable refusal to work light duty offered to or provided for appellant. Appellant was terminated at the urging of his employer. *Compare Superior Indus. v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000). Construing the relevant statute strictly, as we must, the facts remain that this employee was neither offered employment, nor did he refuse employment, at any time after July 5, 2006. As we held in *Barnette v. Allen Canning Co.*, 49 Ark. App. 61, 896 S.W.2d 444 (1995), where an employee suited to light duty is not offered a suitable job by the employer, section 11-9-526 is not triggered. Contrary to the dissenting judge's opinion, we are not holding that Walker was unable to continue light-duty work. We uphold that finding as supported by substantial evidence. We hold only that appellant could not have refused employment where it was no longer offered by his employer. For the foregoing reasons, we reverse and remand on appellant's direct appeal because the Commission's decision is not supported by substantial evidence.

Reversed and remanded on direct appeal. Affirmed on cross-appeal.

HART, GLOVER, and GRIFFEN, JJ., agree.

PITTMAN, C.J., and HEFFLEY, J., dissent.

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[2] Although the ALJ's opinion, adopted by the Commission, recites no less than three times that appellant continued to work over five months after his compensable injury, it is undisputed that only two months elapsed between the injury and when appellant accepted the severance package.

SARAH J. HEFFLEY, Judge, dissenting. Though I might have reached a different result from that reached by the Commission in awarding Walker further medical benefits including surgery, I recognize the standard of review. Applying that standard, I join in the portion of the majority opinion affirming that award. However, applying the same standard to the Commission's denial of TTD following Walker's voluntary termination, I must respectfully dissent from the portion of the majority opinion reversing on that point.

When reviewing a decision of the Commission, the issue is not whether we might have reached a different result from the Commission, but rather whether reasonable minds could have reached the result found by the Commission. *Superior Industries v. Thomaston*, 72 Ark. App. 7, 9, 32 S.W.3d 52, 53 (2000). Reasonable minds could conclude, as did the Commission, that Walker was not physically unable to perform light-duty work and that he refused suitable employment at Cooper Tire and was, therefore, disqualified from receiving TTD.

As recognized by the Commission, Walker returned to his normal, light-duty work at the tire plant immediately after his injury; he did not stop working until June 30, 2006, having signed a *voluntary* termination agreement on June 28. Moreover, as noted by the Commission, no physician ever recommended that Walker cease his light-duty position. The majority implies that Walker was forced to sign the termination agreement due to the Cooper Tire plant closure. However, as recognized by the Commission, the record reveals no firm evidence that Cooper Tire's closure was imminent. At the time Walker was *offered* the termination agreement — implying that he had a choice — there were layoffs occurring at the plant. But Walker does not assert that he was laid off or that he had been notified of a certain job loss. Instead he testified that he "agreed to take the voluntary termination because, man, it wasn't no way that I could keep working on my knee the way it was. They offered me that severance package and I decided to take the little money that they was giving me. My number was coming anyway so I got the money to get me some medical attention." There was no ambiguity about whether Walker voluntarily chose to leave his work at Cooper rather than seek other job duties to accommodate his knee pain. Any potential ambiguity was clarified by Walker's own testimony.

This case is unlike *Superior Industries*, cited by the majority, where Thomaston was *involuntarily* terminated for misconduct. 72 Ark. App. 7, 32 S.W.3d 52 (2000). The court there stated that

"Mr. Thomaston did not refuse employment; he accepted the employment and was later terminated *not by his choice,* but at the option of his employer." 72 Ark. App. at 11, 32 S.W.3d at 54 (emphasis added). Here, regardless of whether Walker's knee pain played a role in his decision, he admits that the termination *was by his choice.* Walker could have rejected Cooper Tire's offer of a voluntary termination package and sought a lighter or different work duty from Cooper Tire. Indeed, Cooper Tire had a statutory duty to provide him with suitable work. Ark. Code Ann. § 11-9-526. But because Walker continued to work, Cooper had no need to make such an offer. Walker accepted a termination agreement and voluntarily gave up his job. His refusal to continue working disqualified him from benefits.[1] This case is also distinguishable from *Barnette v. Allen Canning Co.*, cited by the majority. 49 Ark. App. 61, 896 S.W.2d 444 (1995). There, Barnette was unable to work in any capacity at the canning company and the employer failed to offer her suitable work. Our case is different because at no time before he signed the voluntary termination agreement did Walker become unable to perform his normal light-duty work.

A reasonable person, considering Walker's continuing to work, the medical records, the language of the agreement, and Walker's testimony, could have found that he refused the work at Cooper Tire, not due to his knee pain, but because he was offered a voluntary termination package. Walker would not receive TTD benefits if he had taken an early retirement instead of seeking suitable work at Cooper Tire. I see the same logic at work here. By reversing this case, the majority eschews the standard of review, and gives Walker a double-reward: a voluntary termination package plus TTD benefits even though he refused to work at Cooper Tire.

[1] Ark. Code Ann. § 11-9-526 states that "[if] any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal, unless . . . the refusal is justified."

Marvin Earl GOODSELL *v.* STATE of Arkansas

CA CR 08-115 289 S.W.3d 534

Court of Appeals of Arkansas
Opinion delivered December 17, 2008

Lynn Frank Plemmons, for appellant.

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

D.P. MARSHALL JR., Judge. A Faulkner County jury convicted Marvin Goodsell of four counts of second-degree sexual assault. The victims were Goodsell's two stepdaughters. He appeals, challenging the sufficiency of the evidence to support his convictions and an evidentiary ruling. We address Goodsell's sufficiency challenge first. *Standridge v. State*, 357 Ark. 105, 112, 161 S.W.3d 815, 818 (2004). He argues that the State failed to satisfy the corpus-delicti requirement with other proof that the assaults occurred. Viewing the evidence in the light most favorable to the State, we agree. *Davis v. State*, 350 Ark. 22, 30, 86 S.W.3d 872, 877-78 (2002). We therefore reverse and dismiss Goodsell's convictions. This disposition moots the alleged evidentiary error.

Goodsell confessed to police officers that he sexually assaulted both of his stepdaughters. He then testified at trial that he did not commit the crimes. Under Arkansas Code Annotated § 16-89-111(d) (Repl. 2005), "[a] confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed." This other proof need not have been sufficient to convict Goodsell. *Misenheimer v. State*, 73 Ark. 407, 411, 84 S.W. 494, 495 (1904). The requirement does not mandate that the State establish any further connection between Goodsell and the crimes. *Barnes v. State*, 346 Ark. 91, 98, 55 S.W.3d 271, 276 (2001). Independent of the confession, the State had to prove only (1) the existence of an injury or harm constituting the crime and (2) that the injury was caused by someone's criminal activity. *Ferrell v. State*, 325 Ark. 455, 460, 929 S.W.2d 697, 701 (1996). We must therefore determine whether, setting aside Goodsell's out-of-court confession, the evidence demonstrates that someone sexually assaulted his two stepdaughters. *Barnes*, 346 Ark. at 98, 55 S.W.3d at 276.

As the other proof, the State points to testimony from the two victims, a police lieutenant, and the girls' mother. First, the stepdaughters. Both girls gave statements to police accusing Goodsell of sexually assaulting them. But each girl recanted the

accusations before trial. Goodsell moved to exclude the girls' prior inconsistent statements. The circuit court ruled unequivocally that the girls' out-of-court statements about the assaults would be permitted only as rebuttal evidence on their credibility if they testified at trial contrary to their statements. At trial, both girls denied any abuse, and the circuit court then admitted their prior statements to impeach their testimony. But, as the circuit court instructed the jury, those statements were to be considered "for the purpose of judging the credibility of the witness, but may not be considered . . . as evidence of the truth of the matter set forth in that statement." The girls' accusations to police, therefore, are not other proof of the assaults.

Next, Lieutenant Matt Rice. He took Goodsell's recorded confession. At trial, the prosecutor asked Rice if Goodsell made any hand gestures during the police interview. Rice answered, "Yes. At the time he told me that he put his fingers in her vagina, he held up, I believe, his right hand, — his right hand and his index finger and middle finger when he was telling me about putting his fingers in their vagina." Rice's statement comes straight from Goodsell's confession, which may not weigh in the corpus-delicti analysis. *Barnes*, 346 Ark. at 98, 55 S.W.3d at 276 (2001). And Goodsell's hand gesture, adrift from the accompanying confession, is not evidence that a crime occurred.

We are left with testimony from Leslie Goodsell, the victims' mother. At trial, she twice mentioned the details of the girls' accusations. First, Mrs. Goodsell testified that the girls' youth counselors came to her with "concerns . . . that my husband had been sexually molesting my oldest daughter." The youth counselors did not testify at trial. And Mrs. Goodsell did not testify that the counselors actually observed the assaults or knew for certain that they had occurred. A concern by someone who did not testify at trial is simply insufficient other proof that someone sexually assaulted the girls. Second, Mrs. Goodsell acknowledged that she was aware that her older daughter had told the State Police "that [Mr. Goodsell] had been fondling her." But again, the daughter's prior statement was hearsay that the jury could not consider as substantive evidence.

Arguing for affirmance, the State cites *Hinzman v. State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996) for the proposition that hearsay statements, when admitted, are sufficient to corroborate a confession. *Hinzman* rests on *Johnson v. State*, 298 Ark. 617, 770

S.W.2d 128 (1989). The foundational case — *Johnson* — is distinguishable. There, the victim's prior statement was admitted pursuant to a hearsay exception, Ark. R. Evid. 803(25), and was evidence of the truth of the matter asserted. 298 Ark. at 620-21, 770 S.W.2d at 130. Thus the victim's out-of-court accusation provided sufficient other proof to corroborate Johnson's extrajudicial confession. *Johnson*, 298 Ark. at 620-22, 770 S.W.2d at 130-31.

At first blush, *Hinzman* supports the State's contention that the hearsay testimony from the witnesses here — especially the victims' mother — corroborated Goodsell's confession. For two reasons, however, we are persuaded that *Hinzman* does not control this case. First, *Hinzman* cites and applies *Johnson*, while not purporting to extend the supreme court's precedent. And *Johnson* presented different circumstances: the hearsay statement there was admitted into evidence for its truth under an exception to the hearsay rule. 298 Ark. at 620-21, 770 S.W.2d at 130. Second, *Hinzman* focuses on another issue — how the State impeached the victim with her prior statement. 53 Ark. App. at 260, 922 S.W.2d at 728. That was the "primary thrust of [the] appeal," and the basis for reversal. 53 Ark. App. at 260, 264, 922 S.W.2d at 728, 730. *Hinzman* does not discuss or address the deeper point presented here: the victims' recanted statements, which the circuit court excluded, infected the related testimony of the other witnesses; and the challenged testimony about the victims' statements was not admitted for its truth, but rather was subject to the court's proper limiting instruction about the evidentiary value of the victims' statements.

In sum, the State failed to carry its burden of offering other proof that Goodsell committed these crimes. We must therefore reverse and dismiss Goodsell's convictions. Though precedent binds us to follow the corpus-delicti rule, we question the necessity of this stringent corroboration requirement. We recognize the reason behind the rule — to prevent convictions based solely on coerced confessions. But "the rule is a vestige of a time when brutal methods were commonly used to extract confessions, sometimes to crimes that had not been committed." *U.S. v. Kerley*, 838 F.2d 932, 939 (7th Cir. 1988) (quotation omitted). Some jurisdictions, including the federal system, have done away with the rule, requiring instead that there "be substantial independent evidence which would tend to establish the trustworthiness of the state-

ment." 838 F.2d at 940. If change is to come to Arkansas law on this issue, however, then either the General Assembly must amend Ark. Code Ann. § 16-89-111(d) or our supreme court must reinterpret the other-proof requirement.

ROBBINS and VAUGHT, JJ., agree.

Evender E. "Buddy" JONES, Administrator of the Estate of Michael Evender Jones, Deceased *v.* Jeffery E. CURRENS and M.G. Littlejohn

CA 08-136 289 S.W.3d 506

Court of Appeals of Arkansas
Opinion delivered December 17, 2008

Gibson Law Office, by: *Chuck Gibson*, for appellant.

Wright, Lindsey & Jennings, LLP, by: *Jerry J. Sallings* and *Gary D. Marts, Jr.*, for appellees.

D.P. MARSHALL JR., Judge. This case stems from an accident involving a tractor-trailer driven by Jeffery Currens and a pick-up truck driven by Michael Jones. The wreck occurred in a curve of State Highway 165 near Dumas around 8:00 one morning. Jones was killed. The administrator of his estate brought this case against Currens and M.G. Littlejohn, who owned the tractor-trailer and employed Currens.

How the accident happened was much disputed. As the circuit court put it, the case "boils down to who was on the proper side of the road." The physical evidence, everyone agreed, established the vehicles' point of impact on the shoulder of Jones's lane. Jones's theory of the case was that Currens, impaired after a night of partying and drugs, mishandled the curve and caused the collision. Currens and Littlejohn's theory was that Jones's inattention, caused in part by drug use, led to the wreck. They argued that Jones's vehicle strayed into Currens's lane in the curve, and then both vehicles moved into Jones's lane trying to avoid one another

and collided. Accident reconstruction experts testified for both sides. After two days of trial, the jury returned a nine-person verdict for Currens and Littlejohn. The signing jurors wrote "fifty/fifty shared liability" on the verdict form. Jones appeals, seeking a new trial. He contends that the circuit court abused its discretion on four evidentiary issues. Currens and Littlejohn filed, but abandoned, a cross-appeal.

We are persuaded by Jones's argument that the circuit court abused its discretion, and prejudiced Jones's case, by admitting hearsay testimony from State Trooper Kelvin Fells about Currens's statements to him at the accident scene. The precise legal issue is whether an adequate foundation existed for the court's allowing this hearsay under the excited-utterance exception. It did not.

I.

Trooper Fells investigated the collision. After brief testimony from Jones's employer, Jones called Fells as his second witness in his case-in-chief. Fells arrived at the scene approximately twenty minutes after the wreck. He testified that he spoke with Currens as soon as he got there. He also gave Currens a blank statement to fill out. Fells spent about ninety minutes at the scene studying the physical evidence and gathering information. He continued his investigation by interviewing some witnesses later.

In his written statement at the scene to Trooper Fells, Currens wrote:

> I was proceeding south on 165 when north bound lane driver came in to my lane in curve. The driver looked up and pulled to the left to avoid hitting me and I pulled to the left to avoid hitting him and head on collision happen.

The time on the copy of Currens's statement in the record is not entirely legible. Jones reads it as "9:[5]0." Currens and Littlejohn take issue with that reading in passing, but the statement's particular time was not developed below.

Fells is certified in accident reconstruction. And he prepared a diagram showing Jones's vehicle straying into Currens's lane and then recrossing the center line into his (Jones's) own lane to the point of impact. Neither the diagram nor Currens's statement about what happened were mentioned during Jones's direct examination of Trooper Fells.

During cross-examination, Currens sought to introduce the Trooper's diagram. Jones objected. Before trial, he had attacked the diagram's hearsay basis in Currens's statement. The circuit court sustained the objection. The court then admitted a redacted version of the diagram, which does not show Jones's vehicle ever leaving his own lane. Jones argues now that the court abused its discretion by admitting the diagram because of its hearsay roots in Currens's statement. We disagree. The circuit court ruled for Jones on this issue, thus the redacted version of the Trooper's diagram. No abuse of discretion occurred in admitting that version of the diagram, which was silent about Jones's possible lane change and thus worked no prejudice. *Turner v. N.W. Ark. Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 100-04, 133 S.W.3d 417, 421-23 (2003).

When it came to Currens's statement to Trooper Fells at the scene, however, the circuit court handled the evidentiary issue differently. Currens sought to explore this issue on cross-examination too. Jones objected, citing the hearsay nature of Currens's statement. Currens responded that it was admissible under the excited-utterance exception. Another witness had testified on deposition that Currens was "distraught" immediately after the accident. (This witness gave the same testimony later in the trial.) Currens knew Jones. And Currens's statement was made at the accident scene, in the presence of the wrecked vehicles and Jones's body.

Trooper Fells's testimony about Currens's mental and emotional state was mixed. We quote this testimony in detail. Currens's lawyer has the Trooper on cross-examination.

> Q. When you saw Mr. Currens at the scene and you got the statement from him, was he excited? What was his state of mind?
>
> A. Shock. Like he was in shock. I mean he was sad about the situation.
>
> Q. Was he distraught, hysterical?
>
> A. No, he was — He talked to me calm. It was his facial expression. Several times he stated to me that "that was my friend." He was sad at the situation.
>
> Q. Did he seem like he was at least under the influence of —
>
> [Jones's Counsel]: I object, Your Honor.

The Court: On what basis, Mr. Gibson?

[Jones's Counsel]: He's already testified about alcohol and further stated he wasn't qualified to detect drug intoxication.

The Court: Well, he's asking a broader question. I'm going to let him go. He's got him on cross. He wants to know if he appeared under the influence of anything.

[Currens's Counsel]: Right. Thank you.

Q. Did he seem to be excited or under the influence of emotion, I guess is my question?

A. No, sir.

Q. Was he calm, sedate or —

A. I believe, like I said, he wasn't — He was calm and talked to me but, you know, he was just sad. He was sad and kind of a bit nervous. He was nervous.

Q. I believe you said earlier that he was stunned, I believe is what you said, or not?

A. He was shaken up.

When did Currens make his statement to Trooper Fells about Jones being in the wrong lane? The record before the circuit court, and us, is murky on this point. Currens could have told the Trooper what happened when Fells arrived and they spoke, some twenty minutes after the accident. Or Currens's explanation could have come from the statement that he wrote for Trooper Fells, at least an hour after the accident.

Based on this record, the circuit court overruled Jones's hearsay objection and allowed Trooper Fells's testimony about Currens's statement. The court's ruling was "I'm going to let it in under excited utterance. Present-sense impression also. Go ahead." Fells then testified:

> He told me that he was, you know, headed toward Dumas. And, of course, Mr. Jones was coming in the opposite direction. He told me that he knew that it was Mr. Jones's truck but all of a sudden Mr. Jones's vehicle was in his lane. And about that time both of them went in the same direction, collision happened there on the shoulder.

II.

All the parties acknowledge the obvious: this was hearsay. The circuit court allowed Trooper Fells to testify about Currens's out-of-court statement as evidence that Jones caused the accident by entering Currens's lane in the curve. Currens does not defend the circuit court's present-sense-impression alternative basis. Indeed, Currens's statement, even if made when Fells arrived at the scene, was too far removed from the wreck to qualify under this exception to the hearsay rule. Currens did not make his statement "while [he] was perceiving the event or condition, or immediately thereafter." Ark. R. Evid. 803(1); *see also Brown v. State*, 320 Ark. 201, 202-03, 895 S.W.2d 909, 910-11 (1995). Thus we come to the circuit court's other ground, and the core issue in the case: the excited-utterance exception.

The governing Arkansas Rule of Evidence 803(2) says:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> (2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The wreck and Jones's death were no doubt startling events. The question, then, is whether Currens was still under the stress of those events when he explained what had happened.

"The theory of the excited[-]utterance exception is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." *Luedemann v. Wade*, 323 Ark. 161, 164, 913 S.W.2d 773, 775 (1996); *see generally* 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1745-1750 (Chadbourn rev. 1976). In ruling on this exception, the circuit court should consider all the relevant circumstances: the lapse of time between the event and the statement; the declarant's age, mental condition, and physical condition; the characteristics of the event; and the statement's subject matter. *Fudge v. State*, 341 Ark. 759, 768-69, 20 S.W.3d 315, 320 (2000). The record must show that "the declarant's condition at the time was such that the

statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation." *Bell v. State*, 371 Ark. 375, 386-87, 266 S.W.3d 696, 706 (2007).

The statement need not be contemporaneous with the provoking event. But the statement must be close enough in time that it may "reasonably be considered a product of the stress of the accident, rather than of intervening reflection or deliberation." *Luedemann*, 323 Ark. at 164, 913 S.W.2d at 775. The trend in the law is toward relaxing the time element. *E.g.*, *Fudge*, 341 Ark. at 769, 20 S.W.3d at 320-21. Nonetheless, "[a]n excited utterance must have been made before there was time to contrive and misrepresent; that is, it must have been made before reflective and deliberative senses took over." *Luedemann*, 323 Ark. at 165, 913 S.W.2d at 775.

The circuit court here abused its discretion because an insufficient foundation existed for applying the exception on this record. First, the timing. Though not dispositive, the timing of Currens's statement to Trooper Fells is important. To make a fully informed judgment call, the circuit court needed to know whether Trooper Fells was about to recite what Currens told him orally when the Trooper got to the scene soon after the accident or what the Trooper learned from Currens's written statement, which was completed some time later. The timing will illuminate whether Currens had the opportunity to reflect about the accident before explaining what happened. *Ibid.*

Second, Currens's mental state. Fells said that Currens was not excited or under emotion's influence; yet he also said that Currens was in shock, saddened about Jones's death, calm but a bit nervous, and shaken up. Taken as a whole, this testimony was too murky to justify applying the exception. *Compare Bell*, 371 Ark. at 386-87, 266 S.W.3d at 706. It must be clarified on retrial for the circuit court to have a clear picture of Currens's mental state.

Third, spontaneity. The record contains no indication that Currens's statement was spontaneous. He may have volunteered his explanation to Trooper Fells without prompting. Or Currens may have been responding to pointed questions. The circuit court needed to know this foundational information. And the record should be clarified on this important aspect of the analysis too. *Bell*, 371 Ark. at 386-87, 266 S.W.3d at 706; *compare Rodriguez v. State*, 372 Ark. 335, 336-38, 276 S.W.3d 208, 210-11 (2008).

In sum, the circuit court needed both more information and clearer information to justify admitting Trooper Fells's hearsay testimony as an excited utterance. Ruling in the absence of this information was an abuse of discretion. Just as a court abuses its discretion by considering improper factors, failing to consider proper factors or important information likewise shows discretion abused. *Throneberry v. State*, 102 Ark. App. 17, 18, 279 S.W.3d 489, 490 (2008).

III.

Currens and Littlejohn's fall-back position is that, even if error occurred here, it was harmless. We disagree for several reasons.

Unlike in *Luedemann*, for example, Trooper Fells's hearsay was not duplicated by the same or similar testimony from the declarant. 323 Ark. at 165, 913 S.W.2d at 775-76. Currens testified in Jones's case in chief about his employment. He did not testify, however, about the accident or what he had told Trooper Fells. Currens's counsel tried to cover this ground on cross-examination. Jones objected. The circuit court confined the cross to the scope of direct, and said that of course Currens could be recalled by the defense to tell his story. He was not recalled.

Currens and Littlejohn rely on *Gatlin v. State*, 320 Ark. 120, 895 S.W.2d 526 (1995), and two Eighth Circuit cases, for the proposition that Currens's testimony at trial eliminates any prejudice. Because Jones could have examined Currens about his statements to Trooper Fells, the argument goes, the hearsay error is harmless.

Gatlin, however, is distinguishable. First, the victim in that case testified about being raped on occasions other than the one described in the hearsay testimony. 320 Ark. at 125-26, 895 S.W.2d at 530. This was the first ground of the *Gatlin* court's harmless-error analysis, and it was sufficient to affirm on the point. *Ibid.* As a second ground, the court emphasized that, during the victim's testimony about the rapes, the defendant had the opportunity to cross-examine her about the challenged hearsay but "chose to forego his opportunity to pursue the issue . . . ." 320 Ark. at 126, 895 S.W.2d at 530. Here, Jones did not have the same kind of opportunity. Each party is the master of his case, and Jones had no obligation to examine Currens about his version of the accident in Jones's case in chief. If Currens had testified about his

statements to Trooper Fells at any time during the trial, and Jones had chosen to forego cross-examination, then *Gatlin* would control. In the circumstances presented, however, it does not.

As to the federal cases — exemplified by *U.S. v. Bohr*, 581 F.2d 1294 (8th Cir. 1978) — we, of course, are not bound by them. Whether the hearsay error here was harmless or prejudicial is a question of Arkansas law. Read narrowly, *Bohr* is like *Gatlin*: the declarant also testified about the subject matter of the challenged hearsay, and the appealing party opted not to cross-examine. *Bohr*, 581 F.2d at 1304. Read broadly, *Bohr* would stand for the proposition that, no matter the circumstances presented in the case as a whole, testimony by the declarant on any matter always cures any prejudice from challenged hearsay because the testimony opens the door for cross-examination on the hearsay. We are not persuaded that this kind of blanket rule is either correct or sound.

Finally, Currens and Littlejohn argue that the hearsay was harmless because it was cumulative. They point to the testimony of another witness, one Steven Ringo, who was driving behind Currens when the collision occurred. We conclude, however, that Trooper Fells's hearsay account of the accident from Currens did not duplicate Ringo's testimony. Ringo's evidence was all over the place. His statement at the scene echoed Currens's story: Jones was in Currens's lane. But Ringo later recanted, saying that he never actually saw Jones in the wrong lane and had assumed that fact. At trial, Ringo gave both versions of his story. He shifted back and forth, depending on which lawyer was asking the questions. The crisp and unchanging version of events according to Currens, as related by Trooper Fells, was not duplicated by Ringo.

Trooper Fells's testimony was singular. And it addressed the central disputed fact in the case — whether Jones ever entered Currens's lane. As the circuit court repeatedly and correctly recognized when dealing with the diagram, Fells's testimony carried particular weight because he is an Arkansas State Trooper. The court put it well: "Common sense tells you what kind of weight that the jury gives that." The court therefore refused to allow Trooper Fells to testify about his hearsay-based causation opinion that Jones was in the wrong lane and refused to admit the Trooper's unredacted diagram embodying this opinion. Currens's statement about how the accident happened, however, got a boost from the witness who delivered it. The jury heard the statement, not from Currens's mouth, but from the Trooper's. The speaker

makes a difference. This case must be retried because the hearsay error prejudiced Jones. *Turner*, 84 Ark. App. at 100-04, 133 S.W.3d at 421-23.

IV.

Jones presses three other points for reversal. We do not reach two of them. He asserts error in the circuit court's refusal to grant a new trial based on newly discovered evidence: the results from a post-trial retest of Jones's blood, results which showed no cocaine. Our grant of a new trial moots this point. Jones also argues error, for various reasons, in the circuit court's admission of the initial drug test. We do not decide this issue because it will arise on retrial on a different record. The circuit court must revisit this issue in light of the record available at the new trial, including the retest of Jones's blood.

Jones also contends that the circuit court erred by allowing Currens and Littlejohn's accident-reconstruction expert "to opine that talking on a cell phone caused the wreck." Though the issue is close, we see no abuse of discretion. The expert reviewed witness statements, depositions, photographs, and took measurements at the scene. He concluded that Jones missed the curve. Jones objected to the expert's attempted use of cell phone records — which had been admitted without objection — to explain Jones's inattentiveness. The circuit court sustained the objection. On cross-examination by Jones, the expert stuck to his inattentiveness conclusion. He also testified that he made no assumption about whether Jones was on the phone or not at the time of the wreck. But, the expert said, the phone call may have caused inattention. Taking this exchange as a whole, we conclude that the circuit court did not abuse its discretion in limiting the expert's direct testimony about the cell phone records and allowing Jones to attack this issue on cross.

Reversed and remanded.

BIRD and BAKER, JJ., agree.

Amanda Gail HOLT *v.* STATE of Arkansas

CA CR 08-170 290 S.W.3d 20

Court of Appeals of Arkansas
Opinion delivered December 31, 2008

William R. Simpson, Jr., Public Defender, *Kent C. Krause*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, and *Misty Steele*, Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar, for appellant.

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

PER CURIAM. Amanda Gail Holt was charged with manufacture of methamphetamine, possession of drug paraphernalia with intent to manufacture, maintaining a drug premises, and three counts of exposing a child to a chemical substance. After a jury trial, she was convicted of all of the charges and sentenced to consecutive terms of imprisonment totaling fifty-one years. On appeal, she contends that there is no substantial evidence to support any of the findings of guilt and that the trial court erred in denying her motions for directed verdicts of acquittal. We affirm appellant's convictions for possession of paraphernalia and exposing children to a chemical substance. We reverse and dismiss her convictions for manufacture of methamphetamine and maintaining a drug premises.

Chief Judge Pittman's opinion below presents the majority opinion on the affirmance of appellant's convictions for possession of paraphernalia and exposing the children to a chemical substance. Judge Hunt's opinion contains the majority opinion on the reversal of the convictions for manufacture of methamphetamine and maintaining a drug premises.

Amanda Gail HOLT *v.* STATE of Arkansas

CA CR 08-170 290 S.W.3d 21

Court of Appeals of Arkansas
Opinion delivered December 31, 2008

[redacted]

William R. Simpson, Jr., Public Defender, *Kent C. Krause*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, and *Misty Steele*, Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar, for appellant.

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

JOHN MAUZY PITTMAN, Chief Judge. We affirm appellant's convictions for possession of drug paraphernalia with intent to manufacture and for three counts of exposing a child to a chemical substance or methamphetamine.

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture methamphetamine. Ark. Code Ann. § 5-64-403(c)(5)(A) (Supp. 2007). It is likewise unlawful for any adult, with the intent to manufacture methamphet-

amine, to knowingly cause or permit a child under eighteen years of age to be exposed to, ingest, inhale, or have any contact with a chemical substance or methamphetamine. Ark. Code Ann. § 5-27-230(b)(1) (Repl. 2006). For purposes of this statute, "chemical substance" means a substance intended to be used as a precursor in the manufacture of methamphetamine, or any other chemical intended to be used in the manufacture of methamphetamine. Ark. Code Ann. § 5-27-230(a)(1)(A) (Repl. 2006).

Appellant argues that the evidence is insufficient to support these convictions. Our standard of review for a sufficiency challenge is as follows:

> We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. This court has repeatedly held that 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. We affirm a conviction if substantial evidence exists to support it. Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture.
>
> Circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. Whether the evidence excludes every other hypothesis is left to the jury to decide. The credibility of witnesses is an issue for the jury and not the court. The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence.

Cluck v. State, 365 Ark. 166, 170-71, 226 S.W.3d 780, 783-84 (2006) (internal citations omitted).

Appellant expressly concedes on appeal that there is substantial evidence that methamphetamine was manufactured in the residence at 4108 Vinson Road, a small mobile home, on September 21, 2006; that she was present in the residence when the methamphetamine was being manufactured; and that she knew that methamphetamine was being manufactured. There was, in addition, substantial evidence that appellant had been staying at the residence for a few weeks. On September 21, 2006, a police officer responded to a report that three small children were playing in the

road in front of the residence. He observed appellant's three children — ages four, three, and not yet two — playing outside when he arrived. They were only semi-dressed and smelled of methamphetamine. When the officer approached the residence, he detected the strong chemical odor associated with methamphetamine manufacture emanating from within and permeating the air around the residence. The officer knocked on the door, which was answered by Michael Hogue. Hogue came out on the front porch and closed the door. The officer asked to speak to appellant, and Hogue went back inside the residence to get her. The officer heard movement coming from the bedroom to the right (the only room in the residence with a bed), and appellant came to the door. Asked if she knew where her children were, appellant said that she did not know they were up yet because she had been asleep.

The officer, concerned about the chemical odor, obtained Hogue's permission to search the residence. The residence was filthy and contained only one bed. The bed was located in the bedroom to the right, where officers discovered a functioning methamphetamine lab with a reaction in process. Items found in the bedroom included a razor blade and plastic bag on the dresser, hypodermic needles, tubing, coffee filters, a glass smoking pipe, a salt container stained with iodine as commonly found in methamphetamine labs, a large cardboard box containing boxes of matches, a pair of scissors, a gas torch, a hot plate that was warm to the touch, and a black satchel containing hydrochloric acid generator together with bottles of liquid in which the pill-soak portion of the manufacturing process was then taking place. Many of these items were in plain view. The satchel was found under the headboard of the bed after the mattresses were removed. Articles of children's clothing were found in a dresser drawer that also contained drug paraphernalia. Appellant's children were the only children residing in the residence. The children were decontaminated at a hospital, where they were diagnosed as neglected because of exposure to drug use and manufacturing. Hair follicle tests showed that all three of the children tested positive for exposure to methamphetamine and that the youngest child appeared to have actually ingested cocaine as well.

[redacted] Appellant argues that, because she was not the sole occupant or owner of the residence, the evidence is insufficient to show that she possessed the drug paraphernalia. We do not agree.

> In order to prove possession, it is not necessary to prove literal physical possession of contraband. *See Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000). Contraband is deemed to be constructively possessed if the location of the contraband was under the dominion and control of the accused. *See Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998). Although constructive possession may be implied when contraband is in the joint control of the accused and another person, joint occupancy, standing alone, is not sufficient to establish possession or joint possession. *Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002). The State is also required to establish that (1) the accused exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband. *Id.*

Loy v. State, 88 Ark. App. 91, 101, 195 S.W.3d 370, 374-75 (2004). Here, appellant admits that she knew that the manufacture of methamphetamine was being carried out at the residence. We also think it significant that appellant stated that she had been sleeping immediately before police appeared. However, the only place suitable for sleeping in the trailer was a bedroom where methamphetamine was being manufactured, and the bed was covered with and surrounded by substances and paraphernalia used in the manufacture of methamphetamine. A jury is not required to abandon common sense in evaluating the ordinary affairs of life, and it may infer a defendant's guilt from such improbable explanations of incriminating conduct. *See Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). Given that many of the items were in plain view or found with her children's clothing, and that methamphetamine was actually being manufactured at the time of her arrest, we hold that the evidence is sufficient to show that she knew that the items were drug paraphernalia and that she exercised care, control, and management over them. On this basis, we affirm appellant's conviction of possession of drug paraphernalia with intent to manufacture.

■ We also hold that the evidence supports appellant's convictions of knowingly permitting a child to be exposed to methamphetamine. Appellant's admission that she knew methamphetamine was being manufactured, together with the evidence already recited, is sufficient to prove the element of knowing exposure to methamphetamine. However, pursuant to Ark. Code Ann. § 5-27-230(b)(1) (Repl. 2006), the State must also prove that appellant did so with the intent to manufacture methamphetamine. We hold that the evidence is sufficient to support the

finding that appellant intended to manufacture methamphetamine. We have held, *supra*, that substantial evidence supports appellant's conviction of possession of drug paraphernalia with intent to manufacture. Furthermore, laboratory analysis of the paraphernalia verified the presence of both pseudoephedrine (a methamphetamine precursor) and actual methamphetamine in glass vials found in the residence that were used in the manufacturing process. Pursuant to Ark. Code Ann. § 5-64-401(g)(1) (Supp. 2007), the presence of these substances on the paraphernalia gives rise to a presumption that the possessor (in this case, appellant) has engaged in conduct constituting a substantial step in the manufacture of methamphetamine. We cannot say that the fact-finder was, on this record, required to find that appellant had rebutted the presumption by submission of evidence sufficient to create a reasonable doubt that she attempted to manufacture methamphetamine. *See* Ark. Code Ann. § 5-64-401(g)(2) (Supp. 2007).

Affirmed in part.

GLADWIN, ROBBINS, VAUGHT, and HEFFLEY, JJ., agree.

GLADWIN, J., concurs.

HART, MARSHALL, BAKER, and HUNT, JJ., dissent.

EUGENE HUNT, Judge. This appeal by Amanda Gail Holt (Appellant), is from a finding of guilt by a jury of manufacturing methamphetamine, possession of drug paraphernalia with intent to manufacture methamphetamine, maintaining a drug premises, and exposing a child to a chemical substance. Appellant received 120 months for manufacturing methamphetamine; 60 months for possession of drug paraphernalia with intent to manufacture methamphetamine; 72 months for maintaining a drug premises; and 120 months each on three counts of exposing a child to a chemical substance or methamphetamine. Appellant contends that the evidence was insufficient to convict. We agree that the evidence was insufficient to support appellant's convictions for the charges of manufacturing methamphetamine and maintaining a drug premises. Appellant's convictions for those charges are reversed and dismissed.[1]

On September 21, 2006, officers of the Pulaski County Sheriff's Office received a call about three small children playing in

[1] This opinion will only address the two charges against appellant that are being reversed and dismissed on appeal.

the road unattended at 4108 Vinson Road. Deputy Randy Howard was dispatched to answer the call. Upon Howard's arrival, the children, ages one, three, and four, were found behind one of the trailers at that location. The youngest child had "no clothes on." The front door of the trailer was open and Howard was able to make contact with appellant and the trailer's owner, Michael Hogue. Howard notice a distinct chemical odor of what he believed was methamphetamine coming from inside the trailer. Officers from the narcotics division were called to investigate. The officers took a reading and confirmed the presence of phosphine gas. Hogue's parole officer was notified and once the parole officer arrived at the trailer, a search ensued. Several items connected to the manufacture of methamphetamine were recovered from the master bedroom that Hogue occupied. Appellant and Hogue were arrested.

Appellant stood trial on November 11, 2007. Randy Howard of the Pulaski county Sheriff's Office testified that he answered a call at 4108 Vinson Road on September 21, 2006, and that he located three small children playing outside the trailer at that address unattended. He then went to the front door, which was open, and knocked on the side of the trailer. Hogue came from the master bedroom and answered the door. According to Howard, he could smell the strong chemical odor of methamphetamine before he stepped on the porch. Howard asked to speak with the children's mother and Hogue went to get her. Howard stated that he was not sure where appellant came from within the trailer. Appellant told Howard that she did not know that her children were up yet and that she had been asleep. Howard told appellant and Hogue that he was concerned about the children being in the trailer with the strong chemical odor present. Howard testified that he asked the children to come out of the trailer and he then contacted his sergeant. Howard further testified that he then received permission from Hogue to search the outside of the trailer. The same chemical odor that he smelled initially was present around the back of the trailer where the underpinning was missing. Howard stated that due to the strong chemical odor, he could not stand to be inside the trailer long. Howard testified that there was another bedroom at the other end of the trailer but there was no place for anyone to sleep. Howard was shown a photograph of the trailer and he acknowledged that a mattress was seen leaning against the living room wall. Howard stated on cross-examination that he asked appellant for permission to search and was told that

she had only lived there for a couple of weeks and that "it was not her place to give [him] consent."

Kathleen Brewer, of the narcotics division, came to the trailer and took a reading to confirm the presence of a methamphetamine laboratory. Brewer noticed the distinct smell of methamphetamine upon arrival. Brewer conducted a reading near the back door of the trailer, which indicated the presence of phosphine gas. Brewer stated that this reading was significant because phosphine gas is present whenever red phosphorus is used to manufacture methamphetamine. Brewer further stated that phosphine gas is extremely dangerous in very large quantities and that it attaches itself to anything that is wet or has water in it. According to Brewer, the gas destroys the wet tissue of the mucus membranes found in the mouth, nose, lungs, and trachea. Brewer stated that she was present for the search of the trailer and that all evidence of a methamphetamine laboratory was found in the master bedroom. According to Brewer, Hogue claimed the bedroom from which the items were seized.

Chris Holmes, of the narcotics division, was with the parole officer when the trailer was searched. Holmes stated that a bedroom was located to the right of the front door, there was a washroom to th e left of the front door, and the kitchen was to the left of the washroom. The living room was located on the other side of the kitchen and another bedroom was located adjacent to the living room. Holmes smelled a strong chemical odor when he first arrived at the trailer. The master bedroom was searched first. A stained salt container, a gas torch, a razor blade, and a small plastic bag were located on the dresser in the master bedroom. Holmes stated that the items caught his eye because salt containers are usually stained from iodine in methamphetamine laboratories, razor blades are usually used to chop the narcotics, and small plastic bags are used to package narcotics. Hypodermic needles, a glass smoking device, coffee filters, and a spoon were also found in a dresser drawer in the master bedroom. Children's clothing was in one of the drawers, which also contained a hypodermic needle. According to Holmes, coffee filters are used in a methamphetamine lab and the other items found were consistent with drug use. A hot plate, which was still warm, was located on the side of the dresser. The hot plate caught Holmes's attention because hot plates are used as heating elements during the cooking stages. A large box containing match boxes and a pair of scissors were found in the closet of the master bedroom. A piece of tubing was also found

lying on the closet floor. Homes testified that tubes are used to transfer gases and other chemicals during the various stages of manufacturing methamphetamine. A camp fuel can and a glass jar were found wrapped in a blanket on the bed. Holmes stated that camp fuel is used for a number of things in a methamphetamine lab and that glass jars are used to store chemicals and chemical components. A black leather-like satchel was found beneath the edge of the headboard. According to Holmes, the satchel contained several items, including a liquor bottle containing a bi-layer liquid; two plastic bottles, consistent with an HCL generator, which contained a white granular substance; a hydrogen peroxide bottle; a bottle containing a blue cloudy liquid, which was consistent with a pill soak; two bottles containing a blue cloudy substance; a red plastic bottle; a bottle of drain opener; and bottle caps with tubing and electrical tape. Holmes stated that the items in the satchel were consistent with a methamphetamine lab. Holmes testified that windows had to be opened so that the trailer could air out. The items were subsequently taken to the sheriff's office where they were sampled. Holmes stated that fingerprints were not taken from the items because there were persons found inside the trailer and the "meth lab" was not abandoned. Holmes also stated that he did not witness the manufacturing of methamphetamine.

Norman Kempler of the Arkansas Crime Lab was assigned to test the items found in Hogues' trailer. Kempler stated that the top layer of the bi-layer liquid contained methamphetamine and that the bottom layer was a very strong base. According to Kempler, "the only process after that bi-layer liquid [is formed] is to make meth[amphetamine] into the form that you can actually use it." The cloudy blue liquid contained pseudoephedrine. Kempler stated that the sample was representative of a pill soak. The methanol rinse of the tape contained methamphetamine. The methanol rinse of the syringes contained methamphetamine. The glass smoking device contained methamphetamine. However, the methanol rinse of the plastic tube only showed the presence of iodine. According to Kempler, when methamphetamine is manufactured inside a residence, residual contamination remains. This is true because methamphetamine will spread throughout the structure and contaminate all surfaces.

Appellant unsuccessfully moved for directed verdict on all charges at the conclusion of the State's case. Appellant did not testify. Appellant renewed her motions for directed verdict at the

conclusion of all the evidence. Appellant's motions were denied. The jury found appellant guilty of all charges and sentenced her to a total of 612 months in the Arkansas Department of Correction. The judgment and commitment order was entered on October 18, 2006. Appellant filed her notice of appeal on November 14, 2006.

Standard of Review

A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Gikonyo v. State*, 102 Ark. App. 223, 283 S.W.3d 631 (2008). The test for such motion is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Id.* The credibility of witnesses is an issue for the fact-finder and not for the appellate court. *Id.* The fact-finder may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Id.*

I. Manufacturing methamphetamine

Appellant was charged with the violation of Arkansas Code Annotated section 5-64-401(a)(1) (Repl. 2005), which provides that it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance, including the manufacturing of a controlled substance, methamphetamine. In order to convict appellant of this charge, the State was required to prove that appellant produced or prepared methamphetamine. *Smith v. State*, 68 Ark. App. 106, 109, 3 S.W.3d 712, 714 (1999). At trial, the State sought to prove that appellant manufacture methamphetamine as a principal or an accomplice. An accomplice shares the same guilt as the principal. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002). The mere presence of appellant cannot be the basis of a finding of guilt. *Hutcheson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005); *Wilson v. State*, 261 Ark. 820, 552 S.W.2d 223 (1977). To convict appellant of manufacturing methamphetamine it must be proven that she exercised control or dominion over the contraband. *Williams v. State*, 94 Ark. App. 440, 236 S.W.3d 519 (2006). Constructive possession may be implied when the contraband is under the joint control of the

defendant and another, but joint occupancy alone is not sufficient to establish possession — the State must prove that the defendant exercised control and dominion over the contraband. *Id.*

Control and knowledge of contraband can be inferred from the circumstances, such as proximity of the contraband to the accused, whether the item is in plain view, and ownership of the property where the contraband is found. *See, e.g.*, *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003) (affirming Cherry's conviction for simultaneous possession of drugs and a firearm, where the gun was found in Cherry's kitchen near items used to manufacture methamphetamine). In *Sweat v. State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988), this court reiterated that joint occupancy, coupled with some other factor linking appellant to the contraband, is sufficient proof of constructive possession.

The evidence revealed that the items of contraband were found in the master bedroom; not in a common area of the trailer. Hogue claimed that the bedroom was his. There was no proof to the contrary. Sheriff Howard testified that he did not know where appellant came from when he asked to see her at the door. None of appellant's personal belongings were found in the master bedroom. There were no fingerprints linking appellant to the contraband. There was also no other evidence showing that appellant actually shared this room with Hogue. Based on these facts, there was no additional evidence linking appellant to the contraband other than her presence. Because we have held that presence alone is insufficient, appellant's conviction for manufacturing methamphetamine must be reversed and dismissed.

Reversed and dismissed in part.

HART, GLADWIN, MARSHALL, and BAKER, JJ., agree.

PITTMAN, C.J., ROBBINS, VAUGHT, and HEFFLEY, JJ., dissent.

II. Maintaining a drug premises

Appellant was charged with the violation of Arkansas Code Annotated section 5-64-401(a)(2) (Repl. 2005), which provides that it is unlawful for any person

> [k]nowingly to keep or maintain any store, shop, warehouse, dwelling, building, or other structure or place or premise that is

> resorted to by a person for the purpose of using or obtaining a controlled substance in violation of this chapter or that is used for keeping a controlled substance in violation of this chapter.

To prove appellant's guilt of maintaining a drug premises, the State was required to prove that she helped to maintain a drug premise used for keeping controlled substances. Ark. Code Ann. § 5-64-402(a)(2) (Supp. 2005); 60 Ark. App. 198, 962 S.W.2d 370 (1998). The State concludes that there is substantial evidence that appellant was actively involved in the manufacture of drugs. However, the State offers no proof that appellant maintained a drug premises.

In order to convict on this evidence the circumstances must be consistent with the guilt of the accused and inconsistent with his innocence, and incapable of explanation on any other reasonable hypothesis than of guilt. When the circumstances are of such a character as to fairly permit an inference consistent with innocence, they cannot be regarded as sufficient to support a conviction. *Ayers v. State*, 247 Ark. 174, 444 S.W.2d 695 (1969).

Appellant argues that there was insufficient evidence that she maintained a drug premises. Examination of the facts shows that appellant did not own the trailer and that she was a mere resident. According to Holmes, appellant indicated that she had bee living there two weeks and that she could not give him permission to search. There was no evidence that appellant paid rent or that any of the utilities were in her name. There were no facts that connected appellant to maintaining a drug premises.

On appeal, the only issue we concern ourselves with is, when the evidence is viewed in the light most favorable to the State, does substantial evidence support the judgment? When the State's case is made of circumstantial evidence, if it leaves the fact-finder to speculation and conjecture, then the evidence is insufficient as a matter of law. *King v. State*, 100 Ark. App. 208, 266 S.W.3d 205 (2007).

Reversed and dismissed in part.

HART, MARSHALL, and BAKER, JJ., agree.

GLADWIN and ROBBINS, JJ., agree in part and dissent in part.

PITTMAN, C.J., and VAUGHT and HEFFLEY, JJ., dissent.

ROBERT J. GLADWIN, Judge, concurring. Although I believe that appellant's conviction for manufacturing a con-

trolled substance is not supported by substantial evidence, I believe the other counts on which the appellant was convicted can be affirmed.

Appellant was charged with possession of drug paraphernalia with the intent to manufacture. It is unlawful for a person to use, or possess with the intent to use, drug paraphernalia to manufacture methamphetamine. Ark. Code Ann. § 5-64-403(b)(5)(A) (Supp. 2007). Under our law, it is clear that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is constructively possessed. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994). Constructive possession can be implied when the contraband is in the joint control of the accused and another. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). Joint occupancy, however, is not sufficient in itself to establish possession or joint possession. *Id.* There must be some additional factor linking the accused to the contraband, and the State must show additional facts and circumstances indicating the accused had knowledge and control of the contraband. *See Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

In *Walley,* the appellant was convicted of possession of drug paraphernalia with intent to manufacture. The jury was presented with evidence of an operational methamphetamine lab in the kitchen of Walley's residence. During a search of the residence, law enforcement agents found numerous items used in the manufacturing of methamphetamine. Walley argued that there was no additional evidence linking him to the contraband. Our supreme court held that the jury could reasonably conclude that Walley knew of the existence of the drugs and drug manufacturing paraphernalia in the kitchen of the residence. The jury did not have to believe Walley's testimony that he did not notice the smell in the house, did not notice the stains in the kitchen, did not notice the black plastic on the windows, and did not know what was in the locked cabinets. *Walley v. State, supra.*

In *Fitting v. State*, 91 Ark. App. 283, 229 S.W.3d 586 (2006), the appellant was also convicted of possession of drug paraphernalia with intent to manufacture. The testimony showed that Fitting stayed periodically at the residence of Eddie McCann. McCann testified that Fitting and a woman were "cleaning up a cook" when the police arrived. A police officer testified that Fitting and a woman were walking toward the living room from the back area

of the house, although he could not say specifically from which room they came. In the house, police found a number of components for a methamphetamine lab. Fitting argued that the State provided no evidence that he was in actual or constructive possession of drug paraphernalia with the intent to manufacture. This court held that the evidence tended to connect Fitting with the offense charged. We stated that, among other factors, the police officer testified that Fitting and the woman were walking to the living room from the back area of the house, thus Fitting was in close proximity to the manufacturing items that were seized.

In our case, Officer Howard testified that the only sound he heard was movement coming from the bedroom where the methamphetamine lab was located. Further, appellant said she had been sleeping, and the only bed in the house was in the bedroom. There was a strong chemical odor coming from the residence. Ms. Holt had lived there for at least two weeks. Additionally, the dresser in the bedroom contained children's clothes and a syringe.

Jurors need not view each fact in isolation but rather may consider the evidence as a whole. *Kelley v. State*, 103 Ark. App. 110, 286 S.W.3d 746 (2008). The jury is entitled to draw any reasonable inference from the circumstantial evidence to the same extent it can from direct evidence. *Id.* Jurors are instructed that they are allowed to draw upon common sense to infer intent from the circumstances. *See DeShayer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006). I believe that this evidence connects the appellant with constructive possession of the working methamphetamine lab.

Appellant next argues that there is insufficient evidence that she kept or maintained a drug premises. She argues that her mere presence alone is insufficient to support the verdict. It is unlawful for a person knowingly to keep or maintain any store, shop, warehouse, dwelling, building or other structure or place or premise that is resorted to by a person for the purpose of using or obtaining a controlled substance, including methamphetamine. Ark. Code Ann. § 5-64-402(a)(2) (Repl. 2005). There is no doubt that appellant resided in a dwelling that was resorted to by persons to obtain methamphetamine. The only question was did appellant "keep or maintain" this dwelling. The terms "keep or maintain" are not defined in the statute, and our supreme court has not interpreted this statute. It is clear that something less than actual ownership is sufficient for a person to keep or maintain a drug premises. *See Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781

(1994); *Sweat v. State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988). Webster's II dictionary defines "keep" as "to remain in a given state: stay." "Maintain" is defined as "to keep an existing state." It is clear that appellant lived in the dwelling and kept it in its existing state. This is sufficient to find that appellant kept or maintained a drug premises.

Finally, appellant argues that the State failed to introduce substanial evidence that she, with the intent to manufacture methamphetamine, permitted her children to be exposed to a chemical substance or methamphetamine. Any adult who with the intent to manufacture methamphetamine, knowingly causes or permits a child to be exposed to, ingest, inhale or have any contact with a chemical substance or methamphetamine is guilty of a Class C felony. Ark. Code Ann. § 5-27-230(b)(1) (Repl. 2006). Appellant argues that there is no evidence that she had any intent to manufacture methamphetamine. The statute provides that intent may be demonstrated by the substance's use, quantity, manner of storage, or proximity to another precursor or equipment used to manufacture methamphetamine. In this case an entire working methamphetamine lab was found in the bedroom where children's clothes were found. The various chemicals were found in close proximity to the lab, and other bags of chemicals were found in the other end of the residence. Again, the close proximity of the various pill soak and bi-layer liquids to the rest of the lab show a close proximity. Under the statute, there is enough to show an intent to manufacture.

It should be noted that I do not read Arkansas Code Annotated section 5-27-230(b)(1) to be an enhancement statute. I believe that this is a separate, stand-alone violation against the family with an enhancement clause if the child suffers physical injury.

EUGENE HUNT, Judge, dissenting. The majority's evaluation of this case leads it to affirm the conviction of appellant for possession of drug paraphernalia with intent to manufacture methamphetamine and exposing a child to methamphetamine. I disagree. I would reverse and dismiss due to lack of evidence.

According to Arkansas Code Annotated section 5-64-403(c)(5)(A) (Supp. 2007), it is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture methamphetamine. Appellant argues that there was insufficient evidence linking her to drug paraphernalia. In this case, the

contraband was located in a trailer that appellant and another adult occupied. Beyond appellant's presence, there had to be some other factor linking appellant to the contraband. *Sweat v. State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988). The State's case was devoid of this linking factor. There was no proof of possession or constructive possession. Possess means to exercise actual dominion, control or management over a tangible object. Ark. Code Ann. § 5-1-102(15) (Supp. 2007). One may possess an object without touching the object. *Glover v. State*, 273 Ark. 376, 619 S.W.2d 629 (1981). Dominion includes the right to possess. *Id.* The principles governing possession of contraband are well established. *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994). There was no proof of actual or constructive possession of drug paraphernalia. No witness testified that they saw appellant handle any item used in making methamphetamine. The State offered no fingerprints that connected appellant to any of the drug paraphernalia.

Appellant was also found guilty of three counts of exposing a child to a chemical substance or methamphetamine. Arkansas Code Annotated section 5-27-230(b)(1) (Repl. 2006), states: "Any adult who, with the intent to manufacture methamphetamine, knowingly causes or permits a child to be exposed to, ingest, or have any contact with a chemical substance or methamphetamine is guilty of a Class C felony." Intent can be demonstrated by the substance's use; quantity, manner of storage; or proximity to another precursor or equipment used to manufacture methamphetamine. *Id.* § 5-27-230(a)(1)(B). Appellant concedes that evidence was presented that she knowingly exposed her three children to the manufacture of methamphetamine. However, appellant argues that the State failed to prove the requisite intent. The statute at issue requires some involvement by appellant. As indicated above, there is nothing linking appellant to the methamphetamine lab discovered at the trailer other than her presence. There was no evidence that appellant took part in the manufacture of the drug.

The majority has affirmed appellant's conviction of exposure of a child to a chemical substance. Intent is required to sustain such a conviction. There is no evidence that the majority can point to that shows intent. The statute requires that, with the intent to manufacture, one knowingly causes or permits a child to be exposed to a chemical substance. The fact that the children's hair tested positive for methamphetamine does not prove intent. While

it is true that appellant and Hogue jointly occupied the trailer, such fact alone will not suffice to sustain a conviction.

The problem of joint occupancy arises because of the rule that when joint occupancy is the only evidence the State has, there must be some additional link between the accused and the contraband. On the other hand, if the State is proving a case through constructive possession of contraband by the occupant of a dwelling, it is not required in the first instance to disprove joint occupancy. If, however, evidence is presented that indicates joint occupancy and occupancy is the only evidence the State offers to prove possession, it must either provide the necessary link or proof. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982). The State has failed to show any connection to the exposure of the children to methamphetamine beyond appellant's presence.

There are no facts other than joint occupancy to connect appellant to Hogue's crimes. More is required. Therefore, I respectfully dissent.

HART, MARSHALL, and BAKER, JJ., join in this dissent.

JOHN MAUZY PITTMAN, Chief Judge, dissenting. I respectfully dissent from our holdings that there is no substantial evidence to support appellant's convictions of manufacturing methamphetamine and of maintaining a drug premises. We have affirmed appellant's convictions of possession of drug paraphernalia with intent to manufacture and exposing a child to a chemical substance. Because both of those offenses require substantial evidence to prove that appellant intended to manufacture methamphetamine, and because appellant has admitted that she knew that methamphetamine was in fact being manufactured with that same paraphernalia at the time of her arrest, I think that the fact-finder could plainly infer that appellant was engaged in the manufacture of methamphetamine. To hold, as a matter of law, that the jury could not so find on this evidence is to me inexplicable.

Nor do I believe that there was insufficient evidence to support appellant's conviction for maintaining a drug premises. It is clear that no ownership interest in the premises is required to sustain such a conviction. *See Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995). Thus, I would affirm this conviction based on the reasoning stated by Judge Gladwin in his separate opinion.

VAUGHT and HEFFLEY, JJ., join in this opinion.

ROBBINS, J., joins with respect to the discussion of appellant's conviction of manufacturing methamphetamine.

GLADWIN, J., joins with respect to the discussion of appellant's conviction of maintaining a drug premises.

Louis SCHMOLL and Elizabeth A. Schmoll *v.* HARTFORD CASUALTY INSURANCE COMPANY d/b/a "The Hartford"; Ronny Kisner d/b/a Circle K; and William E. Cole

CA 08-175 290 S.W.3d 41

Court of Appeals of Arkansas
Opinion delivered December 31, 2008

Bart F. Virden, for appellants.

Wright, Lindsey & Jennings, LLP, by: *Claire Shows Hancock*, and *Kyle R. Wilson*, for appellee Hartford Casualty Insurance Co.

Cahoon & Smith, by: *David W. Cahoon*, for appellees Ronny Kisner d/b/a Circle K and William E. Cole.

JOHN MAUZY PITTMAN, Chief Judge. This case arises from an accident involving a tractor-trailer transporting cattle. The issues involve who is responsible for the burial of cattle killed in the accident on property owned by appellants Louis and Elizabeth Schmoll. The Schmolls assert that appellees Hartford Casualty Insurance Company; Ronny Kisner, d/b/a Circle K; and William Cole are responsible. The Conway County Circuit Court granted summary judgment in favor of Hartford, Kisner, and Cole.[1] The Schmolls appeal. We affirm.

On December 17, 2002, Cole was driving a tractor-trailer owned by Kisner. Cole was transporting cattle when he allegedly

[1] The Schmolls also named Johnny Smith and Lloyd Elkins, Jr., as defendants. After the circuit court granted summary judgment to the other defendants, the Schmolls nonsuited their claims against Smith and Elkins. A separate order dismissing the claims against Smith and Elkins without prejudice was entered.

fell asleep and wrecked. Several cattle were killed, others escaped. Hartford was Kisner's insurance company. After the accident, Johnny Smith made provisions for the safe-keeping of the surviving cattle and for the disposal of the dead cattle. Smith took the surviving cattle to the stockyards operated on property owned by the Schmolls. Lloyd Elkins, acting at Smith's direction, proceeded to bury the dead cattle in a shallow pit on the Schmolls' property. Approximately three months later, the Schmolls discovered that the cattle had been buried on their property.

The Schmolls filed suit on December 22, 2003, asserting theories of trespass and negligence for the burial of the cattle on their property without permission. They alleged that Kisner and Cole were responsible for the cleanup of the accident proximately caused by their negligence in the operation of the truck. They also asserted that Smith was acting as an employee or agent of Hartford when he directed Elkins to bury the cattle. As damages, the Schmolls sought the amounts they spent to clean up their property and for damages to their business.

Kisner and Cole filed an answer in which they admitted that Cole was employed by Kisner but denied that Cole had caused the accident. They later filed a motion for summary judgment in which they asserted that the accident merely provided the conditions or occasion for subsequent events to become the proximate cause of the Schmolls' damages and that the actions of Smith and Elkins were the efficient and intervening cause of the damages suffered by the Schmolls.

Hartford's answer denied the material allegations of the complaint. Hartford also moved for summary judgment, arguing that the only connection it had with the case was the issuance of a policy to Kisner and that there was no proof that Smith or Elkins were acting as its agents.

According to Johnny Smith's deposition testimony, the police dispatcher told him that an eighteen-wheeler had turned over and that they needed a truck and trailer to help haul cattle. When Smith arrived at the scene, it appeared that state trooper Mark Brice was in charge. Smith said that he began loading up the live cattle on his trailer, and then took them to a stockyard lot owned by the Schmolls. Smith testified that no one told him to take the cattle there, and he also admitted that he did not call the Schmolls to request permission. Smith said that he told Lloyd Elkins to take the dead cattle behind Paul Russell's garage and bury them in a hole Elkins was to dig.

Smith further testified that, while he was at the scene of the accident, an employee of Hartford called him and inquired how many cattle, living and dead, there were. Smith told the Hartford representative that he had secured the live cattle at the stockyards. Smith said that Hartford did not offer any instructions to him about what to do with the live cattle or in the disposal of the dead cattle. Smith said that he assumed that he was hauling the cattle for Hartford. Everyone working on the cleanup submitted bills to Smith, who, in turn, submitted them to Hartford. Hartford sent Smith a check and he disbursed it to the proper people.

Lloyd Elkins testified that he was contacted by either the Arkansas State Police or Paul's Wrecker Service. The caller told Elkins to bring his dump truck and backhoe to help load the dead cattle. When Elkins arrived at the scene, state trooper Mark Brice told him to take all of the dead cattle to the stockyards and dump them there. Elkins did as Brice instructed, making two trips to haul thirty-eight dead cattle. Elkins testified that Hartford did not give him any instructions with regard to disposal of the dead cattle. Elkins said that he believed that he was working for Smith. He also said that neither Kisner nor Cole, nor anyone from Hartford gave him instructions.

In his deposition, Louis Schmoll testified that the only proof he had that Smith was Hartford's agent in the disposal of the cattle was that Hartford paid Smith. Schmoll also did not have any proof that either Kisner or Cole directed or controlled the salvage operation, including the disposal of the dead cattle, following the accident. Likewise, he did not have any proof that Hartford directed either Smith or Elkins to bury the cattle on his land other than Smith's testimony about telephone calls from a Hartford representative.

On October 26, 2005, the motions for summary judgment were denied. On April 16, 2007, Kisner and Cole filed a motion for summary judgment as to damages and moved for reconsideration of their previous motion. The basis for the motion was that further discovery had revealed that the damages the Schmolls alleged that they had suffered were actually damages to two corporate entities owned by the Schmolls and that the statute of limitations had run on those claims because the Schmolls lacked standing to bring suit on behalf of the corporate entities. Hartford filed a similar motion and also asserted that there was no proof of actions on Hartford's part that would establish that Smith and Elkins were acting as its agents.

In response, the Schmolls asserted that they did have standing because they owned the land leased to the corporate entities and that they had a vested interest in any income lost by the corporations. In addition, the Schmolls sought to amend their complaint to assert claims on behalf of the corporate entities. They alleged that the defendants would not suffer any prejudice as a result of the amendment. Hartford, as well as Kisner and Cole, filed motions to dismiss the Schmolls' amended complaint, asserting that the statute of limitations had already run on the corporations' claims.

The circuit court held a hearing on the motions for summary judgment and motions to dismiss the amended complaint on May 14, 2007. The court found that there was no proof as to the damages the Schmolls suffered as individuals. The court also found that the statute of limitations had run as to any claims the corporate entities may have had. Finally, the court found no proof that Smith or Elkins were agents of Hartford. Accordingly, summary judgment was granted to the defendants. The court further found that there was no issue of material fact as to whether Kisner and Cole were the proximate cause of the Schmolls' individual claims. The court's written order was filed on October 15, 2007. On November 6, 2007, the court issued an amended order that set forth the above findings and also contained a Rule 54(b) certification as a final order for purposes of appeal. This appeal followed.

We will approve the granting of a motion for summary judgment only when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, *i.e.*, when there is not any genuine remaining issue of material fact and the moving party is entitled to judgment as a matter of law. *Cumming v. Putnam Realty, Inc.*, 80 Ark. App. 153, 92 S.W.3d 698 (2002). The burden of proving that 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. *Id.* On appellate review, we determine if summary judgment was proper based on whether the evidence presented by the movant left a material question of fact unanswered. *Id.*

The Schmolls raise two points, challenging the award of summary judgment to Kisner and Cole in the first point, and the summary judgment in favor of Hartford in the second point. In both points, they argue that jury questions were created, making summary judgment inappropriate.

The first issue is whether the negligence of Kisner and Cole in causing the accident was the proximate cause of the injuries the Schmolls suffered when Smith and Elkins buried the dead cattle on their property. Louis Schmoll testified that he did not suffer any damages from the accident itself; instead, his damages stemmed from the burial of the dead cattle on his property. Proximate causation is an essential element for a cause of action in negligence. *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996). When a party cannot present proof on an essential element of his claim, the moving party is entitled to summary judgment as a matter of law. *Sanders v. Banks*, 309 Ark. 375, 830 S.W.2d 861 (1992); *see also Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992). Although proximate causation is usually a question of fact for a jury, where reasonable minds cannot differ, a question of law is presented for determination by the court. *Cragar v. Jones*, 280 Ark. 549, 660 S.W.2d 168 (1983).

To accept the Schmolls' argument that the mere timing of these events established a causal connection, we would have to engage in reasoning based on a logical fallacy known as post hoc ergo propter hoc, meaning "after this and therefore because of this." *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 n. 8 (10th Cir. 1987). This fallacy confuses sequence with consequence, and assumes a false connection between causation and temporal sequence. Post hoc ergo propter hoc is not sound as either evidence or argument. *Wirth v. Reynolds Metals Co.*, 58 Ark. App. 161, 947 S.W.2d 401 (1997).[2]

Here, it might be foreseeable that Kisner and Cole would have an accident leading to the death of the livestock that they were transporting. It might also be foreseeable that any surviving animals would have been taken to the Schmolls' property because it was the location of a stockyard and sale barn. However, it would stretch foreseeability to say that Kisner and Cole should have anticipated that someone over whom they had no control would improperly dispose of dead animals by burying them in a shallow pit on another person's property without the

[2] We are mindful that our supreme court criticized *Wirth* and called its viability into doubt in *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998). The *Wallace* court's criticism of *Wirth* had to do with the supreme court's belief that we applied an incorrect standard of review. *Wallace*, however, did not address whether post hoc ergo propter hoc was sound reasoning. It is not.

landowner's knowledge or consent. *See Ethyl Corp. v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001). Because the Schmolls cannot present evidence of a crucial element of their case, the circuit court correctly granted summary judgment to Kisner and Cole.

In their second point, the Schmolls argue that the circuit court erred in granting summary judgment to Hartford because there were factual issues of agency to be decided. The argument is that it is for the jury to determine whether there was a master-servant relationship between Hartford and Smith so as to impose liability upon Hartford.

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. *Sterne, Agee & Leach, Inc. v. Way*, 101 Ark. App. 23, 270 S.W.3d 369 (2007). Neither agency nor the extent of an agent's authority can be shown by his own declarations in the absence of the party to be affected. *Dixie Ins. Co. v. Joe Works Chevrolet, Inc.*, 298 Ark. 106, 766 S.W.2d 4 (1989); *Zullo v. Alcoatings, Inc.*, 237 Ark. 511, 374 S.W.2d 188 (1964). The burden of proving an agency relationship lies with the party asserting its existence. *Newberry v. Scruggs*, 336 Ark. 570, 986 S.W.2d 853 (1999).

Here, all of the factors that the Schmolls claim indicate a master-servant relationship come from Smith's testimony. In fact, Smith only assumed that he was working for Hartford. There is no evidence that Hartford ever directed Smith in the disposal of the cattle. The fact that Hartford directed Smith to submit bills for the cleanup does not indicate an agency relationship or that Hartford controlled Smith's actions in the disposal of the cattle. Neither does the fact that Hartford paid Smith and he, in turn, disbursed the money to others. Hartford was obligated under its policy with Kisner to make payments for safeguarding the surviving animals and disposal of the dead animals. Further, it was not Hartford that asked Smith to assist with the cleanup; rather, it was law enforcement that called him out to the scene. According to Smith's deposition testimony, it was trooper Brice who asked him to get the cattle off of the truck. The fact that Smith did so did not later transform him into Hartford's agent when Hartford made inquiries to ascertain the scope of a loss that it was obligated to pay.

To hold that a factual question is presented because of Smith's actions would mean that Smith was Hartford's agent simply because he acted as such. However, it is the actions and

words of the principal, Hartford, that create the agency and must be traced to that source. *See Standard Mut. Ben. Corp. v. State*, 197 Ark. 333, 122 S.W.2d 459 (1938). Louis Schmoll testified that he had no proof, other than Smith's actions and Hartford's payment, that Hartford controlled or directed Smith in the disposal of the dead cattle. Therefore, summary judgment for Hartford was proper.[3]

Affirmed.

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

HART, BAKER, and HUNT, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. The improper merging and application of the concepts of foreseeability, intervening cause, vicarious liability, and apparent authority in the majority's reasoning leads it to affirm the summary judgments in this case when proper application of the law requires reversal. The state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file indicate that the Schmolls are entitled to their day in court, and we should reverse the grant of summary judgment.

The majority reasons that "the Schmolls cannot present evidence of a crucial element of their case" because "it would stretch foreseeability to say that Kisner and Cole should have anticipated that someone over whom they had no control would improperly dispose of dead animals by burying them in a shallow pit on another person's property without the landowner's knowledge or consent." This reasoning is clearly wrong on many levels. The majority merges and confuses three distinct concepts: (1) the foreseeability of the possible harm caused by the asserted improper

[3] The dissent would, in effect, dispense with the legal requirement of proximate causation by permitting the jury to find that negligent operation of a motor vehicle by one party was the cause of the trespass committed at another time and place by another party. This amounts to nothing more than but-for causation. No reasonable person could have anticipated on this record that disposal of the carcasses would result in a trespass upon the Schmolls' property, and the trespass was therefore an intervening cause as a matter of law. In any event, the Schmolls have utterly failed to show that the insurer in this case had any duty to supervise the removal of the carcasses or any foreknowledge that reasonably could impose such a duty.

disposal of the animal carcasses; (2) the doctrine of intervening cause; (3) the vicarious liability of a principal for an agent's tortious conduct.

To prove negligence in Arkansas, the plaintiff must show a failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances. *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997). This concept of exercising proper care includes the element of foreseeability. As our supreme court has explained: "[t]o constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner." *Ethyl Corp. v. Johnson*, 345 Ark. 476, 481, 49 S.W.3d 644, 648 (2001) (quoting *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998)). However, a defendant is under no duty to guard against risks it cannot reasonably foresee. *Ethyl Corp.*, 345 Ark. at 481, 49 S.W.3d at 648. In analyzing the issue of foreseeability, however, the question is not whether a defendant could have reasonably foreseen the exact or precise harm that occurred, or the specific victim of the harm. *See Wallace v. Broyles, supra.* It is only necessary that the defendant be able to reasonably foresee an appreciable risk of harm to others. *Id.*

Duty is a concept that arises out of the recognition that relations between individuals may impose upon one a legal obligation for the other. *Tackett v. Merchant's Security Patrol*, 73 Ark. App. 358, 362, 44 S.W.3d 349, 352 (2001). Ordinarily, a person is under no duty to control the actions of another person, even though he has the practical ability to do so. *Id.* One is not liable for the acts of another person unless a special relationship exists between the two. *Id.* The question of what duty is owed to the plaintiff is always one of law. *Id.*

While the question of what duty is owed is one of law, the determination of the nature of the relationships arises from the facts of the situation. In the case before us, the Schmolls alleged in their complaint that Cole, who was an employee of Kisner, caused a wreck that resulted in the death of cattle. They further alleged that each of the defendants was "under a duty to take particular care to properly dispose of the dead animals" and that each "had a duty and responsibility to ensure that the cattle were properly disposed of." Their complaint specifically references Arkansas statutory law and regulations providing for the disposal of dead

cattle. While violation of a law does not constitute negligence per se, it is evidence of negligence. *Young v. Dodson*, 239 Ark. 143, 388 S.W.2d 94 (1965).

The Schmolls claimed that the defendants' negligence in failing to properly dispose of the carcasses resulted in economic damages which, in addition to the physical damage to their property caused by the initial digging of the pit and subsequent removal of the decaying carcasses, included the closing of their businesses of the livestock auction and the restaurant on the site of the auction. They asserted that the improper disposal and its discovery caused severe damage to their business reputation, which resulted in these closures.

In response to the Schmolls' allegation that Mr. Smith had made arrangements with Hartford, as the insurer and agent for Cole and/or Kisner, for the safekeeping of live animals and to dispose of the deceased animals, Mr. Smith admitted that he had made such an arrangement. Mr. Smith also affirmatively stated in his answer that not only were the Schmolls informed that the animals were buried on the Schmolls' property the day after they were buried, but he had also disposed of dead cattle on Schmolls' premises in the past with the consent of the Schmolls. Kisner, Cole, and Hartford denied the allegations.

Mr. Elkins admitted in his answer that he was the one who buried the carcasses; however, he specifically denied Schmoll's allegations that he had buried the animals in a shallow grave using only nine to twelve inches of soil to cover the remains. Rather, he affirmatively stated that he had used at least two feet of dirt to bury the cattle. His reference to the two feet of cover is consistent with paragraph two of the Arkansas Livestock and Poultry Commission's regulation for the disposal of large animal carcasses requiring that all carcasses are to be covered with at least two feet of dirt. Arkansas Code Annotated section 2-40-1302 (Repl. 2008) requires that all large animal carcasses be disposed of pursuant to these regulations. Kisner, Cole, and Hartford answered that they were without sufficient information to form a belief as to the allegations of the improper burial.

A review of these pleadings demonstrates a factual dispute as to whether Mr. Elkins followed the regulations regarding the disposal of carcasses, *see Young v. Dodson*, 239 Ark. 143, 388 S.W.2d 94 (1965) (recognizing that violation of a law does not constitute negligence per se but is evidence of negligence), whether a trespass

occurred, and whether Hartford, acting as the agent for Kisner and Cole, employed Mr. Smith to dispose of the carcasses that Mr. Elkins buried, *see Tackett v. Merchant's Security Patrol*, *supra* (holding that a duty of care may arise out of a contractual relationship between two parties). A factual dispute exists as to the relationship of the individuals which necessarily affects their respective duties.

Because the Schmolls' negligence claim was based upon the failure to properly dispose of the dead cattle, this court's analysis of the duty must focus on the foreseeability of the harm caused by the improper disposal of the carcasses. First, not only was the possibility of the death of livestock in the event of an accident foreseeable, the loss and the disposal of the carcasses were specifically provided for in the contract between Kisner and Hartford. Significantly, the contract stated, "Unless we [Hartford] give our permission, you may not dispose of the carcass(es) of the Covered Livestock until we inspect or examine such carcass(es). But, this clause does not apply if such disposal is required by law or ordinance."

Arkansas Code Annotated section 8-6-205(4) (Supp. 2007) states that it shall be illegal for anyone to "in any manner leave or abandon any solid wastes . . . upon any public highway, street, road . . . or other public property." Kisner and Cole could not merely leave or abandon the carcasses on public property without incurring liability. Each had a duty to neither leave nor abandon the carcasses. To the extent that the majority references a purported instruction by Trooper Brice regarding the disposal of the carcasses, no party alleged nor does the majority hold that Kisner or Cole were relieved of this duty, as the owner of the cattle and employee of the owner respectively, regarding the carcasses merely because the trooper was performing his duties regarding public safety of the highway.

Kisner, and Cole as his employee who caused the death of Kisner's cattle on the road, had a duty to remove the carcasses from the public property and to dispose of the carcasses properly pursuant to Arkansas statutory and regulatory laws. The fact that they left the scene and did not specifically direct the removal and disposal does nothing to relieve them of that responsibility. Neither can their lack of personal involvement affect the foreseeability that the failure to properly dispose of the dead cattle would cause harm. The rules and regulations of the Arkansas Livestock and Poultry Commission were promulgated to prevent such harm by the improper disposal of livestock. Neither the identity of the specific victim of the harm nor the nature of the specific harm is

required to meet the foreseeability prong of a negligence claim. *See Wallace, supra.* Accordingly, Kisner and Cole had a legal duty to properly remove and dispose of the carcasses.

The majority appears to merge the concept of foreseeability as it relates to the Schmolls' claim for damages arising from the negligent disposal with the Schmolls' claim for damages arising from the trespass. The majority's reference to the foreseeability of the trespass suggests it views the alleged trespass as an intervening cause. Even if the factual dispute as to the Schmolls' knowledge and consent resulted in a finding that a trespass occurred, the trespass is irrelevant to the claim that the burial was done in a negligent manner. On the issue of whether or not there was an efficient intervening cause, this question is "simply . . . whether the original act of negligence or an independent intervening cause is the proximate cause of an injury. Like any other question of proximate causation, the question whether an act or condition is an intervening or concurrent cause is usually a question for the jury." *Hill Constr. Co. v. Bragg*, 291 Ark. 382, 385, 725 S.W.2d 538, 540 (1987) (quoting *Larson Machine v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980)); *see also Graftenreed v. Seabaugh*, 100 Ark. App. 364, 268 S.W.3d 905 (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). The *Bragg* court went on to explain the independent effect of the intervening agent:

> original act or omission is not eliminated as a proximate cause by an intervening cause unless the latter is of itself sufficient to stand as the cause of the injury. The intervening cause must be such that the injury would not have been suffered except for the act, conduct or effect of the intervening agent *totally independent* of the acts of omission constituting the primary negligence.

Bragg, 291 Ark. at 385, 725 S.W.2d at 540 (emphasis added).

The burial of carcasses is dependent upon the act that created the need for the burial of the dead cattle — the accident in which they were killed, not the trespass. The improper burial caused the damages to the Schmolls. The alleged trespass is not the cause of the improper burial. The fact that the Schmolls became the specific

victims of the negligent burial may be directly traceable to a trespass, if the fact-finder concludes that Smith and Elkins did not have permission to bury the cattle on the Schmolls' property. However, the fact that a trespass may have occurred only provides the factual explanation as to how the Schmolls became the specific victims, and the foreseeability of the Schmolls as the victims is not required. *See Wallace, supra.* Any trespass committed during the disposal of the carcasses cannot eliminate the negligence that resulted in the death of the cattle and the improper disposal of the dead livestock which led to the damages suffered by the Schmolls. The timing of the trespass cannot in and of itself interrupt the natural and foreseeable consequences flowing from the death of the livestock and the need for the proper disposal of the carcasses.

The majority further contorts its analysis in its failure to explain the relevance of its inclusion of the phrase, "someone over whom they had no control" in its foreseeability pronouncement. The phrase has relevance in a negligence context in the doctrine of vicarious liability of a principal for its agent's tortious conduct when the agent is an independent contractor. However, even the question of whether an agent is an independent contractor is fact intensive in nature. An independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000); *Howard v. Dallas Morning News, Inc.*, 324 Ark. 91, 918 S.W.2d 178 (1996). One who employs an independent contractor is generally not liable for the torts of the contractor committed in the performance of the contracted work. *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). However, when the employer goes beyond certain limits in the directing, supervising, or controlling the performance of the work, the relationship changes to that of employer-employee, and the employer is liable for the employee's torts. *Blankenship v. Overholt, supra.* Because there is no fixed formula for determining whether an entity is an employee or an independent contractor, the determination must be made based on the particular facts of each case. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas., supra.*

The particular facts of this case demonstrate the fact intensive nature of agent and principal tort liability. Any implication that Kisner and Cole could not possibly be liable because they had

no control is untenable under the disputed facts of this case and their responsibility to properly dispose of the carcasses pursuant to Arkansas statutory and regulatory law. Therefore, the trial court erred in granting summary judgment to Kisner and Cole, and the majority errs in affirming that summary judgment. The mixing of the concepts of foreseeability, the doctrine of intervening cause, and the vicarious liability of a principal for an agent's tortious conduct lead the majority to the wrong conclusion.

The majority's improper merger of legal concepts also distorts its analysis of the relationship between Hartford and Smith and whether the relationship was one of principal and agent. The majority relegates Smith's testimony indicating the agency relationship as having no weight. It reasons that "[n]either agency nor the extent of an agent's authority can be shown by his own declarations in the absence of the party to be affected."

This statement of the law is a reference to the doctrine of apparent authority. The doctrine of "apparent scope of authority" has no application in tort cases unless there has been a reliance upon apparent authority which caused the injury. *Curtis Circulation Co. v. Henderson*, 232 Ark. 1029, 342 S.W.2d 89 (1961). The negligent disposal has nothing to do with a reliance upon an apparent authority. As such, the doctrine is inapplicable.

Further, as the majority recognizes, Smith's testimony supports the Schmolls' claim that a master-servant relationship existed between Hartford and Smith. This recognition that Smith's testimony supported the factual existence of an agency relationship between Hartford and Smith is itself sufficient to reverse the summary judgment and remand this case for jury trial.

Ironically, there is no factual dispute that Smith was Hartford's agent for purposes of exercising its right to inspection of the dead carcasses prior to their disposal, nor is there a factual dispute that Smith was Hartford's agent for payment of the expenses related to the disposal. Therefore, there is no dispute that Smith had authority from Hartford to act as its agent in relation to the dead cattle in some manner. The disputed issue is the extent of the authority. Whether an agent acts within the scope of his authority is a question of fact for the jury to determine. *Rowland v. Gastroenterology Assocs.*, 280 Ark. 278, 657 S.W.2d 536 (1983); *see also Holt Bonding Co. v. First Federal Bank of Arkansas*, 82 Ark. App. 8, 110 S.W.3d 298 (2003). Accordingly, the summary judgment granted to Hartford should be reversed.

Smith's testimony referenced a conversation with Hartford that included Hartford's inquiry as to the disposal of the carcasses. In its motion for summary judgment, Hartford relies heavily on the absence of any testimony that Hartford specifically instructed Smith in the disposal process. However, Hartford's silence, or failure to instruct in the proper disposal, could lead a fact-finder to conclude that Hartford ratified Smith's disposal method. In *Brady v. Bryant*, 319 Ark. 712, 894 S.W.2d 144 (1995), our supreme court explained that a principal may become liable for its agent's toriuous conduct through ratification:

> It is well settled in Arkansas law that when the principal has knowledge of the unauthorized acts of his agent, and remains silent . . . he cannot thereafter be heard to deny the agency but will be held to have ratified the unauthorized acts. . . . It has been said that the affirmance of an unauthorized transaction may be inferred from the failure to repudiate it, or from receipt or retention of benefits of the transaction with knowledge of the facts.

Brady, 319 Ark. at 715, 894 S.W.2d at 146 (citing *Arnold v. All American Assurance Co.*, 255 Ark. 275, 499 S.W.2d 861 (1973)). Although *Brady* involved an agent's unauthorized entrance into a settlement agreement on behalf of the principal, the principle of ratification also applies when the agent's actions are tortious, and ratification may bind the principal for punitive damages. Restatement (Second) of Agency §§ 217(c) & 218 (1957). *See also Gordon v. Planters & Merchants Bancshares, Inc.*, 326 Ark. 1046, 1059, 935 S.W.2d 544, 551 (1996).

The majority's improper mixing and matching of legal concepts in this case results in an improper disposition of the case that denies the Schmolls their day in court. This denial violates the fabric of our justice system. Article 2, section 7 of the Arkansas Constitution provides in relevant part:

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law; and in all jury trials in civil cases, where as many as nine of the jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury, provided, however, that where a verdict is returned by less than twelve jurors all the jurors consenting to such verdict shall sign the same.

The right to a jury trial under article 2, section 7 of the Arkansas Constitution is a fundamental right. *Anglin v. Johnson Reg'l Med. Ctr.*, 375 Ark. 10, 289 S.W.3d 28 (2008). This right extends to all cases that were triable at common law. *Id.* That is, the constitutional right to trial by jury extends to the trial of issues of fact in civil and criminal causes. *Id.* There are issues of fact in this case and the Schmolls have a constitutional right to trial of those factual issues by jury.

Accordingly, I dissent.

HART and HUNT, JJ., join.

Randy E. LEWIS *v.* AUTO PARTS & TIRE CO., INC.; Fliteline Motors, Zenith Insurance Co.; Second Injury Fund; and Death and Disability Trust Fund

CA 08-687 290 S.W.3d 37

Court of Appeals of Arkansas
Opinion delivered December 31, 2008

Stephen M. Sharum, for appellant.

David B. Simmons, for appellee Second Injury Fund.

KAREN R. BAKER, Judge. Randy Lewis appeals from a decision by the Workers' Compensation Commission, which reversed the ALJ and found that pursuant to Arkansas Code Annotated section 11-9-716 (Repl. 2002), appellant's attorney was not entitled to a lump-sum attorney fee to be paid by the Second Injury Fund. On appeal, Lewis asserts that Arkansas Code Annotated section 11-9-716 authorizes the Commission to award a lump-sum attorney fee to be paid by the Second Injury Fund. We agree and reverse and remand the Commission's decision.

The error in this case is derived from the Commission's misinterpretation of this court's holding in *Seward v. The Bud Advents Co.*, 65 Ark. App. 88, 985 S.W.2d 332 (1999), and the Commission's misinterpretation of the meaning of the relevant statutes. Lewis contends that the Commission's opinion is based on the false conclusion that the amount of the attorney's fee is "unascertainable" since the amount of payments to the claimant are unascertainable. We agree. The Commission mistakenly determined the following: that because the claimant's benefits were to be paid in installments throughout his lifetime, the amount of claimant's benefits were unascertainable; as a result, the amount of claimant's attorney fee was also unascertainable. Relying on the language in *Seward*, the Commission concluded that because the amount of fees was unascertainable, then the Commission could

not award a lump-sum attorney fee. That is not the holding in *Seward*. In *Seward*, this court held that it was the intention of the legislature to enable the Workers' Compensation Commission to approve the lump-sum payment of attorney's fees chargeable to the employer while providing for installment payments of the portion of the attorney's fees chargeable to the injured employee or the injured employee's dependents; in such a situation the portion of the fee to be paid in installments by the injured employee or the injured employee's dependents should not be discounted since it is not being received by the attorney in a lump sum. *Seward*, 65 Ark. App. at 95, 985 S.W.2d at 335. The Commission's misinterpretation of *Seward* was a mistake of law. We do not defer to the Commission on questions of law. *See Heptinstall v. Asplundh Tree Expert Co.*, 84 Ark. App. 215, 137 S.W.3d 421 (2003) (citing *Bagwell v. Falcon Jet Corp.*, 8 Ark. App. 192, 649 S.W.2d 841 (1983)).

Based on this court's holding in *Seward*, the Commission may approve the lump-sum payment of attorney's fees chargeable to the employer. The purpose of the Second Injury Fund was "designed to ensure to an employer employing a worker with a disability will not, in the event that the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his or her employment." Ark. Code Ann. § 11-9-525 (Repl. 2002). The stated public purpose of the establishment of the Fund is to encourage employment of handicapped or disabled workers by assigning liabilities for the wage-loss consequences of a second injury to the Fund. *Rice v. Georgia Pacific Corp.*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In essence, the Second Injury Fund was created to stand in lieu of the employer and assume responsibility for any liability. *Seward* holds that the Commission can award a lump-sum of fees chargeable to an employer; because it is clear that the Second Injury Fund stands in lieu of the employer, the Commission can also award a lump-sum of fees from the Second Injury Fund.

Lewis also contends that the award of a lump-sum attorney's fee pursuant to Arkansas Code Annotated section 11-9-716 against the Second Injury Fund is not limited by the language in Arkansas Code Annotated section 11-9-804 to be applied to employers only. This presents us with an issue of statutory interpretation. This court reviews issues of statutory construction de novo, as it is

for this court to decide what a statute means. *Johnson v. Bonds Fertilizer, Inc.*, 365 Ark. 133, 226 S.W.3d 753 (2006) (citing *MacSteel v. Ark. Okla. Gas Corp.*, 363 Ark. 22, 210 S.W.3d 878 (2005)). Arkansas Code Annotated section 11-9-704(c) (Repl. 2002) requires that we construe workers' compensation statutes strictly. Strict construction requires that nothing be taken as intended that is not clearly expressed, and its doctrine is to use the plain meaning of the language employed. *American Standard Travelers Indem. Co. v. Post*, 78 Ark. App. 79, 77 S.W.3d 554 (2002). The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. *Teasley v. Hermann Companies, Inc.*, 92 Ark. App. 40, 211 S.W.3d 40 (2005). When a statute is clear, however, it is given its plain meaning, and the appellate court will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used. *Id.* A statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. *Id.* In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* (citing *American Standard Travelers Indem. Co., supra*). The statute should be construed so that no word is left void, superfluous, or insignificant; and meaning and effect must be given to every word in the statute if possible. *Id.*

Pursuant to Arkansas Code Annotated section 11-9-715(a)(2)(A) (Repl. 2002), the Commission can award fees for legal services to be paid from the fund when a claim has been controverted. Section 11-9-716(a) (Repl. 2002) provides that the Commission is authorized to approve lump-sum attorney's fees for legal services rendered in respect to a claim. The lump-sum attorney's fees are allowed even though the claimant is to be paid on an installment basis. Ark. Code Ann. § 11-9-716(b) (Repl. 2002). The statute also indicates that any approved fee is to be discounted at a rate provided in Arkansas Code Annotated section 11-9-804 (Repl. 2002). Ark. Code Ann. § 11-9-716(c). Arkansas Code annotated section 11-9-804 (Repl. 2002) merely provides the method by which the lump sum should be calculated based on life expectancy tables and the discount rate stated.

Section 11-9-715 and section 11-9-716 should be read in conjunction. *See International Paper Co. v. McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984) (holding that the legislature intended

section 11-9-716 and section 11-9-715 to be read in conjunction with one another and saw no conflict between the two statutes; the legislature felt strongly that the Commission should be able to award lump-sum attorney's fees). The language of section 11-9-716 is not limited to employers; it does not mention employers or any other respondent by name. Rather, the statute only indicates that the Commission is authorized to approve lump-sum attorney fees. We hold that the statute includes attorney fees owed by the Second Injury Fund. Therefore, pursuant to Arkansas Code Annotated section 11-9-716, claimant's attorney is entitled to a lump-sum attorney fee for legal services owed to him by the Second Injury Fund.

Both the Commission and appellee cite to *Second Injury Fund v. Furman*, 336 Ark. 10, 983 S.W.2d 923 (1999). The court in *Furman* held that a claimant could not recover attorney fees after prevailing on appeal against the Second Injury Fund in the absence of express statutory authority. We conclude that the holding in *Furman* does not control the issue presented in this case. In *Furman* the court was addressing a different statutory section — namely Ark. Code Ann. § 11-9-715(b)(1) — and the holding applied to recovery of attorney fees *after* prevailing on appeal to this court. Here, the issue is the availability of lump-sum fees for an attorney's work in the proceedings before the ALJ and the Commission.

Pursuant to the statutory authority discussed above, we find that the Commission can award a lump-sum attorney fee from the Second Injury Fund in this case. Therefore, we reverse and remand for the Commission to enter an opinion in accord with this opinion.

Reversed and remanded.

BIRD and MARSHALL, JJ., agree.

Gina D. RELYEA *v.* DIRECTOR, DEPARTMENT of WORKFORCE SERVICES

E 08-131 290 S.W.3d 34

Court of Appeals of Arkansas
Opinion delivered December 31, 2008

No briefs filed.

KAREN R. BAKER, Judge. Appellant Gina D. Relyea appeals a decision of the Arkansas Board of Review denying her benefits under Arkansas Code Annotated section 11-10-513 on finding that she voluntarily left work without good cause connected with the work. For the reasons stated herein, we reverse and remand for an award of benefits.

In her petition for appeal to the Arkansas Appeal Tribunal, appellant stated that she left her employment because a co-worker was sexually harassing her. She further explained her belief that if she did not remove herself from the situation that she would be subjecting herself to more of the same harassment. At the hearing,

the owner, Jerry Seyller, and the offending co-worker, David Fox, appeared on behalf of the employer. Witnesses for appellant were Colton Gwathney and Jason Yarbrough.

The essential facts were undisputed. Appellant worked in accounts receivable for almost two years. Mr. Fox worked throughout the employer's facility performing various duties. As a relative of the owner, Mr. Fox was employed at the business during the entire duration of appellant's employment. For at least the last eight months of her employment there, Mr. Fox made inappropriate gestures and comments to appellant. At first, he merely made inappropriate remarks regarding her appearance, such as, "You look hot today," with additional comments about how she smelled and the appearance of her breasts. When she would tell him that his actions were inappropriate and that he was making her feel uncomfortable, he would physically express his displeasure with her. She characterized his reactions as hateful and described his throwing things on her desk and walking around "huffing and puffing."

Mr. Fox's actions eventually escalated beyond verbal comments and included rubbing her shoulders and back and trying to kiss her. Her thwarting of these attempts, coupled with her verbal reprimands to Mr. Fox, made him angry and were followed by his attempts to place his hands inside her clothing. In response to the hearing officer's query as to why she did not report Mr. Fox's behavior to Mr. Seyller, she explained that she believed reporting it would not only escalate the confrontation, but would lead to her losing her job.

Other employees noticed the inappropriateness of Mr. Fox's actions toward appellant. Appellant testified that a woman whom she was training asked appellant if she had a stalker after observing Mr. Fox's behavior. Appellant further testified that the trainee also told her that Mr. Fox had made comments about appellant to the trainee outside of appellant's presence. Another employee, Mr. Gwathney, testified that he witnessed Mr. Fox touching appellant. Mr. Gwathney described how Mr. Fox would get angry when Mr. Gwathney would speak to or come around appellant. Mr. Yarbrough also testified that he had witnessed Mr. Fox massaging appellant's back and that she appeared to not be pleased with the touching. He stated that Mr. Fox stopped the touching when he saw that Mr. Yarbrough could see what he was doing.

After Mr. Seyller personally witnessed Mr. Fox's actions, appellant reported to Mr. Seyller the scope of the harassment. She

continued to work for a few days after the reporting and described to the hearing officer an additional incident wherein Mr. Fox told her, "You would have to be looking that good today after all this stuff has happened." She described what she was wearing as jeans, a long sleeve sweater with a tank top under it, and a "nice big shirt over it." When Mr. Fox made this comment, appellant testified that she realized that he did not recognize the severity of the situation and that he would not change his behavior. She said that her concern was further reinforced by co-workers relaying Mr. Fox's comments that "he only did it because of something" she did or how she dressed, reinforcing her suspicion that the blame would be placed upon her.

In his testimony, Mr. Fox never denied the touching, admitted that appellant rebuked his actions, and admitted that he believed he had problems in relation to his actions toward appellant. When appellant asked Mr. Fox if he thought he had crossed the line, he responded by saying, "maybe by massaging your chest." In response to appellant's question of what she would do when he would act like that, he said, "Slap the hand or something." He described his own reactions to her rebukes as "just kind of sulked a little bit, I guess, but I didn't, like it wasn't going to jeopardize her job." He also stated, "I don't need to be in certain areas or doing certain things, how I react to certain people." Mr. Fox commented that his exposure in the company acted as a "kind of confession" and that, since everybody knew his actions, it helped him see that there was something wrong. He apologized and announced, "I've got a problem and I'm trying to deal with it."

In response to the situation, the owner gave appellant three weeks off and reassigned her to be in the office with the owner; however, this assignment was in the same building as Mr. Fox and her job duties would still require her to interact with the offending co-worker. Mr. Seyller exposed Mr. Fox's misconduct in front of his peers, and required him to apologize to them and the appellant. Mr. Seyller also stated that he would force Mr. Fox to take vacation time to spend with his family. Appellant expressed her belief that she was being blamed for her co-worker's actions. In her letter informing Mr. Seyller that she would not be returning, she explained that the harassment had affected everything in her day-to-day life. As the time to return to the office approached, she said that she experienced bouts of depression and pressure. Mr.

Seyller testified that if appellant had only had the strength and courage to come back that he believed it would have worked.

Arkansas Code Annotated section 11-10-513(a)(1) (Supp. 2007) provides that "an individual shall be disqualified for benefits if he or she voluntarily and without good cause connected with the work left his or her last work." Good cause is defined as "a cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment." *Perdrix-Wang v. Dir., Employment Sec. Dep't*, 42 Ark. App. 218, 221, 856 S.W.2d 636, 638 (1993). Good cause is dependent not only on the reaction of the average employee, but also on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting. *Lewis v. Dir., Employment Sec. Dep't*, 84 Ark. App. 381, 386, 141 S.W.3d 896, 899-900 (2004). In addition, in order to receive unemployment benefits, an employee must make reasonable efforts to preserve his or her job rights. *Id.*

On appeal, the findings of the Board of Review are conclusive if they are supported by substantial evidence. *Weaver v. Dir., Employment Sec. Dep't*, 82 Ark. App. 616, 618, 120 S.W.3d 158, 159 (2003). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

Under these circumstances, the Board could not have reasonably reached its decision that appellant voluntarily left her employment without good cause. *See Magee v. Dir., Ark. Employment Sec. Dep't*, 75 Ark. App. 115, 55 S .W.3d 321 (2001) (holding that repeated harassment can constitute good cause for leaving employment); *see also Boothe v. Dir., Employment Sec. Dep't*, 59 Ark. App. 169, 954 S.W.2d 946 (1997) (holding that sexual harassment of a spouse can constitute good cause for leaving employment). The actions of Mr. Fox qualify as a battery under Arkansas law. *See generally McQuay v. Guntharp*, 336 Ark. 534, 986 S.W.2d 850 (1999); *McQuay v. Guntharp*, 331 Ark. 466, 963 S.W.2d 583 (1998).

■ We hold that, when the circumstances of the separation from employment include the sexual battery of an employee, and the employer does not discharge the offender or otherwise

separate the victim from the offender completely, then the employee has good cause for leaving the employment and is entitled to unemployment benefits within the meaning of Arkansas Code Annotated section 11-10-513. Here, Mr. Seyller did not separate Mr. Fox from the appellant completely; Mr. Fox remained employed on the same premises, and would have continued to have limited contact with the appellant on the job. At the hearing, Mr. Seyller offered to eliminate any contact between appellant and Mr. Fox if she would return to work. But this offer came too late. The responding discipline of Mr. Seyller's employee/relative did not eliminate the opportunity for future harassment. We conclude that this case is like *Boothe*. At the hearing, the employer's defense — by statements and questions — was that the contacts between appellant and Mr. Fox were at least partly consensual. Given the employer's view of the situation, and the incomplete remedy provided, it would have been futile for appellant to return to work. *Boothe*, 59 Ark. App. at 173-74, 954 S.W.2d at 949. Accordingly, we reverse and remand for an award of benefits.

Reversed and remanded.

BIRD and MARSHALL, JJ., agree.

Paula Vanderpool BYRD *v.* Clifford V. VANDERPOOL, III

CA 07-1313 290 S.W.3d 610

Court of Appeals of Arkansas
Opinion delivered January 7, 2009

Putnam Law Firm, by: *William B. Putnam*, for appellant/cross-appellee.

Clark & Spence, by: *George R. Spence*, for appellee/cross-appellant.

LARRY D. VAUGHT, Chief Judge. This child-custody appeal raises two issues. The first issue is whether the trial court erred in determining that a material change in circumstances occurred authorizing it to revisit the issue of child custody. The second is whether the trial court erred in determining that a joint-custody arrangement was in the best interest of the parties' minor children. Because the record does not support the initial-material-change-of-circumstances finding, we do not address the secondary question of joint custody. This appeal also contains a cross appeal alleging that the trial court erred in its refusal to find appellant in contempt of court. We hold that the trial court did not abuse its discretion and affirm.

Appellant Paula Vanderpool Byrd and appellee Clifford Vanderpool were married in 1988. They were granted an absolute divorce by the Circuit Court of Benton County, Arkansas, on September 22, 2004. The divorce decree was filed on October 12, 2004. Appellant was granted primary custody of the parties' two minor children.

On June 6, 2005, appellant filed a petition for contempt and modification of child support. Specifically, appellant requested that the trial court increase appellee's child-support payments and

hold him in contempt for failure to make certain payments required by the decree, including payments for health and dental insurance premiums for the children. Appellee denied the allegation and filed a counter petition for contempt, alleging that appellant violated the terms of the divorce decree by making derogatory comments about him in front of the children.

The court heard the parties' respective petitions on September 22, 2005. It granted appellant's petition for an increase in child support. The court also found both parties in willful contempt — appellant for making derogatory statements about appellee in the presence of the children and appellee for failing to pay insurance premiums. A review and sentencing hearing was set for November 7, 2005. After the hearing on November 7 (and by order entered November 9), the court directed each to serve specified weekends in the Benton County Jail. The court also ordered the parties to communicate by telephone every Monday at 9:00 p.m.

On July 31, 2006, appellee filed a petition for contempt and for modification of custody, alleging that appellant had violated the court's November 9, 2005, order by continuing to make derogatory comments about him in front of the children and failing to "participate appropriately" in the parties' mandated telephone calls. Appellee claimed that this conduct constituted a material change in circumstances and asked the court to award him primary custody of the minor children. Appellant denied those allegations and further denied that appellee should be awarded custody. Appellant also filed a counterclaim for contempt and modification, asserting that appellee failed to communicate with her and made derogatory remarks about her in the presence of the children.

The parties' claims were heard on March 7, 2007. The trial court found that there had been a material change in circumstances and by order entered July 31, 2007, ruled that the parties should have joint custody of the children. The order set forth a series of rules and procedures for the parties to follow regarding visitation and communication that would minimize the length and number of contacts the parties would have with each other, especially in the presence of the children. The court also ordered counseling for both the children and the parties. It declined to hold either party in contempt, but warned that — based on the parties' history in this case — any future willful violations of the court's orders would result in a "lengthy incarceration."

On July 31, 2007, appellee filed a motion for reconsideration wherein he asked the court to amend its initial order to address certain issues that had not been previously resolved. The court entered an amended order on August 30, 2007, and it is from that amended order that appellant appeals and appellee cross appeals.

Our supreme court has noted that "the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary." *Hamilton v. Barrett*, 337 Ark. 460, 466, 989 S.W.2d 520, 523 (1999). We review child-custody cases de novo and apply a "clearly erroneous" standard to the trial judge's findings. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). 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. *Smith v. Parker*, 67 Ark. App. 221, 998 S.W.2d 1 (1999).

First we address the court's changed-circumstances finding. It is essential that a material change in circumstances affecting the best interests of a child must be shown before a court may modify an order regarding child custody. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). And, the burden of proving that the conditions have so materially changed as to warrant modification and that the best interest of the child requires a change of custody is on the party seeking modification. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001). In this case, the rationale for the trial court's conclusion that a material change in circumstances had occurred was stated as such:

> The Court finds from the testimony, the credibility of the witnesses, the exhibits and other matters considered by the Court, that it appears that Susan Monson [the children's counselor] and this Court are concerned about the impact the two parents' behavior is having on the minor children, Joshua Vanderpool and Ethan Vanderpool, and are concerned enough to want to do something about it. However, the Court is concerned that both parents are more concerned with harboring their anger and resentment toward the other parent and seizing every opportunity to point out the other's faults than with how sad [sic] and the impact they are having on the minor children.

Because the trial judge in this case did not make specific findings of fact to support her conclusion that a material change in

circumstances had occurred, we are required to review the evidence in the record regarding allegedly changed circumstances de novo. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

After conducting a de novo review of the record, we conclude that as a matter of law the trial court's changed circumstances finding cannot stand. First, according to both the children's counselor and attorney ad litem, the children of this turbulent couple have escaped from their parents' child-like gamesmanship relatively unscathed. The professionals both noted that it is the parents, not the children, who are in need of assistance and counseling. Second, the specific incidents that appellee argues support a changed circumstance are trivial, at best. The highlights include: 1) an alleged "stomping around" and "ranting and raving" about missing coats following an exchange of custody; 2) a disagreement about which of the two bags of laundry that the children brought home from a ski trip were clean versus dirty; 3) the appropriateness of attending a Super Bowl party with the children in tow; 4) a shoulder slap, followed by a "thank you," that appellee took to mean as a sarcastic gesture relating to the consequences of his failure to participate in court ordered Monday telephone calls with appellant; 5) an incident where appellant nudged between appellee and his current wife during a parents' group baseball discussion with their son's coach; and 6) the fact that appellant used a "clucking chicken" ring tone to identify appellee's calls and referred to him by his nickname "Cliffy" when they would speak privately.

Appellee seems to concede that any of these "incidents," taken separately would not justify changed circumstances, but he contends that "when taken as a whole, the evidence supports [the] conclusion that appellant was not fostering his relationship with the children." Appellee then directs this court's attention to *Sharp v. Keeler*, 99 Ark. App. 42, 256 S.W.3d 528 (2007), for the proposition that a custodial parent's failure to foster the relationship between a child and the non-custodial parent constitutes a material change of circumstances. In *Keeler*, we affirmed a trial court's finding of a material change in circumstances. The court noted that the record was replete with evidence that the custodial parent was attempting to alienate the non-custodial parent from his son — including evidence that she refused to keep the father apprised of the child's medical information (and the child had serious health problems); that she failed to have the child ready for

visitation; that she failed to tender the child for scheduled visitation when she felt it was in the child's best interest; and that she would not allow the father to babysit the child. This was all done following the trial court's admonishment that she "promote the bond and relationship" between the child and the non-custodial father. *Id.*

In this case, we are convinced that the scattering of petty complaints does not amount to a "failure to foster" of a significant degree to support a finding of changed circumstances. However, we would be remiss if we failed to note that it is apparent from the final order that the trial court made a valiant effort to navigate a tumultuous situation with a creative solution that would best serve the needs of the parties' children. Unfortunately, because the solution was premised on a clearly erroneous foundation, we are forced to order reversal. Further, because we conclude as a matter of law that no changed circumstances exist, there is no need to examine the merit (or lack thereof as the case may be) of the trial court's joint-custody award.

Finally, we turn our attention to the cross appeal challenging the trial court's refusal to find appellant in contempt of court. We review a trial court's refusal to punish an alleged contemnor using an abuse-of-discretion standard. *Page v. Anderson*, 85 Ark. App. 538, 157 S.W.3d 575 (2004). In support of reversal, appellee argues that appellant made a change to the children's health insurance without notification to him, which resulted in retroactive reimbursement. While this might be true, appellee fails to connect this act with a specific court order. Thus, it cannot be said that the trial court abused its discretion in its refusal to hold a party in contempt for violating one of its own orders. As such, we affirm.

Reversed on direct appeal; affirmed on cross-appeal.

GLOVER and MARSHALL, JJ., agree.

Randy WEISENBACH *v.* Larry and Melissa KIRK; Dewayne and Rhonda Smith

CA 08-508 290 S.W.3d 614

Court of Appeals of Arkansas
Opinion delivered January 7, 2009

Lyons, Emerson & Cone, PLC, by: *Scott Emerson*, for appellant.

M. Joseph Grider, for appellees.

JOHN B. ROBBINS, Judge. This appeal arises from a circuit court's vacation of a platted but unused section of a road in a subdivision. For the reasons expressed below, we affirm the trial court's decision to vacate the road.

Appellees Larry and Melissa Kirk own Lot 23 in a subdivision platted in 1979 called Rolling Hills Estates 2nd Addition, outside Pocahontas, in Randolph County. Appellees Dewayne and Rhonda Smith own Lot 22 in that subdivision. Appellant Randy Weisenbach owns property outside and adjacent to the subdivision. A portion of one of the dedicated streets in appellees' subdivision, Rolling Hills Drive, runs between their lots and ends at appellant's property line, to the north. Although this section of the road was dedicated on paper, it was never constructed. Appellant purchased his property, which fronts on Johnson

Church Road, in 2004, and created and filed a plat of Rolling Meadows Subdivision there in March 2005. On his plat, a street labeled "Paradise Trail" is laid out in such a way as to connect to the platted north end of Rolling Hills Drive. Appellant asserts that his property "abuts" Rolling Hills Drive because Paradise Trail and Rolling Hills Drive would connect, if they both were constructed. Appellees take the position that appellant is not an abutting property owner in relation to the unbuilt portion of Rolling Hills Drive or within the context of the statutory scheme by which such dedicated streets may be vacated.

In January 2005, appellees filed a petition under Arkansas Code Annotated § 14-18-105 (Repl. 1998) to vacate this section of Rolling Hills Drive, alleging that it had never been used as a road. Appellant filed an objection, arguing that he planned to develop his property as a subdivision and connect Rolling Hills Drive, via Paradise Trail, to Johnson Church Road. The county court granted the petition to vacate and appellant appealed to the circuit court. In support of their petition, appellees presented the testimony of neighbors Alan Van Winkle, Tina Sharp, Gary Barker, and Carolyn Lowell; former neighbor Bill Harper; appellee Larry Kirk; and appellee Dewayne Smith. Their testimony was essentially that, before this dispute, people had used the area for hunting, cutting hay, riding four-wheelers and motorcycles, and taking walks, but had never used it as a road; that it had never been graded; and that no one had actual knowledge that it had been platted as a road. Mr. Kirk testified that there were no ruts in the field until appellant created some in January 2005.

Appellant testified that, like others, he had used the road before he owned his property, while doing some work for the previous owners of his property. He described the area in dispute as a grassy field road with a rut down one side. He stated that, when he purchased his land, it was important to him that Rolling Hills Drive be a through street because he planned to develop a subdivision. Appellant presented the testimony of three former owners of his property, Stanley Camp, Glendon Matthews, and David Matthews, to support his position.

The trial court entered its decision on January 22, 2008, stating:

> 3. The Court finds that even though the area was platted as a road no road bed, culverts, or other features associated with a road were ever constructed or placed in the area of the platted road.

> 4. The Court finds that Ark. Code Ann. § 14-18-105 and 106 do apply to this situation and must be read together to determine the procedure to be used to petition the County Court to abandon the road. The Court finds that the phrase "owner of all lots and blocks abutting upon any street . . ." in Ark. Code Ann. § 14-18-106(a)(1) does not require that all abutting property owners must join or consent to the action, but that all are to be made parties to the action so that their voices may be heard by the County Court requiring the request to vacate or abandon the road. The road [appellees] are requesting to be vacated was not platted to benefit [appellant] and others in his addition because the person who had the road area platted did not own the adjoining parcel of property. The fact that the plat of [appellant's] addition names the road something different is evident of this intent to not have the road in question be a continuance of said road.
>
> . . . .
>
> 6. The Court further finds that the road being vacated is not against the interest of the public nor will it prevent ingress or egress to the lots of other property owners in the area as is addressed in Ark. Code Ann. § 14-18-107(b).
>
> 7. The Court further finds that for more than five (5) years prior to the filing of this action the use of the area platted as the road does not arise to such a use that it would cause [appellees] to think that the area was in fact being used as a road. Such occasional use of the area by an ATV or other vehicle does not in the Court's mind create notice that [appellant] or others are using the area as a road or using the area against the interest of [appellees].

Appellant then pursued this appeal.

When an owner of land files a plat and thereafter lots are sold with reference to it, such action constitutes an irrevocable dedication of any street or passageway for public use shown or indicated on the plat. *City of Sherwood v. Cook*, 315 Ark. 115, 865 S.W.2d 293 (1993). Title acquired by dedication to the public is an easement, with the fee remaining in the adjacent landowner. *Ark. State Hwy. Comm'n v. Sherry*, 238 Ark. 127, 381 S.W.2d 448 (1964). The public's right to use a dedicated roadway extends to the whole breadth of it, not merely to the part that is constructed or actually traveled. *Id.* However, there is a statutory process for vacating a dedicated roadway in platted subdivisions located outside the limits of a municipality. *See* Ark. Code Ann. §§ 14-18-101 through 110 (Repl. 2008).

The plain wording of Arkansas Code Annotated § 14-18-105 (Repl. 1998) connotes that, where streets and passageways have been platted but never used or, if used at one time, have not been used for a period of five years, the county court is empowered to declare such passageways closed and vacated, if it finds those facts to exist:

> In all cases where the owner of lands situated in a county and outside of a city of the first or second class or incorporated town has dedicated a portion of the lands as streets, alleys, or roadways by platting the lands into additions or subdivisions and causing the plat to be filed for record in the county and any street, alley, or roadway, or portion thereof shown on the plat so filed shall not have been opened or actually used as a street, alley, or roadway for a period of five (5) years, or where any strip over the platted lands, although not dedicated as a street, has been used as a roadway, the county court shall have power and authority to vacate and abandon the street, alley, or roadway, or a portion thereof, by proceeding under the conditions and the manner provided in this chapter.

On appeal, appellant first argues that the trial court erred in vacating Rolling Hills Drive because all abutting landowners did not join in the petition, citing Arkansas Code Annotated §§ 14-18-106(a)(1) and 107(a) (Repl. 1998). Although we do not agree with the trial court that section 14-18-106(a)(1) does not require all abutting property owners to join or consent to the action, we affirm for another reason: as explained below, appellant was not an abutting landowner within the meaning of that statute.

Arkansas Code Annotated section 14-18-106 (Repl. 1998) states:

> (a)(1) The owners of all lots and blocks abutting upon any street, alley, or roadway, or portion thereof, desired to be vacated shall file a petition in the county court requesting the court to vacate it.
>
> (2) The petition shall clearly designate or describe the street, alley, or roadway, or portion thereof, to be vacated, give the name of the addition in which they are located and the date the plat was filed, and attach as an exhibit a certified copy of the plat.
>
> (b)(1) Upon the filing of the petition, the county clerk shall promptly give notice, by publication once a week for two (2) consecutive weeks in some newspaper published in the county and

having a general circulation therein, that the petition has been filed and that on a certain day therein named the county court will hear all persons desiring to be heard on the question of whether the street, alley, or roadway, or portion thereof, shall be vacated.

(2) The notice shall give the names of property owners signing the petition, clearly describe the street, alley, or roadway, or portion thereof, to be vacated, and give the name of the addition in which they are located.

Arkansas Code Annotated section 14-18-107 (Repl. 1998) provides:[1]

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[1] Arkansas Code Annotated section 14-18-108 (Repl. 1998) provides for an appeal:

(a) If the county court shall find that the petition should be granted, either in whole or in part, it shall enter an order vacating the streets, alleys, roadways, or portions thereof.

(b)(1) The finding and order of the county court shall be conclusive on all parties having or claiming any rights or interest in the streets, alleys, roadways, or portions thereof, vacated. However, an appeal may be taken to the circuit court and perfected within thirty (30) days from the entry of the order, and an appeal may be taken from the circuit court to the Arkansas Supreme Court and perfected within thirty (30) days from the entry of the order of the circuit court.

(2) A certified copy of the order shall be filed in the office of the recorder of the county and recorded in the deed records of the county.

(c)(1) The costs of the publication of the notice, the recording of the order, and the court costs shall be paid by the petitioners.

(2) The court costs shall be paid by parties who unsuccessfully contest the petition.

Arkansas Code Annotated section 14-18-109 (Repl. 1998) addresses assessment of the vacated road:

(a) The owners of all lots abutting on the streets, alleys, or roadways, or portions thereof, vacated by an order of the county court, as provided for in § 14-18-108, shall have the right to have reduced to acreage such lots and the streets or alleys so vacated by petition to the county court where the property is situated.

(b) The county court shall promptly hear the petition and, upon proper showing that it is signed by all of the owners, shall order that the lots and streets, alleys, or roadways be reduced to acreage, and they shall thereafter be assessed as acreage for taxation of all kinds.

(a) At the time named in the notice, the parties signing the petition and any other parties owning lots or blocks in the platted lands not abutting on the streets, alleys, or roadways, or portions thereof, to be vacated or otherwise affected by the vacation shall be heard; and the court shall determine whether the streets, alleys, roadways, or portion thereof, should be vacated as proposed in the petition.

(b) No street, alley, or roadway, or portion thereof, shall be vacated if the court finds that it would be against the interest of the public or that no means of ingress and egress would be left to any lots in the addition not abutting on them, unless the owners of the lots file their written consent to the vacation with the court.

We review issues of statutory construction de novo. *Mamo Transp., Inc. v. Williams*, 375 Ark. 97, 289 S.W.3d 79 (2008). The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Id.* In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* We construe the statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. *Id.* When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to resort to rules of statutory construction. *Id.* However, we will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Id.* We strive to reconcile statutory provisions relating to the same subject to make them sensible, consistent, and harmonious. *City of Jacksonville v. City of Sherwood*, 375 Ark. 107, 289 S.W.3d 90 (2008).

Although we construe section 14-18-106(a)(1) as requiring all abutting property owners to join in the petition, the trial court reached the right result. We may affirm the trial court if it is correct for any reason. *Fritzinger v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003). The statutory scheme found in this chapter is focused upon the land included within the recorded plat, not upon the property outside, or even contiguous to, the subdivision. Only dedicated roadways that are within the platted addition or subdi-

(c) The petition may be included in the petition for the vacation of the streets, alleys, or roadways, and the order may be included in the order vacating it, or the petition may be filed and the order entered separately.

vision can be vacated pursuant to this process. These statutes are primarily concerned with the rights of the owners who bought property in reference to the plat. Section 14-18-106(b)(2) clearly contemplates that the property owners signing the petition own property in the addition that contains the road to be vacated. Appellant's property does not front the vacated road and lies outside the subdivision. Therefore, his ownership of Rolling Meadows Estates would not bring him within the terms of that statute, and he did not need to sign the petition or consent to it. To hold that appellant is an "abutting" landowner within the contemplation of these statutes and a necessary signer of the petition to vacate, would lead to an absurd result contrary to the General Assembly's intent. At most, appellant was entitled to an opportunity to be heard as a member of the public or "any other part[y] . . . otherwise affected by the vacation," and he was afforded that right. *See* Ark. Code Ann. § 14-18-107(a).

In his next point, appellant argues that the trial court erred in finding that the road had not actually been used for five years, which was a question of fact. We will not reverse the trial court's findings of fact unless they are clearly erroneous. *Greenwood Sch. Dist. v. Leonard*, 102 Ark. App. 324, 285 S.W.3d 284 (2008). It is obvious that the trial court credited the testimony of appellees and their witnesses over that of appellant and his witnesses, and we cannot say that this finding of fact is clearly erroneous.

Appellant further contends that the trial court mistakenly applied an adverse-possession or prescriptive-easement standard in reaching its decision and in placing the burden of proof on him. We disagree. The trial court's statements about appellees' notice of the platted road and about using it "against [appellees'] interest" are irrelevant in light of the court's sensible construction of the statutes and the evidence supporting its findings of fact.

Appellant next argues that the circuit court erred in finding that it would not be contrary to the interests of the public to close this road. The standard of review requires that we affirm the circuit court's finding of fact regarding the interests of the public unless it is clearly erroneous. *See Greenwood Sch. Dist. v. Leonard, supra.* Given the testimony about the potential for increased traffic in Rolling Hills Subdivision, this finding was not clearly erroneous.

In his last point, appellant contends that, even if the trial court was correct in vacating the road, it erred in failing to recognize his independent right to ingress and egress, citing *Tweedy v. Counts*, 73 Ark. App. 163, 169-70, 40 S.W.3d 328, 333 (2001), where we stated:

> In the instant case, even though there was a valid road closing and Randolph County no longer has any responsibility for maintenance, appellants, as abutting property owners, still have a right to use the old road for ingress and egress to their property, and the chancellor erred in finding otherwise.

Tweedy, however, involved closure proceedings brought under a different statutory process, and, as discussed above, appellant was not an abutting landowner within the contemplation of the statutes that are applicable here. Additionally, section 14-18-107(b) only preserves ingress and egress rights to any lots in the addition not abutting the road to be vacated if they were left with no means of ingress and egress. Appellant's property is not included within this addition, and he has other means of ingress and egress.

Affirmed.

BAKER and HART, JJ., agree.

Roger BEDSOLE *v.* STATE of Arkansas

CA CR 08-376 290 S.W.3d 607

Court of Appeals of Arkansas
Opinion delivered January 7, 2009

Morris W. Thompson and *Terrence Cain*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Deborah Nolan Gore*, Ass't Att'y Gen., for appellee.

D.P. MARSHALL JR., Judge. The issue presented is whether a reasonable person in Roger Bedsole's position would have felt free to ignore State Trooper Condley's post-traffic-stop questions and proceed on his way. Bedsole was traveling east on I-40 in Pope County when Condley noticed Bedsole's car cross the fog line onto the shoulder. Condley initiated a traffic stop. Bedsole pulled over and got out of his car to talk to Condley. Bedsole provided his driver's license, the rental agreement for his car, and answered Condley's questions. Condley issued Bedsole a warning. The video tape of the stop reveals that, right after receiving the warning, Bedsole began to turn toward his vehicle. At that instant, Condley said "[l]et me ask you a question." The Trooper asked whether Bedsole had any drugs or weapons in his car. Bedsole said that he did not. Condley then asked to search the car. And Bedsole agreed.

Condley's search revealed approximately two pounds of methamphetamine. The State charged Bedsole with possession of a controlled substance with intent to deliver and simultaneous possession of drugs and firearms. The State nolle prossed the latter charge. Bedsole moved to suppress the items seized and his statements made during the search. After a hearing, the circuit court denied his motion. Bedsole then entered a conditional guilty plea, reserving his right under Ark. R. Crim. P. 24.3(b) to appeal the denial of his motion to suppress. He now appeals.

We review the circuit court's denial of Bedsole's motion to suppress *de novo*, looking at the totality of the circumstances, reviewing the court's findings of fact for clear error, and giving due weight to inferences drawn by the court. *Bumgardner v. State*, 98 Ark. App. 156, 158-59, 253 S.W.3d 1, 3 (2007). We note two important points at the threshold. First, Trooper Condley's initial traffic stop of Bedsole's car was lawful — Condley witnessed the car cross the fog line. *Sims v. State*, 356 Ark. 507, 512, 157 S.W.3d 530, 533 (2004). Second, the State concedes that Condley did not have reasonable suspicion, under Arkansas Rule of Criminal Procedure 3.1, to continue detaining Bedsole after issuing the warning and completing the traffic stop.

The case thus turns on whether Condley's post-warning questioning of Bedsole was a consensual police-citizen encounter or an illegal detention. We agree with the State that not every police-citizen encounter is a seizure. *Dowty v. State*, 363 Ark. 1, 10, 210 S.W.3d 850, 855 (2005). The critical question, though, is whether Trooper Condley's conduct would have communicated to a reasonable person that he could not answer Condley's questions and leave. *Ibid.* at 10, 210 S.W.3d at 855-56.

We must consider the totality of the circumstances, a broad mandate. *Smith v. State*, 321 Ark. 580, 585-86, 906 S.W.2d 302, 305 (1995). The cases identify various facts bearing on whether a seizure occurred. These circumstances include: the threatening presence of several officers; an officer's display of a weapon; some physical touching of the citizen; and an officer's use of language or a tone of voice indicating that compliance with the officer's request might be compelled. *Ibid.* Whether the officer tells a person that he is free to go, or speaks other parting words, is another relevant fact. *Lilley v. State*, 362 Ark. 436, 440, 208 S.W.3d 785, 788 (2005); *Bumgardner*, 98 Ark. App. at 160, 253 S.W.3d at 3-4. The federal cases on this issue echo the relevance of all these circumstances. *E.g.*, *U.S. v. Pulliam*, 265 F.3d 736, 740-41 (8th Cir. 2001); *U.S. v. Ledesma*, 447 F.3d 1307, 1314 (10th Cir. 2006). And they highlight others. For example, whether the officer's continued questioning "change[s] the climate so that the reasonable listener would view participation in the exchange as freely terminable" is another relevant circumstance. *U.S. v. Sandoval*, 29 F.3d 537, 542 (10th Cir. 1994).

This case is similar to *Lilley*, which also involved a valid traffic stop and the officer's post-warning questioning. *Lilley*, 362

Ark. at 437-39, 208 S.W.3d at 786-88. The State argued that, after the officer issued the warning, Lilley was not detained because a reasonable person would have felt free to leave. *Ibid.* at 440, 208 S.W.3d at 788. Our supreme court disagreed. *Ibid.*

The circumstances of the *Lilley* stop and this one were similar, though not identical. The officer asked Lilley to come back to his patrol car, where there was a drug dog in the backseat, and Lilley complied. *Lilley*, 362 Ark. at 437-38, 208 S.W.3d at 786-87. The officer then ran the appropriate checks, asked Lilley some general questions, and issued a warning. *Ibid.* Here, Bedsole voluntarily got out of his car and spoke with Trooper Condley near the front of the patrol car. Bedsole remained between the vehicles while Condley ran the appropriate checks and asked him general questions. This record contains no evidence that Condley had a drug dog with him. In sum, the citizen's location in *Lilley* presented greater coercive circumstances than in this case.

Trooper Condley then issued Bedsole the warning and, after a moment's pause, said "[l]et me ask you a question." Officer Condley testified that he "gave [Bedsole] a warning and handed his driver's license back and then started talking to him about if he had anything illegal in the vehicle." 362 Ark. at 438, 440, 208 S.W.3d at 787-88. Bedsole also testified that, after Trooper Condley issued the warning and returned his paperwork, "[h]e never quit talking to me." The video confirms this testimony. Similarly, after issuing Lilley a warning and handing his paperwork back, the officer "immediately launched into additional questions" about whether Lilley was carrying anything illegal in his car. 362 Ark. at 440, 208 S.W.3d at 788. The immediacy of Trooper Condley's continued questioning of Bedsole did not change the encounter's climate. 362 Ark. at 440, 208 S.W.3d at 788; *see also Sandoval*, 29 F.3d at 542. Finally, the Trooper, like the officer in *Lilley*, never told Bedsole that he was free to go. 362 Ark. at 440, 208 S.W.3d at 788.

This case presents a closer question than *Lilley*. After considering the totality of the circumstances, however, we conclude that a reasonable person would not have felt free to ignore Trooper Condley's final questions and proceed on his way. We therefore hold that the post-warning encounter was not consensual. Because the State concedes that Condley did not have reasonable suspicion, the Trooper illegally detained Bedsole. The circuit court should have suppressed all the evidence obtained as a

result of that illegal detention. *Lilley*, 362 Ark. at 445-46, 208 S.W.3d at 792.

Reversed and remanded.

VAUGHT, C.J., and HART, J., agree.

Brenda Bryant OSBORN, Opal M. Garfi, Altha P. Hickman, Norma Sexton, Linda Bliss, Rita Gilliam, Gene Bryant, Billy Ray Bryant, and Beverly Beeman *v.* Billy BRYANT, Betty Hamby, Norma Knight, Mabel Kimberling, and Dortha M. Whitner

CA 08-589 290 S.W.3d 620

Court of Appeals of Arkansas
Opinion delivered January 14, 2009

Bristow & Richardson, PLLC, by: *Bill W. Bristow*, for appellants.

Robert Hudgins, for appellees.

ROBERT J. GLADWIN, Judge. This is the second appeal from a declaratory judgment rendered by the Jackson County Circuit Court concerning whether a will that was not admitted to probate could be used as evidence of a devise of property under Ark. Code Ann. § 28-40-104 (Supp. 2007).[1] The circuit court held that the will could not be used because appellant Brenda Bryant Osborn had filed an affidavit for collection of small estate and attached the will to that affidavit. Osborn and the other appellants raise two points on appeal challenging that ruling. We reverse.

The facts are largely undisputed. Lacy Bryant died testate on June 15, 1994, survived by his widow, Naomi Bryant, and eight surviving children.[2] In his will, Bryant left his real property — a twenty-acre tract upon which his home was situated and a sixty-acre tract — to his wife for the duration of her life and then both tracts to Osborn should she choose to pay $200 per acre to Bryant's other heirs for the sixty-acre tract. The will further instructed that, should Osborn elect not to purchase the property, it would be divided equally between Bryant's children, *per stirpes*.

Following Bryant's death, Osborn filed an affidavit for collection of small estate with the Jackson County Circuit Court. The affidavit also attached Bryant's will. The will appears to be properly executed by Bryant and three witnesses. Two of the attesting witnesses also executed a "Proof of Will." Finally, a "Notice of Probate" and proof of publication of that notice were also filed on October 14, 1994.

On June 21, 1995, Osborn executed an "Administrator's Deed" to herself. The deed conveyed the property of Lacy Bryant pursuant to the terms of the will, reflecting that Bryant's widow would retain a life estate and the terms by which Osborn could

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[1] We dismissed the first for lack of a final order. *Osborn v. Bryant*, CA06-1131 (Ark. App. May 16, 2007) (*Osborn I*).

[2] In addition to Osborn, Bryant's other surviving children are appellant Opal Garfi, appellant Altha P. Hickman, appellant Gene Bryant, appellee Billy Bryant, appellee Betty Hamby, appellee Dortha Whitener, and appellee Norma Knight. Appellants Norma Sexton, Linda Bliss, Rita Gilliam, Billy Ray Bryant, and Beverly Beeman are children of Bryant's deceased child O.M. Bryant, as is appellee Mabel Kimberling.

purchase the property upon her mother's death. The deed was duly recorded. Naomi Bryant lived on the property until her death on November 1, 2004.

On December 1, 2004, appellees filed the present declaratory-judgment action against Osborn and the other appellants, heirs who had accepted her payments, seeking to have the court declare that Lacy Bryant's will and the administrator's deed were invalid, and that Lacy Bryant's property should pass in accordance with the laws of intestacy. The complaint also sought partition of the real estate in the event appellees were successful with their petition for declaratory judgment. Appellants denied the allegations and asserted that Osborn owned the property pursuant to the administrator's deed.

Arguments Made in the Circuit Court

At trial, appellees argued that the will and deed were nullities under section 28-40-104 because the will was never probated. They also asserted that the exceptions in section 28-40-104 do not apply because there was a probate proceeding — the affidavit of collection of small estate. Appellees also cited the five-year statute of limitations for probating a will found in section 28-40-103 as a further reason why the deed could not be used as evidence of Osborn's title to the property. Finally, appellees argued that, because there was no administration of Lacy Bryant's estate, Osborn lacked authority to execute the administrator's deed to herself.

In response, appellants argued that the small estate procedure was excepted from the reach of section 28-40-104 by the statute's plain language. Appellants also asserted that section 28-41-102(d) authorized Osborn to execute a deed to herself. At trial, appellants cited the supreme court's decision in *Smith v. Ward*, 278 Ark. 62, 643 S.W.2d 549 (1982), for the proposition that section 28-40-104(b) allows a will not admitted to probate to be effective as evidence of a devise if the two conditions listed in that section are met.

The Circuit Court's Ruling

On June 12, 2006, the circuit court issued a written decision finding that Lacy Bryant's will was never admitted to probate but, nevertheless, could not be used as evidence of a devise because Brenda Osborn's filing of an affidavit of small estates was "a

probate proceeding concerning the succession . . . of the estate" under Ark. Code Ann. § 28-40-104(b)(1). The court noted that the small estate procedure was "not intended to provide a means to avoid probate where there is an elevated likelihood of conflict among heirs, there are out-of-state heirs not likely to see the published notice, and the will provides conditions precedent to the transfer of property." The court concluded that Lacy Bryant effectively died intestate. This court dismissed Osborn's appeal in *Osborn I* for lack of a final order. Following remand, the circuit court entered a partition decree finding that the property could not be divided in kind and ordering it sold. This appeal followed.

Arguments on Appeal

Appellants raise two points on appeal: (1) that the distribution of Lacy Bryant's estate without administration was properly accomplished and the "Administrator's Deed" should be recognized as a valid conveyance of the real property, and (2) that the circuit court improperly applied Arkansas Code Annotated section 28-40-104 to the facts of this case.

This case involves the interpretation of section 28-40-104, which provides as follows:

> (a) No will shall be effectual for the purpose of proving title to or the right to the possession of any real or personal property disposed of by the will until it has been admitted to probate.
>
> (b) Except as provided in § 28-41-101, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of probate by the circuit court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if:
>
> (1) No proceeding in circuit court concerning the succession or administration of the estate has occurred; and
>
> (2) Either the devisee or his or her successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.
>
> (c) The provisions of subsections (b) and (c) of this section shall be supplemental to existing laws relating to the time limit for

> probate of wills, and the effect of unprobated wills, and shall not be construed to repeal § 28-40-103 and subsection (a) of this section or any other law not in direct conflict herewith.

We review issues of statutory interpretation de novo, because it is for this court to determine the meaning of a statute. *See, e.g.*, *Great Lakes Chemical Corp. v. Bruner*, 368 Ark. 74, 243 S.W.3d 285 (2006). Regarding our standard of review for statutory construction, our supreme court has said:

> The basic rule of statutory construction is to give effect to the intent of the legislature. Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible.

Id. at 82, 243 S.W.3d at 291 (citations omitted).

Appellees and the circuit court focused on the fact that section 28-40-104(b) provides that, to be effective as evidence of a transfer of property, a will must be declared valid by a court. Further, they also questioned whether appellants could meet the requirements of section 28-40-104(b)(1), namely, that there have not been any proceedings concerning the "succession or administration of the estate." However, the circuit court erred in its interpretation because it failed to give effect to subsection (b)'s provision that exempts small-estate proceedings from the requirement that, to be evidence of a property transfer, a will must be declared valid by a court. Section 28-40-104(b) provides: "*Except as provided in § 28-41-101* [the small-estate procedure], to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of probate by the circuit court." (Emphasis added.) As noted above, we construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible. By excepting small-estate proceedings from the reach of section 28-40-104(b), the legislature intended that a will that had not been admitted to probate could still be used as evidence of a devise of real property in cases where the small-estate

procedure is used without meeting the conditions listed in that section. The two conditions are relevant in cases where the small-estate procedure is not used. There is no argument that Osborn did not comply with the procedures for collection of small estates.

This is the first case construing this alternate exception language in subsection (b), and we hold that the circuit court erred in its application of the law to the undisputed facts. A plain reading of the statute, giving the words their ordinary and plain meaning, leaves us with no other reasonable conclusion. This unique situation appears to be just the type of scenario that the statute was designed to remedy.

Reversed.

PITTMAN and GLOVER, JJ., agree.

PINE MEADOW AUTOFLEX, LLC *v.* Susan TAYLOR

CA 08-299 290 S.W.3d 626

Court of Appeals of Arkansas
Opinion delivered January 21, 2009

Richard P. Osborne, for appellant.

Williams & Hutchinson, LLP, by: *Timothy C. Hutchinson*, for appellee.

JOHN MAUZY PITTMAN, Judge. This case involves a dispute between appellant lienholder and a subsequent purchaser over possession of an automobile. The trial judge found that appellee was a good-faith purchaser for value and thus was entitled to possession of the automobile under Arkansas Code Annotated section 4-2-403 (Repl. 2001). Appellant argues on appeal that the trial court erred in finding that appellee was a good-faith purchaser for value and

that, even if the latter finding were correct, appellee purchaser would not be entitled to the vehicle because her seller had only void title. We affirm.

Appellant lienholder sold the automobile, a previously-damaged and salvaged 1997 Jeep, to David Cates for $7,995 in June 2005. Appellant financed the purchase and took a lien interest that was noted on the face of the title. Cates subsequently became delinquent on the payments and filed for bankruptcy, whereby the automatic stay prevented appellant from enforcing the lien. On August 25, 2006, Cates applied for a duplicate title for the Jeep. The application was accompanied by a form entitled "State of Arkansas Official Release of Lien or Permission to Issue a Replacement Title," stating that the lien held by appellant had been satisfied and released. The release purported to be authorized by "Jeff Barron" on behalf of appellant lienholder. This document was a forgery in that there was no person named Jeff Barron who was authorized to release the lien on behalf of appellant, Pine Meadow Autoflex LLC. Nevertheless, based on this forgery, the State of Arkansas issued a duplicate title showing David Cates as sole owner of the vehicle with no outstanding lien.

Cates then sold the automobile to Walt Asher, who transferred title to Recovery Files, which operated a used-car lot. Appellee previously had purchased vehicles from Recovery Files without incident. After being informed that the vehicle in question was salvaged, and discovering that the transmission was inoperable, the door did not have a latch, and the rear hatch would not shut, appellee purchased the vehicle from Recovery Files for $1,850 and obtained a clear title in her name. Approximately two months later, after appellee had made extensive repairs, licensed the vehicle, and obtained insurance, the vehicle was repossessed from appellee's home on behalf of appellant. Appellee then brought this action to recover the vehicle.

■ We first address appellant's argument that the trial court erred in finding appellee to be a good-faith purchaser for value. "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. Ark. Code Ann. § 4-1-201(b)(20) (Supp. 2007). Whether a party has acted in good faith in a commercial transaction is generally a question of fact. *Midway Auto Sales v. Clarkson*, 71 Ark. App. 316, 29 S.W.3d 788 (2000). When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether

the findings are clearly erroneous, or clearly against the preponderance of the evidence. *Springdale Winnelson Co. v. Rakes*, 337 Ark. 154, 987 S.W.2d 690 (1999). Here, the record shows that appellee purchased the vehicle from an established dealer with which she had previously dealt. Although there was evidence that appellee purchased the vehicle for less than the blue-book value, there was also evidence that it required extensive repairs. Furthermore, when appellee attempted to obtain a loan to finance her purchase of the vehicle, the lender refused to lend the purchase price with only the vehicle as security, and required additional collateral. Finally, appellee invested in repairs, licensed the vehicle, and obtained insurance. On this record, we cannot say that the trial court clearly erred in finding that appellee was a good-faith purchaser for value.

Nor do we agree with appellant's assertion that appellee acquired only void title. The governing statute, section 4-2-403 (Repl. 2001), provides that:

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> (a) the transferor was deceived as to the identity of the purchaser; or
>
> (b) the delivery was in exchange for a check which is later dishonored; or
>
> (c) it was agreed that the transaction was to be a "cash sale"; or
>
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
>
> (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
>
> (3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed be-

> tween the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law.

The crucial question is whether Cates, at the time of the sale of the vehicle to Walt Asher, had title that was void or instead title that was voidable. The controlling case is *Midway Auto Sales v. Clarkson, supra,* where we held that one who obtains property by fraud acquires voidable title and therefore has power to transfer good title to a good-faith purchaser for value; even where delivery is procured through criminal fraud, voidable title passes. Here, it is likely that Cates obtained the duplicate title by criminal fraud but, even so, the sale to Asher gave Asher voidable title, *Midway Auto Sales, supra,* and the subsequent purchasers therefore were empowered to transfer good title pursuant to Ark. Code Ann. § 4-2-403(1)(d) (Repl. 2001).

Appellant attempts to characterize the forgery and subsequent sale of the auto as theft,[1] but all instances of obtaining property through criminal fraud could be so characterized. Appellant also cites cases from the courts of New York and Texas holding that a title document procured through fraud can pass only void title to subsequent purchasers, and asks us to adopt this rule on public policy grounds. We decline to do so. Appellant, and used-car dealers in general, are beneficiaries of the provision in section 4-2-403(1) allowing good-faith purchasers to pass good title even when they have been defrauded in obtaining the goods that they sell. The assurance that the purchaser of second-hand goods will not be subject to potential claims by those in the chain of title that may have been victims of fraud gives buyers of used vehicles confidence that the transaction will be binding and secure, thereby increasing both the value of the individual vehicle and volume of used-vehicle sales in general. We think that confidence in documents of title issued by the State likewise benefits the business interests of used-car dealers. As beneficiaries of these assurances to buyers, and as the parties best equipped to investigate title irregularities, we think that the risk of forged title documents can and should be borne by dealers rather than purchasers.

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[1] Absent exigent circumstances, one who purchases from a thief acquires no title as against the true owner. *Eureka Springs Sales Co. v. Ward,* 226 Ark. 424, 290 S.W.2d 434 (1956).

Affirmed.

GLADWIN, J., agrees.

GLOVER, J., concurs.

DAVID M. GLOVER, Judge, concurring. I join the majority in affirming the trial judge for correctly applying current law to undisputed facts. However, I disagree with the majority's dicta regarding which party is best equipped to investigate title irregularities and to bear the risk of forged title documents. Here, the basic facts were stipulated. Though this case involves the sale and the multiple resale of one used vehicle, it centers on the handling by the Department of Finance and Administration (DFA) of a forged "State of Arkansas Official Release of Lien on Permission to Issue a Replacement Title." Before us, the parties are the initial seller, a used-car dealership, and after two intermediate sales, the final buyer. At trial, neither side alleged wrongdoing by the other.

This case involves an interplay between the sale of goods under our Uniform Commercial Code and the perfection of liens under our uniform motor vehicle act (the "act"). Our interpretation of Arkansas law, although correct, begs for legislative review of Ark. Code Ann. § 27-14-805. This writer finds there is a gap within the Uniform Motor Vehicle Administration, Certificate of Title, and Antitheft Act, Ark. Code Ann. § 27-14-101 *et seq.*, specifically the interaction between section 27-14-909, "Release of lien by lienholder — Disclosure of Information" subsection (b)(2) and section 27-14-805, "Constructive notice." This case turns on the constructive-notice provision, section 805.

Here, the initial seller, the dealer, followed the act and protected the financed balance owed to it by properly perfecting its lien on the title. (§ 27-14-802-804). Before the initial seller received final payment and satisfied its lien (§ 27-14-909(a)), a forged "official" release of lien was presented to DFA, resulting in a new certificate of title showing no lien being issued by DFA pursuant to section 805. That action on the part of a single DFA employee, activated the constructive-notice of section 805 (which is not actual notice) to the initial seller, the dealer, who in good faith and full reliance on the uniform act had perfected its title retaining a lien under the sister sections 802 – 804 of the act.

It is contemplated under the act that local DFA revenue-office employees are to serve the gatekeeper function to protect or release otherwise valid liens against vehicle titles on file with that

agency. In this case, the forged "official" release of lien that was presented to the DFA revenue-office employee bore an unknown, unverified signature by an imposter who did not even indicate above his signature that he was acting in an agency or representative capacity of the dealer whose name and address also appeared at the top of the one-page "official" document offered. At the least, if constructive notice, instead of actual notice, is all that is required to be given to the lienholder when his valid lien is released, the constructive-notice statutorily imposed language should be bolstered by the requirement of more elaborate verification of identification, authority, and representation. Sellers and buyers are entitled to equal confidence in the documents of title. Sellers include new-car dealers, used-car dealers, financial institutions and individuals, all of whom are also likely lenders with perfected liens. The buyer's confidence in the validity of the certificate of title (issued through a local revenue office) should not exceed the seller's confidence in the security afforded by a perfected lien against the title (also filed at a local revenue office). Even "lawyers and used-car dealers" need protection on occasion. The task of equally protecting legitimate interests of both buyers and sellers of used motor vehicles is a legislative function.

Steven Ralph TEATER *v.* STATE of Arkansas

CA CR 08-641 290 S.W.3d 623

Court of Appeals of Arkansas
Opinion delivered January 21, 2009

Gary McDonald and *William A. McLean*, for appellant.

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

KAREN R. BAKER, Judge. Appellant Steven Ralph Teater was convicted by a jury in Ouachita County Circuit Court of second-degree murder in the death of his wife and attempted second-degree murder of Rod McKinney. He was sentenced to 360 months' imprisonment in the Arkansas Department of Correction. On appeal, he asserts that the trial court erred in granting the State's motion in limine excluding from evidence fifteen text messages found in the cellular phone of his deceased wife and erred in precluding appellant from cross-examining McKinney about the text messages. We affirm appellant's convictions.

The sufficiency of the evidence is not challenged in this case. Rather, appellant challenges the admissibility of the fifteen text

messages, and thus, we will only discuss the facts relevant to the those messages. We do note that the majority of the evidence mirrored the evidence presented in the first two trials.[1]

It is undisputed that on January 18, 2003, appellant shot and killed his wife, Becky Teater, and shot and injured Rod McKinney. At trial, he asserted the affirmative defense of mental disease or defect. In essence, he asserted that he suffered from a mental disease or defect stemming from his belief that Becky and McKinney were having an affair.

Just prior to the August 2007 trial, approximately four and one-half years after the shootings, appellant's current wife discovered fifteen text messages in the outbox of a cellular phone allegedly belonging to Becky. The messages were allegedly addressed to a cellular phone number belonging to McKinney. The text messages were, however, unidentifiable by time or date. The content of the messages was allegedly suggestive of an affair between Becky and McKinney.

Appellant sought to introduce the text messages in an effort to prove that Becky and McKinney were having an affair at the time of the shootings. The State filed a motion in limine to exclude the text messages and preclude appellant from questioning McKinney about the substance of the messages. The court granted the State's motion stating:

> I guess the Defense is contending that these text messages refer — have a bearing, are important, or relevant in the trial because they relate to the state of mind of Mr. Teater.
>
> The Court would disagree. The state of mind of the Defendant most important is his existing state of mind, matters known to him at the time of the offense. And matters that subsequently [came] to his knowledge can't have a bearing on his state of mind at the time of the alleged commission of the offense. So they would have to be excluded as attempting to offer them as extrinsic evidence relative to his state of mind.

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[1] This is appellant's third conviction on these charges. Appellant's previous appeals for the convictions were reversed and remanded for failure to instruct the jury on appellant's affirmative defense of mental disease or defect. *See Teater v. State*, 89 Ark. App. 215, 201 S.W.3d 442 (2005), and *Teater v. State*, CACR 06-936 (Ark. App. Apr. 4, 2007).

On appeal, appellant asserts that this ruling was in error. The decision to admit or exclude evidence is within the sound discretion of the trial court, and we will not reverse a trial court's decision regarding the admission of evidence absent a manifest abuse of discretion. *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005). Nor will we reverse absent a showing of prejudice, as prejudice is not presumed. *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004).

Appellant asserts that the text messages were relevant as proof of the affair between Becky and McKinney, thereby strengthening appellant's defense of mental disease or defect, and to impeach McKinney's trial testimony that he did not have an affair with Becky. Evidence which is not relevant is not admissible. Ark. R. Evid. 402 (2007). Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401 (2007). Even if relevant, evidence may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403 (2007); *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

Appellant's argument as to relevance fails. The only issue at trial was appellant's defense of lack of capacity in that he lacked the capacity as a result of mental disease or defect to conform his conduct to the requirements of the law or appreciate the criminality of his conduct. *See* Ark. Code Ann. § 5-2-312(a) (Repl. 2006). It was undisputed that appellant believed that Becky and McKinney were having an affair and that appellant shot both Becky and McKinney. Even so, the messages were not relevant to establish his defense. First and foremost, the text messages were not discovered until 2007, approximately four and one-half years after the shootings. Appellant does not assert that he had knowledge of the text messages prior to his shooting of the victims. Because appellant was not aware of the text messages at the time of the shootings, the fact that they may have existed at the time he shot the victims can have no probative value regarding his mental state. Therefore, the trial court did not abuse its discretion in excluding the proffered evidence. *See Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991) (stating that abuse of discretion is a high

threshold that does not simply require error in the trial court's decision, but establishes that the trial court's decision was arbitrary and groundless).

Furthermore, appellant asserts that pursuant to Ark. R. Evid. 608[2] the text messages were admissible to impeach McKinney's credibility as to whether he and Becky had an affair. Appellant fails, however, to demonstrate how the trial court abused its discretion in precluding him from questioning McKinney as to the content of the text messages. Arkansas Rule of Evidence 608(b) (2007) states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

We acknowledge the general proposition that matters affecting the credibility of a witness are always relevant. *See Swinford v. State*, 85 Ark. App. 326, 154 S.W.3d 262 (2004). At issue at the trial, however, was whether appellant lacked the capacity to conform his conduct to the requirements of the law or appreciate the criminality of his conduct. Appellant contends that had the jury known of the proffered evidence, the jury would have found McKinney's testimony regarding the details and events of the shooting to be less credible. However, nothing in McKinney's testimony related to appellant's demeanor at the time of the shooting or any other factual issue that could assist the jury in determining whether appellant had the capacity to conform his conduct to the requirements of the law. McKinney's testimony regarding the shootings consisted of a narrative of facts that were not in dispute. Appellant's attempt to discredit McKinney regarding the existence of the affair simply has no bearing on his defense of mental disease or defect.

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[2] Appellant mistakenly cites to Rule 806; however, his argument is premised on the wording in Rule 608.

Based on the foregoing, we affirm appellant's convictions.[3]

Affirmed.

HART and ROBBINS, JJ., agree.

Casey Lee DIRICKSON *v.* STATE of Arkansas

CA CR 08-173 291 S.W.3d 198

Court of Appeals of Arkansas
Opinion delivered January 28, 2009

[3] Appellant argues further that the text messages were not hearsay. But, given his failure to establish relevance, we need not address his argument as to whether the text messages were properly excludable as hearsay.

Sharon Kiel, for appellant.

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

LARRY D. VAUGHT, Judge. Appellant Casey Lee Dirickson was found guilty by a Grant County Circuit Court jury of two counts of internet stalking of a child and received a sentence of fifteen years' imprisonment. On appeal, he contends that the trial court abused its discretion in admitting into evidence the computer printouts of Dirickson's internet conversations with an alleged fourteen year old. We affirm.

On January 26, 2007, Sheridan Police Department Officer David Holland, posing as fourteen-year-old Cheryl Kidd, entered

an internet chat room. Officer Holland was directly contacted by Dirickson, who initiated the conversation by asking Cheryl her age, sex, and location. Cheryl responded that she was a fourteen-year-old female from central Arkansas. Dirickson said that he was twenty-six years old and that he worked as a correctional officer at a prison. He asked for Cheryl's address, and she told him that she lived behind Wal-Mart at "67 Village Lane."

Dirickson and Cheryl chatted again on January 30, 2007. They discussed having sex and agreed to meet at the Wal-Mart near Cheryl's home. Officer Holland, while conducting surveillance at Wal-Mart, observed a man near the entrance of the store matching Dirickson's description. The officer watched Dirickson leave the store in a vehicle. Officer Holland confirmed that the vehicle was owned by Dirickson and that he worked for the Department of Correction. When Dirickson entered into the subdivision where Cheryl supposedly lived, he was stopped and arrested.

At the police station, Dirickson voluntarily gave a videotaped statement to Lieutenant Brent Cole of the Sheridan Police Department. Dirickson began the statement by saying, "I know I'm guilty." He added:

> I was just playing around online. I started talking to whoever it was said they was 14. And one thing led to another. I tried to keep my mind out of it, but the longer I thought about it the more I thought I'd like to take shot. You know?

At the omnibus hearing, counsel for Dirckson requested that she and her expert be permitted to examine the hard drive of the computer that Officer Holland used to converse with Dirickson to authenticate the transcripts of the conversations that the State sought to offer into evidence at trial. The State agreed to make the computer hard drive available to Dirickson for a supervised inspection. However, prior to Dirickson's inspection of the hard drive, the State advised counsel for Dirickson that the hard drive had been destroyed by a virus. In response, Dirickson moved to dismiss the case, or in the alternative to suppress the transcripts, arguing that because they could no longer be authenticated, they were not the best evidence. The trial court reserved ruling on the issue until trial.

At trial, Officer Holland and Lieutenant Cole gave the above testimony. Officer Holland added that he used software to save his internet conversations to the hard drive so that they could be retrieved at a later date. He further stated that he printed out his conversations with Dirickson from the archive immediately after they occurred. The State also presented the testimony of Charles Simpson, an expert in the field of computer software, equipment, servers, and networks. Simpson, who never inspected the hard drive in question, testified that generally, chat-room conversations can be saved u sing programs that "archive" the information into a data base on the hard drive. He said that once information is archived on the hard drive, the file is locked and cannot be changed, deleted, or manipulated. Conversations can only be accessed by printing them out, and the printout will be verbatim from the archive.

Based on this evidence, the jury convicted Dirickson of two counts of internet stalking of a child. Dirickson does not challenge the sufficiency of the evidence on appeal. Rather, he contends that the trial court abused its discretion in admitting into evidence the printouts of Dirickson's internet conversations with Officer Holland. Within this point, Dirickson argues that the admission of the printouts violated (1) the best-evidence rule; (2) the hearsay rule; and (3) his right to confront the evidence.

Trial courts have broad discretion in evidentiary rulings, and a trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of discretion. *Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007). Likewise, we will not reverse absent a showing of prejudice. *McCoy v. State*, 354 Ark. 322, 123 S.W.3d 901 (2003). The first argument made by Dirickson is that the trial court violated the best-evidence rule when it admitted the printouts of his internet conversations with Officer Holland because they are not the best evidence. According to Dirickson, the computer hard drive is the best evidence. We disagree.

The best-evidence rule, Rule 1002 of the Arkansas Rules of Evidence, provides: "[t]o prove the content of a writing, . . .the original writing . . . is required, except as otherwise provided in these rules or by [rules adopted by the Supreme Court of this state or by] statute." Ark. R. Evid. 1002 Rule 1001(3) defines an "original" in the context of computers: "If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.' " Ark. R. Evid. 1001(3).

Based on Rule 1001(3), the printouts of the internet conversations from the hard drive of the Sheridan Police Department computer fall within the definition of an "original"; therefore, they are the best evidence under Rule 1002. *See Bobo v. State*, 102 Ark. App. 329, 285 S.W.3d 270 (2008) (affirming trial court's admission of computer printouts — from computers other than those that generated the conversations — of emails in sexual-assault cases under best-evidence rule). As such, we hold that in the case at bar, the trial court did not abuse its discretion in admitting the computer printouts into evidence.

Even if we held that the printouts are not "originals" under Rule 1001(3), but rather the hard drive is the original, the printouts of the conversations remain admissible under Rules 1003 and 1004 of the Arkansas Rules of Evidence. Rule 1004 states: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Ark. R. Evid. 1004(1). Here, the evidence reflects that the hard drive was destroyed by a computer virus. There is no evidence, nor has it been alleged, that the police or the State destroyed the hard drive. As such, the hard drive is not required under Rule 1004.

The next question is whether the printouts are admissible as duplicates under Arkansas Rule of Evidence 1003, which provides:

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Ark. R. Evid. 1003. Authentication"is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ark. R. Evid. 901(a). One method of authentication is the presentation of "[t]estimony of a witness with knowledge that a matter is what it is claimed to be." Ark. R. Evid. 901(b)(1).

Here, the authentication of the printouts was established via the testimony of two witnesses — Simpson and Officer Holland. Simpson testified that there are programs that save internet conversations onto the hard drive of a computer and that those conversations cannot be altered or manipulated. He also

testified that the printouts from the archive of the hard drive are printed verbatim. Officer Holland testified that he set his program to archive his conversations. Furthermore, he said that the printed his conversations with Dirickson from the archive immediately after they occurred. The officer identified the printouts of the conversations with Dirickson and testified that they stated verbatim the contents of their conversations. This evidence sufficiently authenticates the printouts such that they are admissible as duplicates under Rule 1003.

Dirickson's reliance upon *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988), is misplaced. *Hamm* involved an audio-taped confession given by the defendant. After the tape was transcribed by a secretary, it was erased and reused. The defendant moved to suppress the transcription, but the motion was denied. *Id.* On appeal, the supreme court reversed and remanded the conviction, holding that the transcript was inadmissable because it was not the best evidence. Here, the printouts from the Sheridan police computer are originals, Ark. R. Evid. 1001(3), whereas the transcription of the audio tape is not. Also, there is a significant difference in reliability between a human-transcribed tape recording and a printout from the archive of a computer hard drive. Finally, in *Hamm*, the State conceded that it was error to admit the transcription of the tape. There has been no such concession in the case at bar.

Another case relied upon by Dirickson in *State v. Rivas*, 172 Ohio App. 3d 473, 875 N.E. 2d 655 (2007). There are some factual similarities between the two cases. *Rivas* is an internet-stalking case, where the defendant's counsel moved to inspect the police department's computer hard drive on which the original records of online chats were stored. Counsel argued that the printouts of those chats should not be admitted into evidence because they had not been properly authenticated. *Rivas, supra.* The factual similarities end there. In *Rivas*, the trial court denied the motion, and the jury subsequently found the defendant guilty. The Ohio appeals court reversed the conviction, holding that the trial court had the obligation to conduct an in camera review to verify the accuracy of the computer printouts. *Id.* We hold that *Rivas* is distinguishable from the instant case. First, the court in *Rivas* denied the defendant access to the hard drive, whereas the trial court in the instant case granted Dirickson access to it (before it was destroyed). Moreover,

our rules of evidence expressly provide that the printouts of the conversations are the best evidence. *See* Ark. R. Evid. 1001(3), 1002.[1]

Dirickson's second argument is that the computer printouts are hearsay. We disagree. Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c) (2008).

The two witnesses who made the statements in the printouts are Dirickson and Officer Holland. Rule 801 specifically states that admissions by a party-opponent are not hearsay. Ark. R. Evid. 801(d)(2). Therefore, Dirickson's statements are not hearsay. *Id.* Regarding Officer Holland's statements, Rule 801(c) defines hearsay as a statement offered into evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c). There is not question that the officer's statements were not offered to prove the matter asserted — that he wanted to meet Dirickson for sex. Rather, the officer's statements were offered to put Dirickson's statements in context. *See Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987) (holding that recorded conversations between the defendant's brother and a police informant were not hearsay as they were not offered to prove the truth of the matter asserted, but to put into context other statements of the defendant to the informant); *Russell v. State*, 18 Ark. App. 45, 709 S.W.2d 825 (1986) (affirming the admission of an officer's testimony about conversations between a confidential informant and the defendant; the testimony of the officer was not hearsay because it was not offered to prove the truth of the matter asserted; the testimony showed the context of the defendant's statement). Therefore, Officer Holland's statements are not hearsay. Ark. R. Evid. 801(c).

Lastly, Dirickson argues that the admission of the transcripts of his conversations with Cheryl violated his constitutional rights.[2] Pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), "[w]here testimonial evidence is at issue . . . the Sixth

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[1] We note that Rules 1001(3) and 1002 of the Ohio Rules of Evidence are identical to Rules 1001(3) and 1002 of the Arkansas Rules of Evidence. However, in contract to our holding, the Court of Appeals of Ohio elected not to apply the rules.

[2] It is unclear from his brief whether Dirickson is arguing that he was denied his right to confront the computer hard drive or the transcripts. The distinction is irrelevant to our holding.

Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Beasley v. State*, 370 Ark. 238, 241, 258 S.W.3d 728, 730 (2007) (citing *Crawford*, 541 U.S. at 68)). "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 241, 258 S.W.3d at 730 (citing *Crawford*, 541 U.S. at 68-69).

Dirickson's argument must fail. The intent of the Confrontation Clause is to defend against the use of "testimonial" evidence from a witness who does not appear at trial. *Crawford*, 541 U.S. at 52. Assuming that the computer printouts are testimonial evidence, they did not come from a witness who did not appear at trial. Both of the witnesses who made the statements in the computer printouts were at trial — Dirickson and Officer Holland. Dirickson had the opportunity to confront both.

Affirmed.

ROBBINS and GRUBER, JJ., agree.

Uris MAGANA-GALDAMEZ *v.* STATE of Arkansas

CA 08-460 291 S.W.3d 203

Court of Appeals of Arkansas
Opinion delivered January 28, 2009

Walker Law Firm, by: *Kent Walker*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Valerie Glover Fortner*, Ass't Att'y Gen., for appellee.

RITA W. GRUBER, Judge. By criminal information filed in the Benton County Circuit Court, the State charged Uris Magana-Galdamez with the offenses of being an accomplice to capital murder and being an accomplice to aggravated robbery. The crimes were committed on December 30, 2006, when both Magana-Galdamez and the victim were seventeen years old. Magana-Galdamez's sole point in this interlocutory appeal is that the circuit court's denial of his motion and amended motion to transfer his case to juvenile court, entered by order of February 5, 2008, was clearly erroneous. Finding no clear error, we affirm.

The case was decided under our juvenile-transfer statute. Before being amended, Ark. Code Ann. § 9-27-318(h) (Repl. 2002) stated: "Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the judge shall enter an order to that effect." The subsection was changed by 2003 Ark. Acts No. 1116 § 10, as reflected in the statutory language that controls the present case:

> (h)(1) The court shall make written findings on all of the factors set forth in subsection (g) of this section.
>
> (2) Upon a finding by clear and convincing evidence that a case should be transferred to another division of circuit court, the judge shall enter an order to that effect.

Ark. Code Ann. § 9-27-318 (Supp. 2005).

The State asserts that the effect of the changed language is that clear and convincing evidence now pertains to transferring jurisdiction rather than to retaining it. Directing our attention to

Otis v. State, 355 Ark. 590, 605, 142 S.W.3d 615, 623 (2004), and *Williams v. State*, 96 Ark. App. 160, 162, 239 S.W.3d 44, 46 (2006), the State complains that courts have ignored this distinction. The State's position is well taken.[1]

We note that the standard of review for juvenile-transfer cases remains the same after enactment of Act 1116. *See R.M.W. v. State*, 375 Ark. 1, 289 S.W.3d 46 (2008) (citing *Otis*, *supra*, for its holding that the reviewing court will not reverse the circuit court's decision unless it was clearly erroneous). *R.M.W.* and the present case were decided under identical statutory language, and in each the circuit court denied the appellant's motion to transfer his case to juvenile court. The supreme court's decision in *R.M.W.* included the following discussion of clear and convincing evidence and the movant's burden of proof:

> *To decide whether transfer to the juvenile court was appropriate*, the circuit court had to decide whether the clear and convincing evidence supported R.M.W.'s story that he was a manipulated or an unwilling participant in the robbery. . . . *R.M.W. has not borne his burden of proving that the circuit court was clearly erroneous.*

375 Ark. 1, 7-8, 289 S.W.3d 46, 51 (emphasis added, citations omitted).[2] Under these standards, we turn to the appeal now before us.

On January 10, 2008, the circuit court conducted a hearing on Magana-Galdamez's motions to transfer. Dr. Robin Ross, a forensic examiner for the State, was accepted as an expert in psychiatry and testified as follows regarding her forensic evaluation of Magana-Galdamez on March 28, 2007. Magana-Galdamez, an El Salvadoran of slight build and stature, was cooperative, sat quietly, made good eye contact, was never tearful, and had normal speech. His thought processes were logical, his answers relevant, and his conduct socially appropriate. He was aware of why he was there, aware of the charges against him, and able to participate fully in his assessment. He did not appear confused and was not

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[1] Although in *Williams* we misquoted Ark. Code Ann. § 9-27-318(h) (Supp. 2005), our holding remains sound: that the circuit court's decision to refuse transfer was not clearly erroneous.

[2] *Cf. Otis*, 355 Ark. at 605 n.2, 142 S.W.3d at 623 n.2 (positing the issue of whether the juvenile or prosecutor had the burden of proof in juvenile-transfer cases under previous statute).

observed to have trouble communicating with Ross or the interpreter who was present. Magana-Galdamez disclosed that his birth date was September 12, 1989, rather than one indicated on records Ross had been given. Magana-Galdamez said that, after coming as a pre-teen or teenager to the United States, he lived with his parents in Springdale, Arkansas. He had finished the sixth grade in El Salvador, was placed in the ninth grade in Springdale, and did well in school. He dropped out because of difficulty learning the language and because he wanted to work and make money so that he could move back to his country.

Dr. Ross also considered Magana-Galdamez's social activities, relationships at home, eight-month history of working at a flour mill, and ability to go through the interview without being confused or upset. On the basis of this and other information, Dr. Ross opined that Magana-Galdamez "had adaptive capacities that would not indicate a mental defect."

Magana-Galdamez told Dr. Ross that he began to drink alcohol at approximately age sixteen, rarely drank hard liquor, drank two to three beers at a time, used to drink about twice a month, and was "drunk" on a little glass of tequila the night of the crimes. He said that he had begun to smoke marijuana about a month before his arrest but did not smoke it daily because he did not want his parents to know, and he did not use other drugs.

The forensic evaluation included assessments of cognitive functioning, the criminal justice system, and Magana-Galdamez's understanding of the system. Dr. Ross administered the Folstein Mini Mental State Examination, which she described as a screening tool with excellent validity and reliability: scoring twenty-three out of thirty would indicate a need for further assessment on cognitive functioning, but Magana-Galdamez's score of twenty-seven was above average for his age and level of education. He also had a passing score of eighty out of one hundred on the Georgia Court Competency Test, which Ross described as a structured interview to assess a defendant's understanding of the trial process and issues related to his defense. At this point in the examination, Dr. Ross formed the opinion that Magana-Galdamez had no psychiatric diagnosis, mental disease, or mental defect. Additionally, it was Dr. Ross's opinion that Magana-Galdamez had the capacity to appreciate the criminality of his conduct at the time of committing the crimes, the capacity to conform his conduct to the requirements of the law, and the capacity for the culpable mental state that was an element of the offense with which he was charged.

Dr. Ross acknowledged that anti-social personality traits were possible because Magana-Galdamez had been doing things that were illegal, but said that nothing else indicated a diagnosis of a personality disorder and that the diagnosis had not been made. Dr. Ross reiterated that there had been no cognitive or clinical reasons to perform an IQ test.

Dr. Ross testified that, after being read the felony information, Magana-Galdamez talked about events on the night of the crimes. Magana-Galdamez recounted being in a duplex with others, finding two girls, and going to a friend's house with them. He said that he had been drinking, drugs were present but he did not use them, and a "guy" came over. Magana-Galdamez said that this person, whom he had seen before but did not know, was the one who "did this case." Magana-Galdamez said that he knew it was wrong to rob and kill someone: he did not do it, did not know what was going to happen, and did not know he was going to be breaking the law.

Dr. Ross said that he did not perform the Test of Memory Malingering because Magana-Galdamez did not lack memory of what had happened. Ross stated that the Folstein Mini Test would have indicated the presence of mental retardation; in his opinion, no mental retardation existed and Magna-Galdamez did not suffer from mental disease or defect at the time of the examination or the crime. She testified that it was possible for someone to have a low IQ and still understand the criminality of his conduct and be able to conform conduct to the requirements of the law.

Investigator Greg Hines of the Benton County Sheriff's Office testified that the victim, Derrick Jefferson, died from a single gunshot to the head at close range. Detective Alvaro Barrios of the Springdale Police Department testified that he interviewed Magana-Galdamez and his co-defendant, Erickson Dimas-Martinez. Magana-Galdamez did not speak English well but had no trouble communicating with Barrios, a bilingual speaker of Spanish and English. Magana-Galdamez admitted his involvement in the robbery and homicide by being with Dimas-Martinez and two females when Dimas-Martinez shot Jefferson. Magana-Galdamez said that he shouted at the girls to be quiet, wielding a screwdriver in his hand, and drove the car away from the scene after Dimas-Martinez gave him the keys. Dimas-Martinez gave Magana-Galdamez the firearm used in the shooting and asked him to clean it and the bullets still in it: Magana-Galdamez did so, using his shirt to clean the pistol, and cleaning the bullets individually

after removing them from the magazine. Magana-Galdamez did not indicate in the interview that he had been forced to participate in the crimes or that he attempted to prevent them or to help Jefferson.

Two eyewitnesses, sisters Candie Drain and Keri McConnell, identified Magana-Galdamez and Dimas-Martinez as the individuals who committed the crimes. McConnell testified that the sisters were at a party when Dimas-Martinez and Magana-Galdamez offered Jefferson a ride after learning that he had money to pay for gas. McConnell testified that Dimas-Martinez and Magana-Galdamez initially discouraged the sisters from coming along but finally agreed. Dimas-Martinez had Jefferson drive the car, instructing him to make several stops until they got to an old house where Dimas-Martinez and Magana-Galdamez got out and talked. Dimas-Martinez, with Magana-Galdamez standing behind him, came to the driver's side and asked Jefferson and the girls if they had cell phones. After determining that no one had a phone that worked, Dimas-Martinez pulled out a gun, pointed it through the window at Derrick's face, and ordered him out of the car. McConnell stated that Magana-Galdamez did not look surprised and did not ask Dimas-Martinez to stop, and that they both told Jefferson to take off his shirt and give them his money, hat, earrings, and jacket. She testified, "Both of them were doing this to him."

McConnell further testified that Magana-Galdamez put a knife to the throat of her sister, who was crying and screaming hysterically, and told her to be quiet unless she wanted to die. He picked up Jefferson's clothes and belongings from the ground, put them in the car, and got into the driver's seat. Dimas-Martinez walked to the front of the car with Jefferson following him, Dimas-Martinez tried to open the passenger door, and Magana-Galdamez reached over to unlock it for him. Dimas-Martinez turned around, shot Jefferson, and got into the car. Looking neither surprised nor upset, Magana-Galdamez drove back to the duplex where the party had been. He said it was not "that big of a deal" and told the girls to calm down. He told them they were staying with him overnight, and he took them to his parents' home. In his bedroom, the sisters watched him clean the gun and the bullets from the clip. When they noticed blood on his jacket and became afraid, he again said "it was no big deal" and did not seem to be upset or remorseful.

The State's last witness was Drew Shover, a juvenile intake officer for Benton County. Shover testified that he could not think of anything the juvenile system could offer Magana-Galdamez that the adult system could not offer.

Candie Drain testified for the defense that Magana-Galdamez was in the car and had started the engine at the time of the shooting. She admitted on cross-examination that he held a knife to her throat and told her to be quiet, and that she was afraid of him.

Dr. Ronald McInroe, a clinical psychologist, clinical neuropsychologist, and licensed social worker, testified as an expert in psychological testing. His evaluation of Magana-Galdamez through the Comprehensive Test of Non-Verbal Intelligence produced an intelligence quotient of sixty-four, "in the mild range of mental retardation." Dr. McInroe also diagnosed mild mental retardation under DSM-IV criteria. Scott Tanner, the ombudsman coordinator for the public defender commission, testified about corrections options available for youthful offenders and about the facility at Dermott, Arkansas, where individuals under extended juvenile jurisdiction can be provided housing until age twenty-one, before possible transfer to adult facilities.

Motion to Transfer

A prosecuting attorney has the discretion to charge a juvenile sixteen years of age or older in the juvenile or criminal division of circuit court if the juvenile has allegedly engaged in conduct that, if committed by an adult, would be a felony. Ark. Code Ann. § 9-27-318(c)(1) (Supp. 2005). On the motion of the court or any party, the court in which the criminal charges have been filed shall conduct a hearing to determine whether to transfer the case to another division of circuit court. Ark. Code Ann. § 9-27-318(e).

A circuit court is required by this statute to consider all of the following factors at a transfer hearing:

> (1) The seriousness of the alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court;
>
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
>
> (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;

(4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;

(5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;

(6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;

(7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile before the expiration of the juvenile's twenty-first birthday;

(8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

(9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

Ark. Code Ann. § 9-27-318(g) (Supp. 2005). The court must make written findings on all ten enumerated factors in deciding whether or not to transfer the case, Ark. Code Ann. § 9-27-318(g) and (h)(1) (Supp. 2005), but proof need not be introduced against the juvenile on each factor, and the circuit court is not required to give equal weight to each of the statutory factors in arriving at its decision. *E.g.*, *Richardson v. State*, 97 Ark. App. 52, 244 S.W.3d 736 (2006).

"Upon a finding by clear and convincing evidence that a case should be transferred to another division of circuit court, the judge shall enter an order to that effect." Ark. Code Ann. § 9-27-318(h)(2) (Supp. 2005). Clear and convincing evidence is the degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *R.M.W.*, *supra*.

In the present case, the circuit court's written order stated that its decision to deny Magana-Galdamez's transfer motion was based upon the following considerations of the factors enumerated by Ark. Code Ann. § 9-27-318:

> (a) That there can be no doubt as to the most serious nature of the offenses charged;
>
> (b) That the offenses were violent in nature and execution;
>
> (c) That the offenses were committed against a person and as such are given greater weight;
>
> (d) That the evidence and testimony presented showed the Defendant was highly culpable in the offenses committed;
>
> (e) That although the Defendant had not been previously adjudicated as a juvenile, by his own admissions he regularly used drugs and alcohol;
>
> (f) That the Defendant's lifestyle was that of an adult and not a juvenile as evidenced by the fact that the Defendant quit school to work full-time, that he was not restricted to curfews or his parents' rules, and that he was treated as an adult by his parents;
>
> (g) That neither the Juvenile Court nor Extended Juvenile Jurisdiction are realistic options for this Defendant given his age and the nature of the offenses charged;
>
> (h) That the Defendant acted with another in the commission of the offenses;
>
> (i) That the opinions of both the State and Defense experts were reviewed.

The circuit court concluded, upon consideration of these factors, that there was "clear and convincing evidence that the circuit court should retain jurisdiction over this matter."[3]

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[3] Although the circuit court's language does not reflect the current version of § 9-27-318(h), this does not affect our holding that the court's decision was not clearly erroneous.

Magana-Galdamez presents two primary arguments on appeal: that "the State has failed the evidentiary standard of clear and convincing that the juvenile . . . met the criteria" of Ark. Code Ann. § 9-27-318, and that his admissions in a police interview should not have been used as evidence. We do not address the second argument because it was not raised to the trial court. *See Raymond v. State*, 354 Ark. 157, 162, 118 S.W.3d 567, 571 (2003) (stating that an argument not raised and made below is not preserved and will not be reached on appeal).

As the moving party, Magana-Galdamez had the burden of proving by clear and convincing evidence that the case should be transferred to the juvenile division of circuit court. *See* Ark. Code Ann. § 9-27-318(h)(2) (Supp. 2005). Although his testimony differed from that of other witnesses regarding his culpability in the robbery and murder, and there was conflicting testimony from the two experts on whether he suffered from mental retardation, the assessment of credibility and the weight of competing testimony were matters for the circuit court rather than for the reviewing court to decide. Taking the evidence as a whole, the circuit court retained jurisdiction, making written findings on the enumerated factors of section 9-27-318(g) as to why juvenile jurisdiction was inappropriate. We find no clear error in that decision.

Affirmed.

VAUGHT, C.J., and ROBBINS, J., agree.

POWHATAN CEMETERY, INC.; Darlene Moore, Individually and as Incorporator of Powhatan Cemetery, Inc.; Evelyn Flippo, Individually and as Incorporator of Powhatan Cemetery Inc.; and Robert Flippo, Individually and as Incorporator of Powhatan Cemetery, Inc. *v.* Lois COLBERT, Carolyn Depriest, Cletis Smith, Charles Hall, Sr., Charles Hall, Jr., Brent Tipton, Maleta Tipton, Individually and as Members of the Powhatan Cemetery Association

CA 08-134 292 S.W.3d 302

Court of Appeals of Arkansas
Opinion delivered February 4, 2009

Mixon Parker & Hurst, PLC, by: *Donn Mixon*, for appellants.

John Barttelt, for appellees.

ROBERT J. GLADWIN, Judge. Appellants, Powhatan Cemetery, Inc., and Darlene Moore, Evelyn Flippo, and Robert Flippo, incorporators of Powhatan Cemetery, Inc., appeal the Lawrence County Circuit Court's orders of November 8, 2007, which found in favor of appellees Lois Colbert, Carolyn Depriest, Cletis Smith, Charles Hall, Sr., Charles Hall, Jr., Brent Tipton and Maleta Tipton, who were each members of the Powhatan Cemetery Association. At issue was the identity of individuals named to the board of directors of the corporation, who were alleged to be the directors of the trust that had established the Powhatan Cemetery Association. The trial court found that Powhatan Cemetery, Inc., while a valid corporation, was not authorized by the Powhatan Cemetery Association and did not have the legal right to maintain the cemetery. Based upon further findings, the trial court appointed as members of the Powhatan Cemetery Association Board the following: Darlene Moore, Maleta Tipton, Robert Flippo, Lois Colbert, Carolyn Depriest, Cletis Smith, and Charles Hall, Jr.

From the November 8, 2007 orders, appellants appeal contending that appellees did not plead a legal theory for which relief could be granted; that appellees lacked standing; that the trial court

failed to make findings of fact and conclusions of law; that the trial court abused its discretion in failing to recuse and grant a new trial; and that the trial court's findings that the corporation has no legal authority to operate the cemetery, naming trustees for the cemetery, and ordering funds transferred are clearly erroneous. We disagree and affirm.

Statement of Facts

In 1877, a forty-acre tract of land in Lawrence County was deeded to B.F. Matthews, George Thornburgh, and C.T. Stuart as trustees of the Powhatan Cemetery. For more than 100 years — apparently since the deaths of the original trustees — the cemetery's business has been conducted by the Powhatan Cemetery Association Board. Through the years, the Board has been comprised both of people who are descendants of the original trustees and people unrelated to the original trustees but who have been elected to serve.

This court held in *Powhatan Cemetery Ass'n v. Phillips*, 90 Ark. App. 424, 206 S.W.3d 277 (2005), that the Board had the authority to manage the cemetery when we upheld a lower court's ruling that an easement granted by the Board was valid. The appellant therein argued that, upon the deaths of the original trustees, title to the cemetery property descended to their heirs, subject to the trust. Therefore, appellant claimed, only those heirs or court-appointed successor trustees — not the Board members — had the power to convey the easement. In holding otherwise, this court reasoned:

> Appellant is correct that, as a general rule, upon the death of a person who holds title in trust, his heirs are vested with the estate, subject to the trust. *See Cole v. Williams*, 215 Ark. 366, 220 S.W.2d 821 (1949). However, in order to ensure that a trust may prevail rather than be extinguished due to a lack of authorized trustees, the general rule must sometimes yield when, over the course of many years, persons have assumed the mantle of trusteeship and the court has sanctioned their doing so. The case of *Slade v. Gammill*, 226 Ark. 244, 289 S.W.2d 176 (1956), is helpful on this point.
>
> *Slade v. Gammill* involved an 1848 deed in which Warner Brown conveyed property to three trustees of a cemetery. Following the deaths of the original trustees, other trustees were appointed over the years, even though the deed did not provide for successor

trustees. In 1954, the trustees serving at that time conveyed certain cemetery property to an adjoining church. Thereafter, the purported heirs of Warner Brown challenged the legality of the conveyance, claiming that the trustees had no authority to make the transaction. The trial court approved the conveyance, and our supreme court upheld the trustees' authority, stating that:

> It is elementary law that a court of equity will appoint trustees in any proper case in order to prevent a failure of the trust. This was recognized by our Court in the early case of *Conway, et al., Ex parte,* 4 Ark. 302 [1842]:
>
> "But even suppose that the ten trustees, who signed the deed, were incompetent to take, still, the other five being competent, a court of equity would not permit the trust to fail; for it is a rule in equity which admits of no exception, that a court of equity never wants a trustee. Whenever a trust is created, either by deed or will, or by operation of law, and no person is appointed trustee, equity will follow the estate, and cause the trust to be executed. If no trustee is named, or he dies, or the trust devolves upon an incompetent person, the trust shall prevail, and the Chancellor will appoint trustees."
>
> Again, in *Vaughan v. Shirey*, 212 Ark. 935, 208 S.W.2d 441, we said: "It is familiar law that equity will not permit a trust to fail through the failure of the named trustee to serve, but will, in that event, appoint another trustee . . . ."
>
> When Warner Brown conveyed the cemetery to Trustees in 1848, a trust was created. So, even if [the conveying trustees] were not the duly appointed, qualified and acting Trustees of the Warner Brown Cemetery at the beginning of this suit, they certainly were such after the decree of the Chancery Court in this case, because the decree not only recognized them as the Trustees, but recites: ". . . and their appointment are approved and confirmed. . . ." Thus, the Chancery Court, which at all events had the residual power to appoint trustees, approved and confirmed the appointment of the said Trustees and likewise approved the execution of the deed which they made.

Slade v. Gammill, 226 Ark. at 249-50, 289 S.W.2d at 180 (citations omitted).

> In the case at bar, the original deed contemplated the existence of successor trustees; it deeded the land not only to the three original trustees but to "their successors in such Trusteeship forever, with all rights and privileges there unto belonging." While the deed made no provision for the manner in which successor trustees would be appointed, the evidence at trial was that, since the deaths of the original trustees, the Board has acted as successor trustee, with vacancies being filled by a vote of the remaining Board members. As trustee, the Board has, in the words of the trial court, "laid out plots, approved burials, cared for graves and markers, communicated with funeral homes, and even granted easements to neighboring land owners." Based on this evidence, the trial court found that the Board "acted by authority derived from that original deed." Thus, although the court did not formally appoint the Board members as trustees, it found them to be qualified and acting with due authority by virtue of many years of practice and custom, and by virtue of the deed's grant to "successors in such Trusteeship." Given these circumstances and the supreme court's holding in *Slade*, we affirm the trial court's finding that the Board had the authority to grant the easement in this case.

Id. at 430-32, 206 S.W.3d at 281-82.

Partly based upon their experience in the litigation surrounding *Powhatan Cemetery Ass'n v. Phillips*, *supra*, the Board determined to incorporate and began discussing incorporation in meetings held as early as 2000. On March 14, 2004, the Board voted unanimously to incorporate and, to that end, pay the necessary attorney's fees to attorney Clay Sloan and filing fees to the Secretary of State. According to the testimony at trial, Darlene Moore, a named appellant, was authorized to obtain the signatures of all Board members in order that articles of incorporation might be filed with the Secretary of State. The Articles were written such that the incorporators were the only members of the corporation, i.e., only those who were signatories on the Articles. Moore claims that all members of the Board signed the proposed articles of incorporation except Carolyn Depriest, who was out of town at the time. These Board members included Darlene Moore, Evelyn Flippo (Darlene Moore's mother), Robert Flippo (Darlene Moore's brother), Maleta Tipton, and Brent Tipton. However, appellees contend that several members were left out of the incorporation process and, thus, wrongfully excluded from the Board in violation of the trust. These members were Carolyn Depriest, Lois Calbert, Chuck Hall, Jr., and Cletis Smith.

The testimony at trial was that the Articles were filed on July 8, 2004, by Darlene Moore, but the completion of this task was not reported to the Board for some nine months. Appellees brought suit, and in their amended complaint filed June 21, 2006, alleged that the Board members who signed as incorporators took improper control over the funds and bank account of the Powhatan Cemetery Association and refused to relinquish control of approximately $75,000, which had been donated by various families and citizens of Lawrence County for the care and upkeep of the cemetery. Appellees sought an injunction on use of any cemetery funds until the trial court determined the proper identity of the Board. Appellants filed a motion to dismiss alleging that the trial court lacked jurisdiction because appellees failed to state facts upon which relief could be granted; that there was no matter in controversy; that the appellees were not the real party in interest; that appellees had a conflict of interest; that appellees lacked standing; that appellees had unclean hands; that the claim was barred by limitations, laches, estoppel, and waiver; that the prerequisites of a shareholder derivative action had not been met; and that the prerequisites of an action related to an unincorporated association had not been met.

Sometime after the three-day trial, the trial judge contacted the attorney for appellees to notify him that the trial court had found in appellees' favor and to request that counsel prepare the precedent. Appellants filed a motion to dismiss, as well as a request for findings by the trial court, and a motion for recusal and new trial. A hearing was held November 8, 2007, wherein the trial court adopted the proposed findings of fact and conclusions of law prepared by appellees' attorney. This appeal timely followed.

Standard of Review

Both parties contend that this case is subject to a de novo standard of review. *See Sowders v. St. Joseph's Mercy Health Ctr.*, 368 Ark. 466, 247 S.W.3d 514 (2007); *Powhatan Cemetery Ass'n v. Phillips*, *supra*. The trial court's decision should not be reversed unless there is a finding that is clearly erroneous. *Phillips*, *supra*. A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left, upon reviewing the entire evidence, with a firm conviction that a mistake has been committed. *Id.*

I. Legal Theory

Appellants contend that the amended complaint does not set forth any facts upon which relief may be granted. They argue that during the trial, no legal theory was brought forth or suggested by appellees, and that appellees merely argued that this matter was an equity matter wherein the trial court might mold any remedy justified by law. Appellants cite *Fite v. Fite*, 233 Ark. 469, 345 S.W.2d 362 (1961), for the proposition that there must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of equity.

Appellants argue that there is no connection between the instant case and the original trust. They contend that this court previously concluded that the cemetery was bound by the actions of the Board. *See Powhatan Cemetery Ass'n v. Phillips*, *supra*. Appellants insist that there is no trust at issue here, and the complaint in this case does not seek any relief with regard to a trust. Therefore, they contend that there is no legal theory for relief that has been advanced by appellees, and this court should reverse the trial court's judgment.

Appellees maintain that their complaint states an adequate legal basis for equitable relief. As referenced above, this court held in *Powhatan Cemetery Ass'n v. Phillips*, *supra*, that the cemetery was held in a charitable trust. Appellees contend that this litigation was filed when appellant Darlene Moore wrongfully seized control of the cemetery and its financial accounts through a series of deceitful and fraudulent actions. They argue that the essence of this matter was pinpointed by the trial judge when he questioned Moore about how one becomes a member of the cemetery corporation. She finally responded, "The problem is that when you have people who - many times are not wanting to go in the direction to protect certain things, then are they really an asset to that corporation? That's a concern of mine." The trial judge then asked if it was correct that the corporation members would have to permit others to come into the corporation. Moore agreed, stating, "We vote on members. That is correct." Appellees argue that Moore's testimony that all prospective members would have to agree with her as to the best interest of the cemetery speaks for itself. They allege, therefore, that the original trust had all but failed. We agree and hold that appellees' complaint states an adequate legal basis for equitable relief.

At the time of trial, the board of the new corporation consisted of Moore; her eighty-four-year-old mother; her brother

who lives 200 miles away in Bella Vista, Arkansas (who had given power of attorney to Moore); Miriam Smith, who was identified on cross examination as Moore's sister; and Tom Caldron, a long-time acquaintance of Moore's. This case can only lie in equity because it involves the probable failure of an ancient trust and the actions of successor trustees. Further, there is otherwise no remedy at law. Appellees' complaint properly requests relief under equitable principles and establishes an adequate legal theory.

II. Standing

Appellants argue that appellees lack standing to bring this action. Appellants contend that the corporation was formed through proper legal procedures, resulting in a formal filing and acceptance by the Arkansas Secretary of State on July 8, 2004. Further that, thereafter, only the actions taken under the Articles could legally affect the structure of the corporation. Appellants argue that if appellees' contention that the initial incorporation of members and directors was fraudulently obtained, then the corporation would have rights to be redressed. They maintain that the mechanism to bring suit to redress wrongs suffered by a corporation is a stockholders' derivative action. *See* Ark. R. Civ. P. 23.1. Appellants insist that only shareholders or members may bring such an action, and the corporation is a necessary party. They contend that derivative-action procedures apply to nonprofit corporations, citing *Morgan v. Robertson*, 271 Ark. 461, 609 S.W.2d 662 (1980). There, our supreme court stated, "We believe an officer, director and a member of a non-profit corporation is not without standing to question the management and conduct of other officers and directors which are alleged to be in violation of the By-Laws and Articles and against the purposes of the corporation." *Id.* at 466, 609 S.W.2d at 665.

Therefore, appellants contend that even if the corporation had been made a plaintiff, only appellees Brent Tipton and Maleta Tipton would have standing to assert their complaint. Appellants claim that because the Tiptons signed the Articles as incorporators and because the Tiptons do not assert that the corporation has been harmed, appellants cannot comprehend the complaint. Appellants argue that Lois Colbert, Carolyn Depriest, Cletis Smith, Charles Hall, Sr., and Charles Hall, Jr., were not and are not shareholders or members of the corporation. Therefore, appellants argue that appellees have no standing to bring this action.

The courts have the responsibility to ascertain and protect the intent of the settlor in a charitable trust. The intention of the settlor is the paramount principle. *Teak v. Simmons First Nat'l Bank*, 309 Ark. 294, 832 S.W.2d 458 (1992). Equity dictates that a court appoint trustees when a trustee has acted wrongly and to avoid a failure of the trust. *Vaughn v. Shirey*, 212 Ark. 935, 208 S.W.2d 441 (1948). Because appellees hold an interest as trustees, regardless of whether they are former trustees or current trustees, they hold an interest that distinguishes them from the general public and provides reason to believe that, in their capacity as a representative, will give wholehearted support to the cause of the charity. Thus, we hold that appellees have standing.

III. Findings of Fact and Conclusions of Law

A trial court is obligated to make findings of fact and conclusions of law upon a litigant's request made prior to the judgment. Ark. R. Civ. P. 52(a) (2007). Appellants argue that the trial court failed to make findings of fact and conclusions of law when requested to do so. Appellants contend that they made the request when they learned that the trial court had communicated with appellees' attorney. They assert that, at the hearing on appellants' motion, the trial court declined to make findings, but instead, adopted the order prepared by appellees' attorney. Appellants argue that this is not in compliance with the requirement of making findings of fact and conclusions of law under Rule 52. Appellants claim that the order adopted by the trial court is simply a paraphrase of appellees' briefs and does not comply with Rule 52.

However, we hold that the trial court complied with Rule 52(a). It is undisputed that, after the trial, both parties submitted post-trial motions and briefs. When the trial court invited appellants to object to the proposed findings of fact and conclusions of law, appellants declined. The trial court did not err by adopting the order prepared by appellees' counsel as his own. Further, as no specific objections were raised, there are no grounds for relief.

IV. Recusal

The decision to recuse is within the trial court's discretion, and it will not be reversed absent abuse. *Porter v. Arkansas Dep't of Health & Human Servs.*, 374 Ark. 177, 286 S.W.3d 686 (2008). An abuse of discretion can be proved by a showing of bias or prejudice

on the part of the trial court. *Id.* Appellants filed a motion for the trial court to recuse alleging that the judge had communicated ex parte with appellees' attorney. Appellants claim that the trial court abused its discretion in failing to recuse and grant a new trial. Appellants assert that the trial judge has a duty to "avoid impropriety and the appearance of impropriety in all of the judge's activities." Ark. Code Jud. Conduct, Canon 2. Further, a judge shall not initiate ex parte communications. Ark. Code Jud. Conduct, Canon 3B(7). Finally, a judge must dispose of all judicial matters promptly, efficiently and fairly. Ark. Code Jud. Conduct, Canon 3B(8).

Appellants contend that, even though appellees' attorney claimed in his response to the recusal motion that he had no discussion of the merits of the case with the trial judge, some discussion of the merits had to have taken place in order that appellees' attorney might know how to prepare the precedent. Also, they allege that the trial judge took no measures to include appellants' attorney in any discussions. Appellants finally argue that the trial court took two-and-one-half months from the time they requested findings of fact and conclusions of law to file an order.

■ However, appellees claim that the trial judge did not abuse his discretion in failing to recuse. They reiterate that appellants never complained that the trial judge acted improperly in any way or exhibited any prejudicial bias in the case. Appellees point out that appellants complained only after they learned that the trial court had ruled against them and had asked the prevailing party to prepare a precedent. Despite appellants' accusations at the hearing on the motion, there is nothing in the trial court's final order that was not in evidence.

A judge is presumed to be impartial. *City of Dover v. City of Russellville*, 346 Ark. 279, 57 S.W.3d 171 (2001). The party seeking recusal must demonstrate bias. *Id.* We hold that the trial judge did not abuse his discretion in denying appellants' motion for recusal.

V. Whether Findings are Clearly Erroneous

Appellants contend that the trial court's findings — Powhatan Cemetery, Inc., has no legal authority to operate the cemetery, naming trustees for the cemetery, and ordering funds transferred — are clearly erroneous. Appellants contend that every witness at trial testified that the governing body of the cemetery agreed that

the cemetery was to be incorporated. They point out that the minutes of meetings reflect that the board voted to incorporate and that Clay Sloan was to do the legal work for the incorporation. The articles of incorporation were filed with the Secretary of State, a certificate was issued, as was an employer identification number. They maintain that there is no dispute with the fact or form of the incorporation, and that appellees' only dispute has been with the identity of the members of the corporate board. However, appellants contend that all appropriate legal steps were followed to incorporate as authorized by the association, and therefore, the trial court's finding that the corporation has no authority to operate the cemetery is clearly erroneous.

The trial court ordered that Darlene Moore, Maleta Tipton, Robert Flippo, Lois Colbert, Carolyn Depriest, Cletis Smith, and Charles Hall, Jr., are to serve as trustees of the Powhatan Cemetery. Appellants claim there is no law or evidence to support naming anyone as a trustee of the cemetery. As this court previously noted in *Phillips*, *supra*, the cemetery had been operated by the Powhatan Cemetery Association for many years. Therefore, appellants claim that any reference to trustees is clearly erroneous. Further, appellants claim that the trial court's naming of the particular seven people had no basis in the evidence. Appellants point out that Brent Tipton's testimony was that he was sworn in, along with Maleta Tipton, Darlene Moore, and Carolyn Depriest. However, he did not know if Lois Colbert and Charles Hall, Jr., attended any meetings before March 2004. He did not disagree that Cletis Smith did not attend meetings before March 2004. Further, appellants claim there was no dispute that Evelyn Flippo and Robert Flippo were longtime board members prior to 2001. Therefore, appellants argue that even if the trial court used the standard of "board-members-at-the-time-of-incorporation" to name the trustees, the decision was clearly erroneous.

Finally, appellants contend that the order to transfer funds to the seven people named is clearly erroneous. They argue that there was no evidence with regard to funds or their source. They contend there is no basis for any ruling in this regard.

Appellees maintain that the trial court's findings are not clearly erroneous. They point out that only Moore's testimony supports the contention that Lois Colbert and Charles Hall, Jr., were never members of the board and that Carolyn Depriest and Cletis Smith can be ousted with no legal recourse. Appellees claim that Moore did not invent this theory until after the meeting of

April 16, 2005, when she became upset. In fact, appellees argue that Moore had to admit upon cross examination that she served with these individuals on the board for many years, that they voted, made motions, seconded motions, and participated in every way. Also, Moore never raised one objection at any time.

Appellees argue that Moore has no excuse for not obtaining the signatures of Lois Colbert, Carolyn Depriest, Cletis Smith, and Charles Hall, Jr., on the proposed articles of incorporation. Clay Sloan testified that he designed the Articles so that all of the current board members would be incorporators, and subsequently new board members. Further, Maleta Tipton testified that she specifically told Moore to obtain the signatures of Colbert, Hall, Smith, and Depriest prior to filing the Articles, and Moore agreed. Also, the evidence showed that Lois Colbert had taken minutes at meetings for about three years, despite Moore's testimony otherwise. Finally, every board member who testified, other than Moore, claimed that Moore never made it known to them that the Articles had been filed. Therefore, they maintain that the trial court's findings are not clearly erroneous, and we agree.

Affirmed.

HENRY and BAKER, JJ., agree.

Katrina PARKER, Gene Graves, and Laura Graves *v.*
SOUTHERN FARM BUREAU CASUALTY INS. CO. and
Farm Bureau Mutual Insurance Co. of Arkansas, Inc.

CA 08-568 292 S.W.3d 311

Court of Appeals of Arkansas
Opinion delivered February 4, 2009

[Rehearing denied March 18, 2009.]

Blair & Stroud, by: *H. David Blair*; and *Tom Thompson*, for appellant.

Watts, Donovan & Tilley, P.A., by: *David M. Donovan*, for appellees.

JOHN B. ROBBINS, Judge. This appeal arises out of the grant of summary judgment to two insurance companies (Southern Farm Bureau Casualty Insurance Company and Farm Bureau Mutual Insurance Company of Arkansas, Inc., collectively "Farm Bureau" and the appellees herein) regarding two policies owned by Gene and Laura Graves. For purposes of this appeal, the operative facts are not in material dispute and are viewed most favorably to appellant, Katrina Parker. We affirm in part and reverse in part and remand for further proceedings.

The insureds, Gene and Laura Graves, resided in rural Stone County, as did their neighbors, Ron and Katrina Parker. The relationship was not harmonious. On the morning of August 24, 2005, Mr. Graves was on his land shooting dogs that had been attacking his sheep. Graves believed that the aggressive dogs belonged to the Parkers. Although Mr. Graves remained on his land, at some point he was near the fence line, whereupon the Parkers emerged from their house. Mr. Parker fired a pistol shot, while Mrs. Parker attempted to return inside the Parker residence. Graves intentionally returned fire toward Mr. Parker, which shot killed Mr. Parker.[1] The bullet passed through Mr. Parker and struck Mrs. Parker, which seriously and permanently injured her.

Appellant Katrina Parker filed a negligence suit against Mr. Graves in Stone County Circuit Court, attempting to acquire monetary relief for her damages. Mr. Graves submitted a claim on two insurance policies, both homeowner's and general liability, seeking to have Farm Bureau provide a defense and indemnity. Farm Bureau initially mounted a defense on behalf of Mr. Graves.

Then, Farm Bureau filed an independent declaratory judgment action in Pulaski County Circuit Court, seeking to have the trial court declare that there was no obligation on Farm Bureau's part to defend or indemnify its insureds. Declaratory judgment is typically used to determine the obligations of the insurer under a policy of insurance. *See Martin v. Equitable Life Assurance Society*, 344 Ark. 177, 40 S.W.3d 733 (2001). All interested parties must be named in a declaratory-judgment case. Ark. Code Ann. § 16-111-106 (Repl. 2006). Farm Bureau named its insureds and Katrina Parker as defendants. This Pulaski County Circuit Court lawsuit is the subject of the present appeal.

It is undisputed that Mr. and Mrs. Graves purchased insurance coverage under a homeowner's policy and general liability policy with Farm Bureau that were in force at the time of the shooting. Farm Bureau presented the exclusionary provisions in each policy, arguing that there was no duty to defend or indemnify for Mr. Graves's intentional acts that resulted in bodily harm or property damage. Farm Bureau moved for summary judgment. Mr. and Mrs. Graves as well as Mrs. Parker responded in resistance to the motion. Each of them also counterclaimed, requesting that

[1] After reviewing the evidence, the prosecuting attorney declined to prosecute Mr. Graves on the basis that he acted in self-defense.

the trial judge declare that the policies provided coverage for this incident, or at least did not unambiguously exclude coverage. A hearing was conducted before the Pulaski County Circuit Court, and after taking the issue under advisement, the trial judge entered summary judgment on Farm Bureau's behalf.

The trial judge determined that the insurance policies were unambiguous, that the material facts were undisputed, and that Farm Bureau was entitled to a declaratory judgment as a matter of law. He found that the homeowner's policy excluded coverage for any intentional act that causes damage whether the damage was expected or unexpected. He further held that the general liability policy did not provide coverage for any injuries that are the result of an act by the insured that was intended to harm others. Katrina Parker appeals to our court. Mr. and Mrs. Graves did not appeal.

Appellant's argument is that summary judgment was inappropriate because Farm Bureau did have a duty to defend the insureds. Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Castaneda v. Progressive Classic Insurance Co.*, 357 Ark. 345, 166 S.W.3d 556 (2004). In reviewing summary-judgment cases, we determine whether the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Norris v. State Farm Fire & Cas. Co.*, 341 Ark. 360, 16 S.W.3d 242 (2000). The moving party always bears the burden of sustaining a motion for summary judgment. *Youngman v. State Farm Mut. Auto. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998). Where there are no disputed material facts, our review must focus on the trial court's application of the law to those undisputed facts. *See id.* When the facts are not at issue but possible inferences therefrom are, we will consider whether those inferences can be reasonably drawn from the undisputed facts and whether reasonable minds differ on those hypotheses. *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

The law regarding construction of an insurance contract is well settled. Once it is determined that coverage exists, it then must be determined whether the exclusionary language within the policy eliminates the coverage. *Norris v. State Farm Fire & Cas. Co.*, *supra.* Exclusionary endorsements must adhere to the general requirements that the insurance terms must be expressed in clear and unambiguous language. *Id.* If the language of the policy is

unambiguous, we will give effect to the plain language of the policy without resorting to the rules of construction. *Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001). On the other hand, if the language is ambiguous, we will construe the policy liberally in favor of the insured and strictly against the insurer. *Id.* Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one reasonable interpretation. *Harasyn v. St. Paul Guardian Ins. Co.*, 349 Ark. 9, 75 S.W.3d 205 (2002). Whether the language of the policy is ambiguous is a question of law to be resolved by the court. *Id.*

In this case, the trial court was called to apply two exclusionary clauses in the respective policies of insurance. The clause contained in the homeowner's policy read in relevant part that:

> [C]ertain types of losses are not covered by your policy. . . . [W]e do not cover: . . . bodily injury or property damage caused by intentional acts or at the direction of you or any covered person. The expected or unexpected results of these acts are not covered[.]

Another such clause was enumerated in the general liability policy, stating in relevant part:

> This policy does not apply . . . to injury, sickness, disease, death or destruction of property arising out of an act by any insured that is intentionally designed to do harm to others.

Moving to the application of the undisputed facts, seen in the non-movant's most favorable light, we hold that the trial court did not err in entering summary judgment for Farm Bureau on the homeowner's policy. When construing insurance policies, where terms of the policy are clear and unambiguous, the policy language controls, and absent statutory strictures to the contrary, exclusionary clauses are generally enforced according to their terms. *Smith v. Shelter Mut. Ins. Co.*, 327 Ark. 208, 937 S.W.2d 180 (1997). An insurer may contract with its insured upon whatever terms the parties may agree upon, which are not contrary to statute or public policy. *Shelter Gen. Ins. Co. v. Williams*, 315 Ark. 409, 412, 867 S.W.2d 457, 458 (1993). Contracts of insurance should receive a practical, reasonable, and fair interpretation consonant with the apparent object and intent of the parties in light of their general object and purpose. *Sweeden v. Farmers Ins. Group*, 71 Ark. App. 381, 30 S.W.3d 783 (2000).

The duty to defend is broader than the duty to indemnify. *See Murphy Oil USA, Inc. v. Unigard Security Ins. Co.*, 347 Ark. 167, 61 S.W.3d 807 (2001). When making the determination of duty to defend, we look to the allegations made against the insured. *Id.* However, in the present appeal, the fundamental question is whether the ultimate duty to indemnify is triggered, because Parker is an interested party in that outcome. Thus, the real issue on appeal is whether the trial court erred in granting summary judgment, declaring that the exclusions were unambiguous and effective to exclude coverage for this event.

As alleged in appellant Parker's complaint, she contended that Mr. Graves provoked a confrontation with Mr. Parker and maliciously discharged a firearm in order to inflict fatal injuries upon Mr. Parker with knowledge that such discharge would create an appreciable risk of harm to Mrs. Parker. In her answer to Farm Bureau's motion for summary judgment, appellant Parker stated that Mr. Graves intended to fire his rifle at Mr. Parker but not with the intent to cause harm to her (Mrs. Parker). Also, appellant clarified her accusation to be that Mr. Graves acted intentionally toward Mr. Parker but negligently toward her. She added that the act of shooting the dogs was a reckless and negligent act that was the proximate cause of her injuries, adding distance between the primary cause of her injuries — the shot toward Mr. Parker.

This case differs significantly from *Talley v. Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981), cited by appellant. In *Talley*, the policy excluded any "bodily injury . . . which is either expected or intended from the standpoint of the insured." Therefore, the question of whether unintended or unexpected injuries were excluded was not explicit in the policy. Years later, our supreme court admonished insurance companies that exclusionary language for unintended or unexpected injuries from intentional acts could be included in the policy, if the insurer so chose to include those terms. *See Norris v. State Farm Fire & Cas. Co., supra.* The *Norris* opinion went on to give an example of how to word such an exclusion. The homeowner policy exclusion we consider today explicitly excludes "injury or property damage caused by intentional acts or at the direction of you or any covered person. The expected or unexpected results of these acts are not covered[.]" This complies with the directive of our supreme court, and it is unambiguous.

Viewing appellant's allegations most generously to her, appellant's lawsuit is based upon injuries caused by the unexpected

result of Mr. Graves's intentional act, whether that be in shooting in Mr. Parker's direction or in setting a dangerous confrontation in motion. We have no hesitation in holding that summary judgment was properly granted to Farm Bureau with regard to the homeowner policy.

We next consider the general liability exclusion and hold that there exists ambiguity in the language, rendering it susceptible to more than one reasonable construction precluding summary judgment. Farm Bureau did not specifically set forth language in that provision to exclude unintended results of intentional acts as it did in the Graves's homeowner's policy, and as was discussed in the *Talley* and *Norris* cases. The policy's exclusion of an "injury . . . arising out of an act by any insured that is intentionally designed to do harm to others" could reasonably be construed to only exclude injuries to the "others" intended to be harmed, rather than to any person, whether such person was the intended victim or not, as contended by Farm Bureau.

Moreover, we believe that viewing the evidence in the light most favorable to Mrs. Parker, it could be reasonably concluded that Mr. Graves acted intentionally to shoot in self defense but not necessarily with the design to do harm. Thus, there is some question on whether the facts fit within "an act . . . intentionally designed to do harm to others," even if the exclusion otherwise complied with the *Norris* case. Both of these fundamental flaws lead us to the conclusion that summary judgment, declaring that Mrs. Parker's injury was clearly and unambiguously excluded under the general liability policy, was improper and must be reversed.

Affirmed in part; reversed and remanded in part.

VAUGHT, C.J., and GRUBER, J., agree.

STATE FARM AUTOMOBILE INSURANCE COMPANY *v.*
Eda STAMPS and Gary Stamps

CA 08-750. 292 S.W.3d 833

Court of Appeals of Arkansas
Opinion delivered February 11, 2009

Milligan, Medlock, Gramlich, LLP, by: *Phillip J. Milligan*, for appellant.

Watts, Donovan & Tilley, by: *James W. Tilley* and *Staci Dumas Carson*, for appellees.

LARRY D. VAUGHT, Chief Judge. Appellee Eda Stamps filed suit against appellant State Farm Automobile Insurance Company seeking underinsured motor-vehicle coverage. After a jury rendered a $135,000 verdict in her favor, the Sebastian County Circuit Court entered an order awarding Eda a statutory penalty and attorney's fees. State Farm appeals from this order, arguing that the trial court erred in awarding the penalty and fees because the amount Eda recovered at trial was not within twenty percent of the amount she demanded or sought in her suit as required by Arkansas statute. We affirm.

In June 2000, Eda, while operating her automobile, was struck by another automobile driven by a drunk driver. The drunk

driver had a State Farm policy of liability insurance in force with limits of $50,000. State Farm tendered the policy limits to Eda. At the time of the accident, Eda had her own policy of liability insurance in force, also with State Farm. Eda's policy included underinsured motor-vehicle coverage with policy limits of $250,000. Because Eda alleged that she suffered damages in excess of $50,000, she demanded that State Farm pay her the policy limits. The claim was denied.

Eda and her husband Gary filed suit against State Farm seeking underinsured motor-vehicle coverage. No specific monetary amount was sought in the complaint; rather, they prayed for an amount that exceeded federal jurisdictional limits of $75,000, costs, pre- and post-judgment interest, statutory penalties, and attorney's fees pursuant to Arkansas Code Annotated section 23-79-208(d)(1) (Supp. 2007). An amended complaint filed by the Stampses prayed for the same damages.

Just over a month prior to trial, the Stampses filed a document entitled "Amended Demand Pursuant to A.C.A. § 23-79-208." Therein, the Stampses stated that they had previously demanded policy limits from State Farm; however, they reduced their demand to $150,000. The Stampses further stated:

> That should Plaintiff prevail either by settlement or verdict to the extent of at least 80% of [the] demand, Plaintiff requests an immediate Court assessment of 12% penalty, reasonable attorneys fees, costs and pre and post judgment interest.

State Farm did not accept this demand.

At trial, the parties stipulated that the Stampses' policy of underinsured motor-vehicle coverage had limits of $250,000. In opening statements, counsel for the Stampses advised the jury that the Stampses received policy limits of $50,000 from the drunk driver. Counsel also said that the Stampses' damages exceeded $50,000. Counsel stated that Gary would testify that "[w]e want [State Farm] to pay us that $250,000," and "[so] that's what State Farm is now looking to argue, is the damages — how much of that 250 they're going to have to turn loose of. That's what this case is about. How much of those damages do I have to write a check for . . . ." Gary testified that he did not think that $250,000 would make his wife whole, but that "since that's the policy limits, . . . that's all I would expect."

The jury returned a verdict in favor of Eda in the amount of $135,000.[1] At a post-trial hearing, Eda's counsel argued that Eda was entitled to the twelve-percent penalty and attorney's fees pursuant to Arkansas Code Annotated section 23-79-208(d) because the $135,000 jury verdict was within twenty percent of her $150,000 demand.[2] State Farm argued that at trial the Stampses demanded $250,000, regardless of what her complaints sought, and that Eda is not entitled to penalties and attorney's fees because her recovery was not within twenty percent of $250,000. In response, Eda's counsel argued that there was no $250,000 demand at trial. He argued that the jury knew that policy limits were $250,000 because the parties stipulated to that fact. Eda's counsel claimed that the complaints asked for an amount in excess of $75,000 and that Eda's only demand was $150,000.

The trial court entered an order awarding the twelve-percent penalty and attorney's fees, stating that statutory damages "are available under section 23-79-208 if the amount recovered is within twenty percent of the amount demanded or which is sought in the suit." The court acknowledged State Farm's argument that Eda's counsel demanded $250,000 at trial and was now bound to that figure as her demand, but the court found that argument unpersuasive. After reviewing the record and citing pertinent portions of it, the trial court found that neither the testimony from Eda and Gary nor arguments from their counsel

> rises to anything close to a demand for $250,000. Taken as a whole, those statements made by counsel at the opening statement stage of the trial do not rise to such a level as to undo the history of the case, which clearly reveals a $150,000.00 demand.
>
> In the Court's opinion, Plaintiff did not do what was forbidden — manipulate the case to make such an award certain. In that regard, this case appears to the Court to be clearly distinguishable from the cases cited in Defendant's brief. On the other hand, Plaintiffs were not bound to roll over and play dead at trial just because they had made a demand. To rule otherwise would remove any incentive for defendants to engage in settlement in such cases.

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[1] The jury awarded Gary $0, and this award was not appealed by him.

[2] Eda also argued that she was entitled to pre-judgment interest. The trial court subsequently denied this motion, and she did not appeal.

> The motion as it relates to the twelve percent (12%) damages assessment pursuant to Ark. Code Ann. [§] 23-79-208 is granted.[3]

State Farm filed a timely notice of appeal, arguing only that the trial court erred in awarding a statutory penalty and attorney's fees pursuant to Arkansas Code Annotated section 23-79-208(d).

This case involves an issue of law concerning the interpretation of a statute. We review issues of statutory interpretation de novo. *City of Pine Bluff v. Southern States Police Benev. Ass'n, Inc.*, 373 Ark. 573, 285 S.W.3d 217 (2008). It is for this court to decide what a statute means. *Id.* In this respect, we are not bound by the trial court's decision; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Id.*

It is well settled that:

> [t]he first rule in interpreting a statute is to construe it just as it reads by giving words their ordinary and usually accepted meaning. (Citation omitted.) . . . In interpreting a statute and attempting to construe legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate matters that throw light on the matter. (Citation omitted.)

National Standard Ins. Co. v. Westbrooks, 331 Ark. 445, 448-49, 962 S.W.2d 355, 375 (1998) (citations omitted). The statute in question, Arkansas Code Annotated section 23-79-208, provides in pertinent part, as follows:

> Recovery of less than the amount demanded by the person entitled to recover under the policy shall not defeat the right to the twelve percent (12%) damages and attorney's fees provided for in this section if the amount recovered for the loss is within twenty percent (20%) of the amount demanded or which is sought in the suit.

Ark. Code Ann. § 23-79-208(d)(1) (Supp. 2007). Our supreme court has held that "§ 23-79-208(d), being penal in nature, is strictly

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[3] The trial court also found that Eda was entitled to attorney's fees in the amount of $54,000. While State Farm is appealing the appropriateness of the award of attorney's fees under Arkansas Code Annotated section 23-79-208(d)(1), it is not appealing the reasonableness of the amount of attorney's fees awarded.

construed." *Westbrooks*, 331 Ark. at 449, 962 S.W.2d at 357 (citation omitted). "The purpose of § 23-79-208 is to punish the unwarranted delaying tactics of insurance companies." *Id.*, 962 S.W.2d at 357 (citation omitted). However, when an insured demands more than that which he is entitled to recover, the statutory penalty and attorney's fee should be denied:

> It could never have been the purpose of the legislature to make the insurance company pay a penalty and attorneys' fees for contesting a claim that they did not owe. Such an act would be unconstitutional. The companies have the right to resist the payment of a demand that they do not owe. When the plaintiff demands an excessive amount he is in the wrong. The penalty and attorneys' fees is for the benefit of the one who is only seeking to recover, after demand, what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it.

Westbrooks, 331 Ark. at 449, 962 S.W.2d at 357 (citing *Pacific Mut. Life Ins. Co. v. Carter*, 92 Ark. 378, 388, 123 S.W. 384 (1909)).

In cases applying section 23-79-208(d)(1), no demand other than the filing of suit is required under section 23-79-208 and its predecessor statutes. *R.J. "Bob" Jones Excavating Contractor, Inc. v. Firemen's Ins. Co.*, 324 Ark. 282, 920 S.W.2d 483 (1996) (citations omitted). However, a new and lesser demand may be made by amendment after suit is filed. *Id.* (citations omitted). When such an amendment is made, the insurer's liability under section 23-79-208 is determined by whether it elects to contest the claim rather than offering to pay the reduced amount or asking for time in which to pay. *Id.* (citation omitted).

The critical question in this case is whether the $135,000 jury verdict is within twenty percent of the "amount demanded" or "which [was] sought in the suit." As such, we must determine what amount Eda demanded or what she sued for — $250,000 or $150,000.

State Farm contends that $150,000 was not the amount Eda demanded or sued for because the amended demand extending that offer is not a pleading recognized by the Arkansas Rules of Civil Procedure. Moreover, State Farm contends that after Eda filed the amended demand, the amount she actually demanded or sued for was $250,000 because that is the amount of damages she requested from the jury at trial. We disagree with both arguments.

First, there is no requirement in section 23-79-208(d)(1) that the amount demanded or sought in the suit be filed in a "pleading" contemplated by the Arkansas Rules of Civil Procedure. Nevertheless, the amended demand was a document, filed with the court, that clearly stated that Eda was reducing her demand. Secondly, after our own review of the record, we hold that Eda never made a demand or sued for $250,000 at trial. The parties stipulated to the limits of the policy, which were $250,000. Because of this stipulation, it was known by the jury that it could award any amount between $0 and $250,000.

State Farm cites three cases in support of its arguments. The first is *Unum Life Insurance Company of America v. Edwards*, 362 Ark. 624, 210 S.W.3d 84 (2005). There, Edwards was seeking benefits from her disability insurer. While the maximum benefits Edwards could receive under her policy was $54,928.75, Edwards's complaint and amended complaint prayed for benefits in excess of $3,000. A jury found that Edwards was entitled to $43,943. Because Edwards had not specified an amount of benefits that she was seeking, the insurer argued that she was not entitled to a penalty and attorney's fees under section 23-79-208(d). The trial court disagreed and awarded the statutory penalty and fees. On appeal, the supreme court affirmed the award, holding that although Edwards did not amend her complaint to definitely state the amount of benefits she claimed, she was seeking all future benefits due under her policy and her recovery was within twenty percent of what she sought.

State Farm claims that the holding in *Edwards* is that the application of section 23-79-208 is triggered by "the actual recovery which the insured seeks at trial, not a set sum in any pre-trial filing." We disagree with this characterization of the holding in *Edwards* as several Arkansas cases have held that a "pre-trial filing" triggered section 23-79-208. *See Southern Farm Bur. Cas. Ins. Co. v. Brinker*, 350 Ark. 15, 84 S.W.3d 846 (2002); *Westbrooks, supra*; *see also R.J. "Bob" Jones Excavating Contractor, Inc., supra*; *Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 358 F.3d 1086 (8th Cir. 2004) (applying Arkansas law). Furthermore, there are critical factual distinctions between *Edwards* and the instant case. In *Edwards*, prior to trial there was no specific amount of money that was demanded or sought in the pleadings or any other document. All that the court had to consider was the evidence Edwards presented at trial. The instant case differs in that prior to trial there was a specific formal demand filed for $150,000.

State Farm also cites *Brinker* for support. In *Brinker*, the insured sought underinsured motor-vehicle coverage following an automobile accident with a third party. Brinker's complaint against his insurer sought $100,000 in damages. Brinker later sent a letter to his insurer reducing his demand to $75,000, which his insurer refused to pay. Brinker filed an amended complaint requesting penalties, payment of $75,000, and interest. It was later determined that the insurer owed Brinker the $75,000, and Brinker sought penalties and attorney's fees pursuant to Arkansas Code Annotated section 23-79-208(d). The trial court awarded Brinker the penalty and attorney's fees, and the insurer appealed, claiming that the award of $75,000 was not within twenty percent of the amount "demanded" ($100,000). The supreme court affirmed the award, holding that Brinker's recovery of $75,000 was within twenty percent of his letter and amended complaint demanding $75,000.

State Farm contends that *Brinker* stands for the proposition that "a later demand for judgment, even if made outside the pleadings, is controlling to determine whether a demand is within twenty percent of the amount awarded." In other words, Eda's request at trial for $250,000 (a demand made outside the pleadings) triggered section 23-79-208. We disagree with State Farm's application of *Brinker* and its argument. The *Brinker* court, in affirming the statutory award, found that section 23-79-208 applied based not only on the demand letter (made outside the pleadings), but also based upon the amended complaint that was filed in that case. In the case at bar, the document filed by Eda with the reduced demand similarly activated the application of the statute. Moreover, as previously stated, Eda did not make any formal and specific monetary demand at trial.

The final case cited by State Farm is *McAlister v. Nationwide Mutual Fire Insurance Co.*, 2006 U.S. Dist. LEXIS 71014 (W.D. Ark. Sept. 29, 2006). In *McAlister*, the insureds, who suffered a fire loss, were forced to sue their insurer after it denied coverage. In their amended complaint, they demanded "$60,000 or an amount to be proven at trial." At trial, the insureds asked the jury for $108,305. The jury awarded them $68,261. The insureds sought penalties and attorney's fees under section 23-79-208(d); however, the district court denied the request. The court held that the amount that the insureds "demanded" was $108,305 and that because the insureds' recovery was not within twenty percent of

$108,305, the request for the statutory penalty and attorney's fees was denied.

McAlister is distinguishable from the case at bar because there was no amended demand filed. Also, the insureds in *McAlister* demanded a specific amount of money ($108,305) at trial that exceeded the amount of damages they sought in their amended complaint. That did not occur in the case at bar. Eda, Gary, and their counsel generally spoke about the stipulated policy limits of $250,000, but there is no evidence that at trial they demanded a specific amount of money that they were seeking as damages.

In sum, under our de novo review, we affirm the trial court's order awarding Eda attorney's fees and a twelve-percent penalty under section 23-79-208(d)(1).

Affirmed.

ROBBINS and GRUBER, JJ., agree.

Randy Wayne CUMMINGS *v.* Sandra Lynn CUMMINGS

CA 07-1325 292 S.W.3d 819

Court of Appeals of Arkansas
Opinion delivered February 11, 2009

Tapp Law Offices, by: *J. Sky Tapp*, for appellant.

The Farrar Firm, by: *Bryan J. Reis*, for appellee.

JOHN MAUZY PITTMAN, Judge. This appeal focuses on the financial aspects of a marriage that lasted almost forty years. Appellant Randy Cummings (husband) and appellee Sandra Cummings (wife) both appeal various aspects of the circuit court's ruling. Husband's arguments focus on the valuation and division of a family-owned business, the nominal alimony awarded to wife, and an award to wife of one-half of the value of gifts husband gave to a girlfriend (to whom he was later married) during the pendency of this case. Wife's arguments are that the circuit court's award of alimony was insufficient and that the court failed to enforce the parties' settlement agreement. We modify the circuit court's decree in one respect and affirm the decree as modified.

Background

The parties married in 1967. In 1982, husband started a business, Quality Reinforcement, Inc. (QRI). Its value was one of the major issues at trial. Husband filed his complaint for divorce on March 26, 2004, seeking a divorce and alleging that there were property rights and debt obligations to be adjudicated. Wife filed a counterclaim seeking a divorce and division of the property.

On April 17, 2006, husband made a written offer of judgment pursuant to Ark. R. Civ. P. 68 whereby wife would receive QRI and would assume all liabilities for the business. Wife did not respond to the offer and rejected it at trial.

On August 31, 2006, the parties entered into a written "Property Settlement and Separation Agreement" that resolved some of the outstanding issues between the parties. Wife was to receive two vehicles, one jet ski, a Kawasaki Mule and trailer, and two storage trailers. Husband was to pay the $500 debt remaining on wife's vehicle. He was also to receive a $700 credit. Husband was to receive two pick-up trucks, one jet ski, a trailer, his guns,

and his personal property. Husband was to assume the debt on his 2004 truck. The parties also agreed to equally divide the funds contained in certain accounts and certificates of deposit, as well as the proceeds from the sale of a mobile home and the sale of forty acres under contract. The parties further agreed to list a residence and adjacent lot for sale. If that property was not sold within ninety days, it would be sold by the circuit court clerk. Husband also agreed to pay wife $600 per week in temporary maintenance and $600 per month for wife's rent during June through August 2006. The agreement reserved the issues of alimony and the valuation of QRI. Additionally, husband would be entitled to a credit of $20,000 if the court determined the value of QRI was above $50,000.

On September 7, 2006, the court entered a divorce decree granting wife a divorce, approving and incorporating the parties' written agreement, and reserving jurisdiction over the issues set out in that agreement.

Evidence at Trial

Gary Welch, a certified public accountant appointed as the court's expert, testified that he valued QRI based on the earnings method. He determined that, as of September 30, 2005, QRI's value was $421,000, while the value as of September 30, 2004, was $449,000. On cross-examination, Welch acknowledged that his analysis was not based on interviews, depositions, or industry publications; instead, he relied on tax returns for ninety to ninety-five percent of his data. He also indicated that his value of QRI exceeded the actual value of the corporation's tangible assets by approximately six to seven times. He would not describe the difference as goodwill; rather, he characterized it as QRI's earning capacity.

Welch said that he did not consider the impact upon QRI if husband was unable to operate the business or personal goodwill attributable to husband. He did consider husband's presence as a "key man" as an element of the risk of management, which would result in a lower valuation of the company. On redirect examination, Welch distinguished QRI from professional practices because, according to Welch, QRI obtains work based on it submitting the lowest bid, not on the presence of a particular, licensed individual.

Rachel Kremer, also a certified public accountant, testified as wife's expert. She used an income approach similar to that used

by Welch and valued QRI at $430,000. Her valuation was as of June 2006, when the parties were divorced. She considered husband's presence in the business as part of her company-specific risk rate, which would serve to decrease the value of the company. Kremer testified that she had not seen instances of personal goodwill that were not associated with a professional practice. Due to QRI not being a professional practice, Kremer did not assign a value to personal goodwill.

On cross-examination, Kremer testified that eighty percent of her valuation came from the fact that husband worked in the business and did not have to pay someone else to do the work he was doing. She added that beside husband paying himself a salary, he was compensated in other ways such as the company paying for a vehicle and that he had written company checks to pay for his divorce attorney and personal credit card bills. She also said that an owner can establish a successful business, but that does not make it personal goodwill. She also said that the fact that a former employee of QRI left to start his own business and was beating QRI on bids was an indication that it was corporate goodwill, not personal to husband.

Bruce Engstrom, certified public accountant and husband's expert, testified that there was little reason for anyone to pay a high price for the business because it is relatively cheap to enter. He also stated his opinion that some of the case law that prohibits the division of personal goodwill makes no distinction between professional practices and other commercial enterprises. He asserted that QRI depended on husband's presence to be invited to bid and obtain work. Engstrom testified that, in order to sell the business, one would have to demand that husband remain with the business under an employment contract, with most of the purchase price being attributed to husband's employment contract. He concluded that the only way to properly value QRI was based on the net asset value of QRI's tangible assets. Prior to making his calculation as to value, Engstrom eliminated several of the corporation's assets that the parties used for personal use or had been distributed to the parties as a result of the settlement agreement. He asserted that the income approach was appropriate if it was irrelevant who owned the goodwill. He also opined that QRI had goodwill. Engstrom said that Kremer could not identify why QRI had goodwill that would cause it to earn more than a similar business and asserted that it was because of husband's presence. His opinion was that the stock of QRI was worth $60,674.

On cross-examination, Engstrom acknowledged that there were no cases in which a reduction for personal goodwill was allowed that did not involve a licensed professional, such as a doctor or an architect. He also repeated his belief that only husband, not the company, had the goodwill.

At a December 11, 2006, hearing on whether the circuit court would require him to continue to pay temporary alimony to wife, husband testified that each party received $850,000 in assets, pending the valuation of QRI. He denied sabotaging the business and asserted that he was still bidding for work. According to husband, he was almost fifty-nine years old and could no longer physically work as he previously had done. He also said that he had recently lost two key employees. He asserted that the company had made only $3,000 to $4,000 in the preceding three months so that he could not continue to pay wife $3,000 per month in alimony. Husband testified that there was only $26,000 in the company's bank account. He denied that he bought a jet ski for his girlfriend, stating that he received a jet ski under the parties' settlement agreement. He also purchased a jet ski dock that he placed at the house he shared with the girlfriend, as well as a washing machine. He was asked, over his attorney's objection, about his deposition testimony, taken prior to the decree, where he admitted that he gave his girlfriend $12,000 over a period of months. He also acknowledged that the company provided his girlfriend with a cell phone.

At a February 16, 2007, hearing, wife testified that she stood by her affidavit of financial means and answers to interrogatories as to her needs. She said that she had been diagnosed with spinal stenosis and a narrowing of her spine; that she walked with a limp; and that she was incapable of lifting anything without pain. She testified that she was caring for her niece's two-year-old daughter without compensation and that she sometimes picked the child up. She testified that she could not sit or stand for long periods without pain. She acknowledged that she did not have any medical documentation to support her claim. She stated that she did not know if she received $750,000 in assets, adding that she had no other source of income apart from investment income or the proceeds from the sale of property. During the marriage, wife was a housewife and did not work outside the home, except to occasionally assist with the bookkeeping and check writing at QRI.

Husband testified that wife wrote herself checks totaling $42,000 from the QRI account for personal use in 2004. He again

asserted that he could no longer physically continue to work in the same business due to his having carpal tunnel syndrome; because of a sciatic nerve problem in his back; and because he had undergone recent knee surgery. He asserted that, other than the assets and his continued presence, QRI had no value. The company did not own heavy equipment such as backhoes or excavators. He also asserted that he had seen videotapes of wife walking without a limp and carrying a forty-pound child and groceries without difficulty. He asserted that he should not have to pay alimony.

Dustin Tramel, a private investigator, testified that he conducted ten days of surveillance on wife and witnessed her walking without a limp; picking up a forty-pound child and groceries; getting into and out of a vehicle without trouble; and running on a couple of occasions.

The Circuit Court's Ruling

On May 29, 2007, the circuit court issued a letter opinion containing extensive findings of fact and conclusions of law. The court first addressed the issue of alimony to wife. Wife was found to have no marketable skills, having been out of the workforce for approximately forty years. She was also found to suffer from spinal stenosis, which made full-time employment difficult. The court also considered the fact that each party would be receiving approximately $1,100,000 in property before concluding that wife's alimony should be a nominal $1 per year. The court retained jurisdiction for future modification, based on changes in circumstances, including whether the valuation of QRI was reversed or modified on appeal. The court then turned to the valuation of QRI. The court found that both wife's expert and the court's expert had valued the business as a going concern and having business goodwill. The court found that husband's expert had valued the business at approximately $60,000, based as if it were not a going concern, and that the business only had goodwill personal to husband. The court rejected the valuation by husband's expert as being inconsistent with Arkansas case law. The court averaged the values found by wife's expert and the court's expert to arrive at a final value of $425,500. Wife was awarded half of this amount, or $212,750. The court next addressed gifts husband had given to his girlfriend. The court found that husband admitted giving approximately $12,000 cash, together with other personal property totaling another $12,000. The court awarded wife $12,000 for her share of these marital assets. This appeal and cross-appeal timely followed.

Arguments on Appeal

Husband argues five points on direct appeal, asserting that the circuit court erred by (1) valuing Quality Reinforcement, Inc., at $425,000 and awarding wife $212,750 for her interest in the corporation; (2) awarding wife alimony; (3) not recognizing provisions of the parties' settlement agreement as to a credit he was to receive; (4) failing to acknowledge husband's offer of the entire interest in the corporation to wife in lieu of having to pay her for her interest; and (5) finding that husband had made gifts totaling $24,000 to his girlfriend and awarding wife one-half of that amount. On cross-appeal, wife argues two points in which she contends that the circuit court erred in failing to enforce the parties' earlier oral settlement agreement and in awarding alimony that was insufficient to meet her needs.

Standard of Review

On appeal, divorce cases are reviewed de novo. *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005). We give due deference to the circuit court's superior position to determine the credibility of witnesses and the weight to be given their testimony. *Id.* With respect to the division of property in a divorce case, we review the circuit court's findings of fact and affirm them unless they are clearly erroneous. *Id.* The decision whether to award alimony is a matter that lies within the circuit court's sound discretion, and we will not reverse the decision to award alimony absent an abuse of that discretion. *Id.*

Discussion

I. Valuation and Division of Quality Reinforcement, Inc.

We first address husband's first and fourth points, in which he challenges the court's valuation of QRI at $425,500, and asserts that the court failed to properly credit his offer to wife of QRI in its entirety instead of having to pay wife for her interest in the business. Husband contends that much of the value placed on QRI is the result of "goodwill" that is dependent upon his continued presence with the company.

The valuation of goodwill is a question of fact and is dependent upon the particular circumstances. *Cole, supra.* Here, the circuit court did not assign any goodwill to the value it found for QRI. The court noted that both Welch and Kremer had

included goodwill for QRI in their valuations. However, the court did not place a value on the goodwill of QRI. Husband could have asked for specific findings of fact concerning the goodwill of QRI. The court's valuation of QRI is within the range of the expert testimony. The court also considered the fact that Engstom's valuation did not comport with prior Arkansas case law in that there was a deduction for goodwill personally attributable to husband's continued presence in the business and that those cases had been ones involving professional practices, not ordinary commercial enterprises. Therefore, we cannot say that the circuit court's valuation of QRI was clearly erroneous.

Husband also argues that the circuit court erred in refusing to credit his Rule 68 offer of the entire business to wife. Rule 68 of the Arkansas Rules of Civil Procedure allows one making a bona fide offer of judgment equal to or greater than the amount ultimately adjudicated to collect costs for trial expenses incurred subsequent to the offer. The purpose behind this rule is to encourage early settlement of claims and protect the party who is willing to settle from expenses and costs that will subsequently accrue by providing a defendant the means to compel a plaintiff to consider anew the merit of his or her claim at the time the offer is made and whether continued litigation is appropriate. *See Warr v. Williams*, 359 Ark. 234, 195 S.W.3d 903 (2004). This is a divorce case in which the circuit court has broad discretion in effecting an equitable distribution of the marital estate; moreover, the offer only addresses one aspect of the marital estate, QRI, while ignoring other property and debts that should be considered in determining whether the distribution is equitable. Even had wife accepted the offer, the circuit court would have been required to determine the value of the asset so as to effect an equal and equitable division of property and to determine whether alimony was appropriate. Under these circumstances, no litigation expenses would have been saved even had wife accepted the offer and, where the purpose of the rule is not served by the offer of judgment, we cannot say that the circuit court is required to find that the offer of judgment was bona fide.

II. Alimony

Under this point, we discuss both husband's second point and wife's second point on cross-appeal. Both points concern the court's award of alimony to wife. The circuit court awarded wife

alimony of $1 per year and retained jurisdiction for future modification of the alimony award, including if the valuation of the corporation was reversed on appeal. Husband argues that there was no need to award wife alimony in light of the property she was awarded. Wife, on the other hand, argues that the award is insufficient because she had demonstrated need for alimony of $3,000 per month.

Alimony and property divisions are complementary devices that a circuit court employs to make the dissolution of a marriage as equitable as possible. *Cole, supra.* The primary factors to be considered in awarding alimony are the need of one spouse and the other spouse's ability to pay. *Id. Cole* also lists other, non-exhaustive factors for the circuit court's consideration, including the parties' financial circumstances, the amount and nature of the parties' income, both current and anticipated, the extent and nature of the parties' resources and assets, and the parties' earning ability and capacity. It is no longer necessary for the court to award nominal alimony in order to retain jurisdiction for future modification. *Mulling v. Mulling*, 323 Ark. 88, 912 S.W.2d 934 (1996); *Grady v. Grady*, 295 Ark. 94, 747 S.W.2d 77 (1988).

We cannot say that the circuit court clearly erred in awarding wife only a nominal amount of alimony. Wife filed an affidavit of financial means showing that her current expenses totaled $4,382 a month. Wife argues that she should receive alimony because she is unable to work because of her health. However, that is but one of the factors for the circuit court to consider. The circuit court's order indicated that it considered the proper factors, including the fact that wife was to receive over $1,000,000 in assets, with a substantial amount of cash. As pointed out above, alimony and property division are complementary devices designed to make the divorce equitable. This could indicate that wife does not "need" alimony. The circuit court indicated that it was awarding nominal alimony so that it could retain jurisdiction to later modify the amount if this court were to reverse or modify the value assigned to QRI. Such a consideration is proper. *Mason v. Mason*, 319 Ark. 722, 895 S.W.2d 513 (1995); *Cole, supra.* Therefore, no abuse of discretion has been shown.

III. Settlement Agreements

Husband's argument is that the court failed to enforce the parties' agreement that, if the court valued QRI as worth more than $50,000, husband would be entitled to a $20,000 credit. In

her brief, wife concedes that husband is entitled to the credit. After entry of the divorce decree, the court issued a letter opinion stating that husband was entitled to the credit. Therefore, the circuit court's order should be modified to give husband a $20,000 credit against the amount he will have to pay wife for her interest in QRI.

For her argument on cross-appeal, wife asserts that the court erred in not enforcing an "agreement" placed on the record by the parties' attorneys in September 2005 that established the value of QRI and provided that husband would pay wife alimony of $2,150 per month until she turned sixty-five. The day before the original trial date, each party met in the offices of their attorney and negotiated via the telephone. An agreement was reached and confirmed via letter and e-mails between counsel. The next day, the attorneys appeared in open court and announced the settlement on the record. Approximately three weeks later, husband filed a motion seeking to have the case set for trial, alleging that his attorney lacked the authority to make the settlement. Wife later filed a motion to establish and enforce the parties' agreement. In that motion, she asserted that the terms read into the record constituted a contract not subject to modification by the court.

We find no error on this point. Whether the parties intended to enter into a binding agreement, and whether the husband's attorney was authorized to do so without the approval of his principal, are questions of fact best resolved by the circuit court. Furthermore, even if it were intended to be a binding agreement between the parties, the circuit court was not bound by it. There are two types of property agreements regarding the payment of alimony. *Seaton v. Seaton*, 221 Ark. 778, 255 S.W.2d 954 (1953); *Linehan v. Linehan*, 8 Ark. App. 177, 649 S.W.2d 837 (1983). The court in *Seaton* distinguished between these two different types of agreements:

> One is an independent contract, usually in writing, by which the husband, in contemplation of the divorce, binds himself to pay a fixed amount or fixed installments for his wife's support. Even though such a contract is approved by the chancellor and incorporated in the decree, as in the *Bachus* case, it does not merge into the court's award of alimony, and consequently, as we pointed out in that opinion, the wife has a remedy at law on the contract in the event the chancellor has reason not to enforce his decretal award by contempt proceedings.

> The second type of agreement is that by which the parties, without making a contract that is meant to confer upon the wife an independent cause of action, merely agree upon "the amount the court by its decree should fix as alimony." *Pryor v. Pryor*, 88 Ark. 302, 114 S.W. 700, 129 Am. St. Rep. 102, which construed an agreement of the first type, and *Holmes v. Holmes*, 186 Ark. 251, 53 S.W.2d 226, involving an agreement of the second type. See also 3 Ark. L. Rev. 98. A contract of the latter character is usually less formal than an independent property settlement; it may be intended merely as a means of dispensing with proof upon an issue not in dispute, and by its nature it merges in the divorce decree. In the *Holmes* case we held that the second type of contract does not prevent the court from later modifying its decree.

Seaton, 221 Ark. at 780, 255 S.W.2d at 955-56.

IV. Gifts to Girlfriend

Husband challenges the circuit court's decision to award wife $12,000 for her share of the value of gifts husband gave to his girlfriend during the course of this case. Husband does not argue that it was not proper for the circuit court to consider the gifts when determining the final property allocation because he cannot. In *Johnson v. Cotton-Johnson*, 88 Ark. App. 67, 194 S.W.3d 806 (2004), this court upheld an order that one party directly reimburse the other spouse for marital assets given to a paramour. In *Williams, supra*, we affirmed an unequal division of property and debts that took the husband's gifts of marital assets to other women into account. Husband's argument is that the proof of these gifts came after the parties were divorced and had divided some of their assets, including a jet ski that husband received under the settlement agreement. However, at that time the circuit court had not made a final division of all of the parties' marital property. Therefore, the fact that the proof of some of the values of such property came prior to the parties' written agreement is irrelevant. Moreover, the resolution of this issue depends upon the credibility of husband as a witness concerning whether he made such gifts. In such instances, we defer to the circuit court's resolution of the issue. *Johnson, supra.*

Affirmed as modified on direct appeal; affirmed on cross-appeal.

HART and BROWN, JJ., agree.

Bonnie MITCHELL, Administrator of the Estate of Gerald Wagner *v.* TYSON POULTRY, INC.

CA 08-843 292 S.W.3d 848

Court of Appeals of Arkansas
Opinion delivered February 11, 2009

[Rehearing denied March 18, 2009.]

Nolan Caddell & Reynolds, P.A., by: *Bennett S. Nolan*, and *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellant.

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *E. Diane Graham* and *Farrah L. Fielder*, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant's decedent was employed by Tyson as a yard truck driver. His duties included spotting trailers around the yard and to the loading dock, and checking the temperature of the trailers. He was given two thirty-minute breaks each day. The break time was unpaid. He could leave the premises during a break but was required to clock out and back in if he did so. The decedent generally took breaks in the wastewater section of the plant because a friend worked there. The decedent was returning from a break in the wastewater section and was crossing the yard where he worked en route to the office, where he reported after breaks to receive new assignments, when he was run over and killed by the junior spotter. The employer accepted the death as compensable and tendered workers' compensation benefits. Appellant administrator refused to accept them and contested compensability. The

Commission found that the death was compensable under the Arkansas Workers' Compensation Act because the decedent was performing employment services at the time of his fatal injury. Appellant administrator argues that this was error as a matter of law. We find no error, and we affirm.

The exclusive remedy of an employee or his representative on account of injury or death arising out of and in the course of his employment is a claim for compensation under Ark. Code Ann. § 11-9-105 (Repl. 2002). The Commission has exclusive, original jurisdiction to determine the facts that establish jurisdiction, unless the facts are so one-sided that the issue is no longer one of fact but one of law, such as an intentional tort. *VanWagoner v. Beverly Enterprises*, 334 Ark. 12, 970 S.W.2d 810 (1998).

Here, appellant argues that the Commission lacked jurisdiction. Specifically, appellant argues that the decedent was not performing employment services at the time of his fatal injury because, although his break was finished, he had not yet arrived at the office where he was to receive instructions regarding his subsequent duties. Appellant is mistaken. We have addressed this issue several times; the case of *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002), is instructive:

> Pursuant to Ark. Code Ann. § 11-9-102(4)(b)(iii) (Repl. 2002), an injury inflicted upon the employee at a time when employment services were not being performed is not compensable. The phrase "employment services" is not defined by statute, but has recently been interpreted by the supreme court. In an opinion expressly overruling all inconsistent prior opinions, the supreme court said that:
>
> > Since 1993, we have twice been called upon to construe the statutory language found in sections 11-9-102(4)(A)(i) and 11-9-102(4)(B)(iii). We have held that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer. . . ." *We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." The test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly."*
>
> Here, there was evidence that appellee, although clocked out, was in the middle of her shift and preparing to return to work from a

> break; that the injury occurred on Wal-Mart's premises at a place designated for appellee's use; and that, at the moment she was injured, appellee was returning her personal items to her locker as required by Wal-Mart as an integral part of a rather elaborate loss-prevention system designed to prevent employee theft. On this record, reasonable minds could quite clearly find that the injury occurred within the time and space boundaries of the employment, while appellee was carrying out Wal-Mart's purpose or advancing Wal-Mart's interest, and we therefore hold that the Commission did not err in finding that appellee was performing employment services at the time she was injured.

Sands, 80 Ark. App. at 54-55, 91 S.W.3d at 95 (quoting *Collins v. Excel Specialty Products*, 347 Ark. 811, 816-17, 69 S.W.3d 14, 18 (2002)) (internal citations omitted) (emphasis added by the court in *Sands*).

The facts in the present case are essentially identical. The decedent had finished his break and was performing the employment service of returning to the office to obtain instructions. He was in the yard, his assigned work area, when the fatal injury occurred, and there was even evidence that arguably could support an inference that he was checking the temperatures of trailers while en route to the office. But no such evidence is required. It is undisputed that he was within the time and space boundaries of his employment, finished with his break, and en route to receive further instructions. This constitutes performance of employment services under *Sands*.

Affirmed.

HART and BROWN, JJ., agree.

A.G. "Bud" MARTIN, Jr. *v.* Buy BOBO & Nellie Bobo

CA 08-651 292 S.W.3d 865

Court of Appeals of Arkansas
Opinion delivered February 11, 2009

[Rehearing denied March 18, 2009.]

Wilson, Walker & Short, by: *Charles M. Walker*, for appellant.

McKenzie, Vasser & Barber, by: *A. Glenn Vasser*, for appellees.

RITA W. GRUBER, Judge. Appellant A.G. "Bud" Martin, Jr., appeals from an order of the Hempstead County Circuit Court granting summary judgment to appellees Guy and Nellie Bobo and quieting title to certain lands in dispute in the Bobos. Appellant's sole argument on appeal is that the circuit court erred by quieting title in appellees because their claim to the disputed land was barred by the doctrine of res judicata. We hold that the circuit court was correct in finding that res judicata was not a bar to appellees' quiet-title action, and therefore we affirm the circuit court's order.

The disputed land lies near the Red River, which separates Miller County from Hempstead County. The land is referred to by the parties and in the circuit court's order as Tract No. 2 and is described as follows: All of that part of the East One-Half of the Northeast Quarter (E½NE¼) of Section 30, Township 14 South, Range 25 West lying East of the center of the Bois D'Arc Creek in Hempstead County.

In their motion for summary judgment to quiet title to Tract No. 2 in them, appellees attached an affidavit showing continuous and exclusive adverse possession of Tract No. 2 for over thirty years. They also provided evidence that neither appellant nor his predecessors in title had ever made a claim to Tract No. 2. In response to the motion, appellant provided no affidavit or other evidence to dispute or contradict the facts supporting appellees' claim of adverse possession. Rather, appellant contended that appellees' claim was barred by the doctrine of res judicata. Specifically, appellant argued that he and his predecessors in title, Clinton D. Jones and his family, were involved in a quiet-title action with appellees in Hempstead County Circuit Court in which the court quieted title in the Jones family to the land in dispute in this case.

In a letter opinion dated June 9, 2004, the circuit court described the following land as the "areas in dispute" in the previous case:

> Part of the Southwest Quarter and part of the Northwest Quarter of Section 29, the East One-Half Southeast Quarter of Section 30, and part of the East One-Half Northeast Quarter, Section 31 are the areas in dispute. Specifically the area west of the dotted line running through these areas which is ear marked as encroachment area on the Bud Martin property survey by James Cole is the area of dispute.

The court then entered an order quieting title to the following described property in the Jones family, which we note is the precise description used in the deeds through which the Jones family acquired the property:

> TRACT 1: The South Half of Section 29, containing 318 acres, more or less; the fractional East Half of the Southeast Quarter of Section 30, containing 53.41 acres, more or less, the fractional East Half of the Northeast Quarter of Section 31, containing 64.66 acres, more or less, and the North Half of Section 32, containing 320 acres, more or less, all the lands above described being situated in Township 14 South, Range 25 West, and containing in the aggregate 756.07 acres, more or less . . .

> TRACT 2: The Northeast Quarter and fractional Northwest Quarter, all in Section 29, Township 14 South, Range 25 West, and containing 266 acres, more or less, together with all accretions thereto . . . .[1]

Appellant argued that TRACT 2, described in the prior litigation, was the same land that was in dispute in this case. Because the East One-Half of the Northeast Quarter of Section 30 — in dispute in this case — is immediately west of and formed by accretion to the Northeast Quarter and fractional Northwest Quarter, all in Section 29 — in dispute in the prior litigation — appellant argued that the language "together with all accretions thereto" used in the prior litigation referred to and included the property in the East One-Half of the Northeast Quarter of Section 30.

The circuit court in this case rejected appellant's argument, finding that Tract No. 2, in dispute in this case, was not included in the prior litigation but was contiguous to Section 29, which was involved in the prior litigation. The court also found that no claims of ownership by record title or accretion were made by appellant or the Jones family in the prior litigation to the land in dispute in this case. Noting that appellant presented no evidence to dispute or contradict the facts supporting appellees' claim of adverse possession, the court held that no genuine issue of material fact existed and granted appellees' motion for summary judgment, quieting title to Tract No. 2 in appellees.

The sole issue on appeal is whether the circuit court erred in failing to apply the doctrine of res judicata in this case. Ordinarily, upon reviewing a court's decision on a summary-judgment motion, we would examine the record to determine if genuine issues of material fact exist. However, in a case like this one that does not involve the question of whether factual issues exist but rather the application of the legal doctrine of res judicata, we simply determine whether appellees were entitled to judgment as a matter of law. *Ruth R. Remmel Revocable Trust v. Regions Fin. Corp.*, 369 Ark. 392, 402, 255 S.W.3d 453, 461 (2007).

The doctrine of res judicata consists of two facets: issue preclusion, which is often referred to as collateral estoppel, and claim preclusion, which appellant is claiming applies in this case.

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[1] The supreme court affirmed the circuit court's order in *Bobo v. Jones*, 364 Ark. 564, 222 S.W.3d 197 (2006).

See Beebe v. Fountain Lake School Dist., 365 Ark. 536, 231 S.W.3d 628 (2006). Claim preclusion bars the relitigation of a subsequent suit when five elements are met: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. *Council of Co-Owners for Lakeshore Resort & Yacht Club Horizontal Prop. Regime v. Glyneu, LLC*, 367 Ark. 397, 401, 240 S.W.3d 600, 604 (2006). The critical element in dispute in this case is whether both suits involve the same claim or cause of action.

Appellant argues on appeal that TRACT 2 from the prior litigation is the same property that is in dispute in this case. Specifically, he contends that the language from the prior order, "all accretions thereto," refers to any property west of the Northeast Quarter and fractional Northwest Quarter of Section 29. Because the property in dispute in this case is west of this property, he claims it is an accretion to Section 29 and was quieted in the Jones family in the prior litigation. He asserts that a review of the original government survey for Section 29 demonstrates that there was no such thing as a Section 30 in Hempstead County, and that the Red River originally cut through Section 29, resulting in a fractional quarter section described as the fractional Northwest Quarter of Section 29. He argues that Section 30 existed only in Miller County. He contends that the gradual move by the Red River to the west led to the accretions to Section 29, which the circuit court quieted in the Jones family in the prior litigation. Thus, he argues, any lands formed to the west of the original fractional Northwest Quarter of Section 29 are "accretions thereto" and included in the prior decree.

The parties do not dispute that accretion is the gradual deposit and addition of soil along the bank of a water body caused by the gradual shift of the water body away from the accreting bank. *Swaim v. Stephens Prod. Co.*, 359 Ark. 190, 196 S.W.3d 5 (2004). Nor do the parties challenge whether the property in dispute is accreted land. There is also no dispute that the accretion was not recent and that appellees have been in adverse possession of this "accreted" land for over thirty years. The dispute is whether "[a]ll of that part of the East One-Half of the Northeast Quarter (E½NE¼) of Section 30, Township 14 South, Range 25 West lying East of the center of the Bois D'Arc Creek in Hempstead County" is the same property described by — and thus the same

claim or cause of action as — "[t]he Northeast Quarter and fractional Northwest Quarter, all in Section 29, Township 14 South, Range 25 West, and containing 266 acres, more or less, together with all accretions thereto" for purposes of res judicata.

The United States System of Surveying the Public Lands, enacted in 1785 and modified since by various acts of Congress, divides land across the United States into townships that are six miles square running along north-south and east-west lines. Charles B. Breed & George L. Hosmer, *The Principles and Practice of Surveying, Volume I. Elementary Surveying* 120-21 (3d ed. 1908); *see also Journals of the Continental Congress, Volume XXVIII* (J.C. Fitzpatrick ed., 1933-34). Each Township is then divided into thirty-six sections. A section is a mile square and contains 640 acres, more or less. *American Law of Property*, Vol. III § 12.100 (Little, Brown & Company 1974). Sections do not always fall completely within one county, or even one state, but may exist on both sides of a county or state border. *See Alphin v. Banks*, 193 Ark. 563, 102 S.W.2d 558 (1937). In *Alphin*, the court indicated that many sections along the southern boundary of Arkansas are fractional because the north portion of the sections are in Arkansas and the south portion of the sections are in the State of Louisiana. *See also Black v. Clary*, 235 Ark. 1001, 363 S.W.2d 528 (1963) (parts of several sections in dispute lay in Lafayette County and parts in Miller County, divided by the Red River).

We reject appellant's argument that Section 30 does not exist in Hempstead County. The Red River moved west. Indeed, this is the reason appellant's predecessors acquired land by accretion in the prior litigation. While most of Section 30 may have existed in Miller County in 1819 at the time of the original government survey referred to by appellant in his brief, this is no longer the case, as is evidenced by the surveys used as exhibits in the prior litigation, including the survey designated "Bud Martin Property Survey." All of the surveys include part of Section 30 in Hempstead County. The "Jones Property Survey" actually depicts the East One-Half of the Northeast Quarter of Section 30 as the "Guy Bobo" land. Finally, the circuit court's order in the prior case quieted title in the Jones family, appellant's predecessor in title, to "the fractional East Half of the Southeast Quarter of Section 30, containing 53.41 acres, more or less." This order, including the circuit court's underlying determination that the property was located in Hempstead County, was affirmed by our supreme court. *Bobo*, 364 Ark. at 568, 222 S.W.3d at 201.

The property in dispute in this case is in Section 30, not in Section 29. Whether the property is an accretion and whether appellant might have had some claim to the land under that theory is not at issue in this case. He has not disputed appellees' claim of adverse possession of the disputed property. The East One-Half of the Northeast Quarter of Section 30 was not in dispute in the prior litigation. The doctrine of res judicata applies against a party only when both suits involve the same claim or cause of action and the party had a fair and full opportunity to litigate the issue in question. *Carwell Elevator Co. v. Leathers*, 352 Ark. 381, 389, 101 S.W.3d 211, 217 (2003). We hold that, for purposes of res judicata, property located in Section 30 is not sufficiently described by the language "and accretions thereto" to property located in Section 29 and that appellees did not have a fair and full opportunity to litigate their claim in the prior case to the property in dispute in this case. Therefore, the doctrine of res judicata is not applicable in this case; accordingly, we affirm the order of the circuit court.

Affirmed.

VAUGHT, C.J., and ROBBINS, J., agree.

Joseph S. COOK & Amanda R. Cook *v.* John RATLIFF

CA 08-732 292 S.W.3d 839

Court of Appeals of Arkansas
Opinion delivered February 11, 2009

John D. Bridgforth, P.A., by: *John D. Bridgforth*, for appellants.

One brief only.

DAVID M. GLOVER, Judge. This is a prescriptive easement case. Appellants, Joseph and Amanda Cook, appeal from an order that was not filed until December 14, 2007. The notice of appeal was filed on January 11, 2008. In the order, the trial court determined that appellee, John Ratliff, proved that he had used an access road across appellants' property in a manner and frequently enough to establish an easement by prescription. The trial court permanently enjoined appellants from blocking appellee's access across the easement, which was described and set in the order as twenty feet wide. Appellants raise two points of appeal: 1) the trial court erred in finding appellee John Ratliff established a prescriptive easement by adverse possession over lands now owned by appellants Joseph Cook and Amanda Cook, and 2) the trial court erred in restricting cross-examination of appellee John Ratliff at trial. Finding merit in appellants' first point of appeal, we reverse and dismiss without the necessity of reaching the second point.

The gist of appellants' argument under their first point is that the trial court clearly erred in finding that appellee proved an easement by prescription because appellee did not prove any overt action that would make clear to appellants that appellee was exerting an adverse use and claim to appellants' property. We agree.

Applicable Law

The use of unoccupied and unenclosed lands for passage is presumed to be permissive until those using the way, by their open and notorious conduct, apprise the owner that they are claiming it as of right. *Stone v. Halliburton*, 244 Ark. 392, 425 S.W.2d 325

(1968). Use which is permissive in its inception can never ripen into an adverse or hostile right no matter how long continued unless the statutory period has elapsed after notice of the adverse claim has been brought home to the owner. *Id.* Some act or circumstance, in addition to, or in connection with, the use of a way across unenclosed lands of another and tending to indicate that the use was not merely permissive is required to establish a right by prescription. *Id.*

A prescriptive easement may be gained by one not in possession of the land by operation of law in a manner similar to adverse possession; like adverse possession, prescriptive easements are not favored in the law because they necessarily work corresponding losses or forfeitures in the rights of other persons. *Carson v. Drew County*, 354 Ark. 621, 128 S.W.3d 423 (2003). The statutory period of seven years for adverse possession applies to prescriptive easements. *Id.*

The determination of whether a use is adverse or permissive is a fact question, and former decisions are rarely controlling on this factual issue. *Id.* A trial court's finding of fact will not be reversed unless it is clearly erroneous. *Id.* In reviewing a trial court's findings of fact, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.* Disputed facts and determinations of witness credibility are within the province of the fact-finder. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.* It is this court's duty to reverse if its own review of the record is in marked disagreement with the trial court's findings. *Id.*

Appellee's Case

The evidence was clear that appellants' land was unoccupied, unenclosed, and unimproved, making appellee's use of the "roadway" across it presumptively permissive unless appellee made it clear to appellants that his use was adverse. The testimony presented by appellee in support of his claim for a prescriptive easement follows.

John Aldridge, a surveyor, testified that he prepared a survey for appellee in 1993; that in preparing the survey, he drove from "the yellow brick road" (County Road 409) across the Weaver property (predecessors in title to appellants) and a portion of the

Sykes property to appellee's property; and that he was driving across an "old wood road, a logging road type thing." He said that the road terminated at the old home place, which was on appellee's property; that the road was passable if it was dry; and that the Weaver/Sykes road was the primary access they used to get into appellee's property. He described the Weaver property as unenclosed and uninhabited; that the road in question was an old logging road and that it washes out when it rains; that when it was wet, it was not passable without a four-wheel drive; and that in the survey, he made a provision for an easement over Effie Clay's property (north of appellee's), but not over the Weaver property on the east.

Don Farmer testified that he did some work for appellee about ten years ago whereby he took a bulldozer and cleared an existing old road that went to a farmhouse; that the road was "kind of growed up" when they got there; that they worked on the whole road and had to knock down little saplings; that prior to working on the road, one could not drive a pickup truck into appellee's property; and that he worked on the road about three or four hours. He testified that to his knowledge, the property surrounding the road was unimproved and uninhabited; that it looked as if someone might have used the road for hunting, but otherwise, it would have been impassable in a vehicle; that he did not put any gravel down; that he did not see any asphalt or concrete on the road; that there were "ruts and stuff"; that if someone does not build up a road correctly and put good materials on it, it will wash out forever; that the road washed out every year; and that the work he did was just for a quick fix.

Leo Goodwin testified that his family formerly owned the property currently owned by appellee; that it joins the Sykes place and Clay place; that to get to his family's property they used the road on the Clay farm after the other one got so bad, they could not travel it; that "it was growed up and washed out"; and that they used the road from the Clay property, which went around the edge of the Clay place down the Goodwin (appellee's) property. He said that there was another road into the property but that they never used it; he said that the other road was "growed up" when he got big enough to know; and that it was on the east side of the Clay place. He said that his uncles lived on the east side of the place; that they got in and out of there on their feet; and that they did not have a road. He said that his family never logged the property but that they had farmed in there; that they had tractors

and a trailer; that they never took the tractor and trailer out on the east side; that there might have been a trail over on the east side but it did not look like vehicles had ever been down it; and that the last time he was there was twenty years ago when he moved his grandmother to a nursing home and that on that occasion they went around the edge of the Clay place. He stated that he was 62 years old; that he had gone to the Goodwin/appellee's property since he was five or six years old; that his family went around the Clay side on the edge of the woods on the Clay property; that when they sold the place, that was the only way to get back there; and that there was a pig trail but you could not drive a full-size vehicle on it.

Alan Barnes testified that he is in the logging business; that he cut timber for appellee on property that was west of appellants' property in 2005; that he accessed that property through a road off County 430 back to a little house; that it crossed the appellants' property; that he could not drive a pickup truck down there for the "washout and things in it"; that he basically went through and "just pushed the top off and filled the washouts in"; that the road came to a gate that opened up on to a little pasture where the old house was; that he worked on appellee's property cutting the timber for about a month or more; and that he hauled the logs out on the same road with an 18-wheeler truck. Barnes said that appellee told him there was an easement across the Clay property and he was in a lawsuit with them, so he would have to come in from the other side, the west side. Barnes testified that if it was not for the washout, a person could have gotten a pickup down the road; that he had to push some honeysuckle and saplings out of the way; that he was there in the summertime and it was dry; that he had to fix the washouts before he could drive down the road; that before he got there with his bulldozer, he could not drive down it; that appellants' property was unenclosed, unimproved, uninhabited; and that one could tell it was not a traveled road.

Appellee rested, and appellants moved for a directed verdict, which was denied.

Appellants' Case

Appellants began their case with the testimony of King Calvert, who testified that he was familiar with the property of both parties; that for a six to eight-month period about five years ago, he had to use an alternate route to get to work because a bridge on County Road 409 washed out; that in doing so, he

passed by the appellants' property two or three times a week when the weather was nice; that no one lives on appellants' property; that it was unenclosed and unimproved; that the "road" was not a road; that he could not negotiate it in a pickup; that he called it a pig trail; that he had not traveled that area in the last eleven months; that there was an opening off the county road (430) onto the Cook/appellants' property, but that no one used it; that it "was just not possible there was a road there and I didn't know it"; that he did not see any vehicles come in and out of there; that he did not drive in and out of there; and that he knew appellee and had never seen him on either of the county roads.

Danny Parsons testified that he is personally familiar with the parties' properties; that he hunts on the north side of appellee's property; that he observed appellee going in and out of his property; that appellee took the route in the northwest corner of his property, which was off Effie Clay's property; that he started hunting in that area in the fall of 1996, which was about ten years ago; that he remembers the old logging road; that he thought a bulldozer went out there in 2005 and pushed some dirt out; that in 2005, the appearance of the property changed; that before then it was a game trail or logging road "with saplings and stuff growed up in it"; that by saplings, he meant small trees, probably six inches in diameter; that between 1996 and 2005, it was not possible to drive a truck or regular sized vehicle through that old logging road; that he drove on County Road 430 to about County Road 409; that he did not drive on the old logging road in his pickup because it was impassable; that he has not noticed anything having been done to the road since 2005; that since then it has gotten very deep "washouts"; that saplings are starting to grow back; that a person could not drive a pickup truck through that area without tearing it up; and that the county has not maintained it. Parsons explained on cross-examination that his observations from 1996 to 2006 were what he observed from the county road; that after appellants bought the property in 2006, he went out there but prior to that he had not been down the road across the Weaver/appellants' place; that he could observe the entrance from County Road 430; that he never saw a bulldozer; that he has never been on appellee's property; that he saw appellee come in through the Clay property; that the road in question never looked maintained to him; and that he did not know if appellee worked on the road or if his family went out there and planted food plots and worked on appellants' property. On redirect, Parsons stated that between 1996 and 2006, he had occasion to travel County Road 430; that from County

Road 430, looking west onto the Weaver/appellants' property, one cannot see very far; that it is all in woods; that he never noticed an opening; and that from County Road 430, looking at the old logging road, he could see saplings grown up in it from 1996 on.

Lee Fesmire testified that he is in the real estate business; that he is familiar with the appellants' property; that the predecessors listed it with his agency for five years; that he had shown the property several times and "been all over it"; that he had even hunted it a few times; that there were some old two-wheeler trails there, like old logging roads from years ago; that the only road was County Road 430; that the old logging road looked like it was grown up; that he did not try to drive his vehicle on it; that he drove a four-wheel-drive pickup; that he backed off County Road 430 onto this logging road, but you could not get across, "you'd be stuck"; that there was no traffic on the logging road; that the Weaver/appellants' property was unenclosed, unimproved, and uninhabited; that he assumed someone took a bulldozer and made a road in 2005 because he was there last Christmas and was surprised to see the changes; that he knew the Weavers had not done it; that he does not know the current condition of the road because he has not been there in a year; and that the logging road stayed washed out. He explained that his personal contact with the property was probably in 2002, 2003; that he observed it for three or four years; that he did not know what it looked like in 1993; that in 2003 he could drive a four-wheeler from the county road to the Weaver property line; and that a four-wheeler is made for rough roads or paths.

Tommy Hollowell testified that he owns eighty acres located a quarter mile or less from the Weaver/appellants' property; that he is familiar with the old Weaver property; that the last time he went down the logging road was on a horse; that a person could get down it on a four-wheeler; that he was out there about four years ago; that he runs cattle on the east side of County Road 430; that he has never seen a truck or any kind of vehicle on the old logging road; that he had seen appellees park on County Road 430, but he had never seen anybody able to traverse the road in a vehicle; that when he rode the horse out there four years ago, trees had grown up considerably in the path he used to walk down; that he wanted to see the old house that used to be there; and that he had to get off the horse and walk down a little ways to see it; and that he never considered it to be a road, but rather a trail.

Appellant Joseph Cook testified that he contacted Mr. Fesmire about the Weaver property in 2003; that he and his brother walked the property and found corner stakes; that it was unenclosed, unimproved, and uninhabited; that they walked the property numerous times; that the main county road was 430; that other than the county road that splits the property there was no other vehicle-worthy road on the property; that there was no road on the property in 2003 and 2004; that there were several small trail paths out there but nothing you could pull off the county road onto with a vehicle; that there is an incline approximately four or five feet on County Road 430 to the logging road or trail; that "it washed out bad there"; that there were trees six to eight inches in diameter growing in the trail; that some of the trees were eighteen- to twenty-feet tall; that a person could ride a four wheeler through; that the property changed greatly in 2005; that he did not purchase the Weaver property until 2006, but that he purchased forty acres south of it before then; that he noticed in 2005 that it went from a trail through the woods to a thirty-foot wide road; that he saw vehicles and logging equipment coming in and out of the road; that today, a person would need a good four-wheel drive to access the road; that since they completed logging in 2005 to the present, the road has deteriorated, washing out again on both sides; that he took pictures in October 2006; that the pictures were taken from the logging road; that the photographs demonstrate the size of the trees that are in the trail; that he walked from County Road 430 west and took pictures of each pile of brush and each tree that was pushed out of the road to gain access across his property; that the Sykes property is contiguous with appellee's property; that the Sykes have more than one access to their property; that the Sykes' first access comes off County Road 404 which corners into County Road 409 onto County Road 404; that County Road 404 is the road Mr. Calvert was talking about that had the bridge washed out; that County Road 409 goes over to County Road 430; and that Sykes' second entry has a gate and goes from County Road 404 to appellee's property.

Mr. Cook explained that since 1996, he had seen appellee and his son-in-law, Scott Hickman, use the Clay road; that the Clay road leads from County Road 409 back to what used to be the Goodwin property and is now appellee's property. He said that to go from his property to appellee's property, one had to cross the Sykes property. He said that he has a gate on his property that is contiguous to County Road 430; that pictures taken in October 2006 show the washout next to the gate; that the ruts were

thirty-six to forty inches deep at that time; that he has not seen the back side of the property since early November; that the road was not passable in 2003 when he first saw it; that it became passable in the summer of 2005 when the Barnes Logging Company came through; and that it is no longer passable by regular vehicle but that an all-terrain vehicle could go down the road.

On cross, Mr. Cook explained that he did not own any property adjacent to appellee in 1996; that he did not go on the Weaver or the Sykes property in 1996; and that he first entered the property in 2003. He testified that in 1996 when he first went out there, he saw appellee use the Clay access; that he first saw him use the access on the other side (east side) in 2005; that appellee told him in the hunting season of 1996 that he was using the Clay access because the access on the other side of the property was washed out; that he had no knowledge if appellee used the east-side access in 1997, 1998, 1999, 2000, or 2001; that appellee and his family got on their property off county road 404, off the Sykes property; that he placed the T-posts on the property line between his property and the Sykes property in 2006; and that before he did that, there was nothing blocking the road.

On redirect, Mr. Cook testified that in 2003, he had been by the Weaver/appellants' property many times on County Road 430; that from 430 to the property line between the Weaver and Sykes properties in 2003, there were brush, weeds, honeysuckle, blackberry bushes, briar bushes, and numerous sized trees, from one to nine inches in diameter and six to thirty feet tall; and that for five to six years prior to 2003, regular vehicles could not have traversed the road.

Appellee's Rebuttal

After appellants rested, appellee Ratliff in rebuttal testified that in 2003, he did not observe any saplings of the size described by Mr. Cook; that he drove down the road in 2003 in a Suburban four-wheel drive; that he put up a gate on his property in the 1990s; that he first observed what appeared to be tracks in the road in 1995 and that in response, he erected the gate; that he has used the Weaver/appellants' property every year since he has been there, thirteen years; that it was never a pig trail or path, it was a road; that he had Don Farmer clean up the road in 1994; that he worked the road every year, using dozers and tractors with gradeboxes, filling holes; that he missed one year; that he never

told Mr. Cook that he was not using the access on the other side; and that he told Cook to get off the place, that he was trespassing.

On cross-examination, Ratliff stated that he tried to get an easement over the Clay and the Weaver property "because you need two different ways in"; that the first time he was brought in to look at the property, he was taken over both the Clay and Weaver property; that he used both sides for access; that he has not been on the Clay property since 2004; that he still claims an easement across the Clay property; that he does not know if the Weaver/appellants' property is unenclosed; that he put a gate on his own property, not on the Sykes or Weaver property; that "the road ruts out every year" and he has to fix it every year; and that some ruts are as deep as your knee.

Final Rebuttal

In final rebuttal by appellants, Mr. Cook testified that he has known about the Weaver property since 1996; that he has never seen any repairs to the road; that from 1996 forward, no one could have driven a vehicle on the land in the condition that it was in; that he was testifying about the "mouth of the road" since 1996; that he did not know about the rest of the road until 2003, any farther than he could see from County Road 430. He said that from 1996 to 2005, a person could probably see sixty to seventy-five yards into the brush off County Road 430; that after the timber company was there in 2005 and cleared the road out, a person could see farther because there would not have been "trees and brush and stuff" growing up in the road. He stated that there has been a road there since 2005; that prior to that time, the road had not been a useable road; that there was a four-foot cut in the road; and that it went up over the hill, not through the hill. He said that the Barnes timber cut was in 2005, prior to his ownership; that the pictures of his property taken from the Sykes property showed what his property was like in October 2006 after the bulldozer came through in 2005.

Opinion Letter

In her letter opinion dated January 23, 2007, the trial judge summarized the above testimony as follows:

> According to the testimony of Plaintiff and his witnesses they have used this road since it was purchased by Plaintiff in 1993. Rusty Ratliff, Plaintiff's daughter, specifically stated permission for this use

was never requested of the Weavers, the Defendants' predecessor in title, and no effort was made to conceal their use of the road.

The Plaintiff's property was used for recreational and hunting purposes since purchase. Due to the topography of the land, when Plaintiff and his family or guests wanted to access the west side of the Plaintiff'sproperty, they used this access road off County Road 430. There are no habitable structures located on it or utility services provided to the area. Scott Hickman, Plaintiff's son-in-law, also testified to his personal use of the roadway for a period of ten (10) years. In addition to the hunting and other recreational purposes testified to by Plaintiff and Rusty Ratliff, Scott also used Plaintiff's property for trail riding. According to Scott, he was on the property at least once a month until deer season, then he was on it more frequently.

According [to] these three (3) witnesses, in addition to the use of this roadway across the Weaver, now Cook property, they have done maintenance on the road. A view of the land, both from the pictures and the on-site visit, indicates the area at the entrance to Defendant's property is difficult to cross when the area is wet. According to Plaintiff, each year he did bulldozer work on the road to make it passable. No gravel or concrete was ever placed by Plaintiff on Defendants' property however he did use the dozer to smooth out the ruts in the road. Ricky Milton testified, in exchange for hunting privileges, he cleaned off the road. Don Farmer testified about 10 years ago, he was hired by Plaintiff to make the road passable. According to Mr. Farmer, prior to him performing his work, he could tell the road had been used because the road was gutted out in places. Alan Barnes testified he was hired by Plaintiff in about July 2005 to log timber on his property. Mr. Barnes utilized the disputed road for this purpose.

Mr. Barnes stated an old road was present, however one could not drive a pick-up on it due to the washouts. Prior to commencing cutting timber, Mr. Barnes took about 45 minutes filling these washouts to make the road passable. There were also some limbs and saplings he had to push out of the way in order to get his 18-wheeler truck down the disputed road.

Defendants' witnesses dispute the maintenance of the road by Plaintiff or his agents. According to King Calvert, approximately 5 years ago he had cause to travel County Road 430 for about a 6-8 month period. In doing so, he passed the area of the disputed road

daily. Mr. Calvert testified while there was an area where one could exit from County Road 430 onto Defendants' property it did not appear to be a road and he certainly never saw anyone on it. Mr. Calvert did not know the condition of this area 20 to 30 feet away from County Road 430.

The realtor who had the Weaver property listed for five years, Lee Fesmire, also testified. Mr. Fesmire's first contact with the property was in 2002 or 2003. He then drove a four-wheeler down to the Weaver's property line and back. According to him, the disputed road was all grown up at this time. On a visit Christmas 2005, he noticed someone had taken a dozer and cleared the land. Mr. Fesmire was aware the Weavers had not done this work.

According to both Defendant, Joseph Cook and Tommy Hollowell, the disputed road is no more than a trail which is passable, at best, only with a four-wheeler. Within the roadway are saplings growing which would destroy a car. It must be noted that Mr. Hollowell's knowledge of the disputed road commences with the date of purchase by the Cooks. Prior to that date he was only aware of the condition of the disputed road as could be seen from County Road 430.

Discussion

From the testimony, the trial court concluded that appellee's "use may not have been on a weekly basis, [but] it was frequent enough to be adverse to the interests of the owners," and that appellee "has done some maintenance of this road which again makes it clear that an interest adverse to the interests of the owner, is being exercised"; the trial court enjoined appellants from blocking appellee's access to his property. We find clear error in the trial court's assessment of the evidence.

It is well established that where there is passage over property that is unenclosed, uninhabited, and unimproved, there is a presumption that such use is permissive, and not adverse; that use which is permissive in its inception can never ripen into an adverse or hostile right no matter how long continued unless the statutory period has elapsed after notice of the adverse claim has been brought home to the owner; and that some act or circumstance, in addition to, or in connection with, the use of a way across the unenclosed lands of another and tending to indicate that the use was not merely permissive is required to establish a right by prescription.

Here, while appellee presented testimony that he and family members often used appellants' property to access their own, such use is presumed permissive. The only evidence that went beyond this "use" involved maintenance of the roadway. Even so, the testimony regarding the bulldozing of the roadway in 1993 or 1994 was not sufficient to bring home to appellants' predecessors the fact that appellee was making an adverse claim to the roadway. At that time, it took the dozer operator only three to four hours to complete his work, and he acknowledged that it was something of a stop-gap measure and that unless more was done the road would wash out every year during the wet season. Thereafter, the annual efforts to fill in the washed out areas were similarly "stop-gap" measures. The only testimony that could be regarded as bringing home an adverse, rather than permissive, use of appellee's passage over appellants' property occurred in 2005 (prior to appellants' purchase) when the logging company widened the road and dramatically altered its appearance — visible even from the county road. But, even that act was not permanent, and more importantly, the requisite period of time to establish adverse use, seven years, was not possible to achieve between the 2005 widening of the road and the time that appellants put their gate in place and this action was commenced by appellee. We are left with a definite and firm conviction that the trial court was mistaken in concluding that appellee established a prescriptive easement over appellants' property.

Reversed.

KINARD and MARSHALL, JJ., agree.

Jamie HICKS and C.H. *v.* Cheryl BATES and D.B., Nucor Steel of Arkansas, Liberty Mutual Fire Insurance Company, Death & Permanent Total Disability Trust Fund

CA 08-501 292 S.W.3d 850

Court of Appeals of Arkansas
Opinion delivered February 11, 2009

[Rehearing denied March 18, 2009.]

W. Ray Nickle; *Ward & Reeves, Attorneys at Law*, by: *W. Edward Reeves*; and *William W. Carter*, for appellants.

John Barttelt, for appellee minor child.

Rieves, Rubens & Mayton, by: *David C. Jones*, for appellees Nucor Steel of Arkansas and Liberty Mutual Fire Insurance Co.

COURTNEY HUDSON HENRY, Judge. Appellants Jamie Hicks and C.H. appeal the decision of the Arkansas Workers' Compensation Commission (Commission) awarding dependent-death benefits to D.B., the minor son of the decedent, Jerry Hicks. For reversal, appellants argue that the Commission erred in concluding that D.B.'s claim of benefits was not barred by the statute of limitations found in Arkansas Code Annotated section 11-9-702 (Supp. 2007). Appellants also argue that substantial evidence does not support the Commission's finding that D.B. was wholly and actually dependent upon the decedent at the time of his death. We affirm the Commission.

The decedent, an employee of appellee Nucor Steel (Nucor), sustained a compensable injury on July 29, 2002, resulting in his death. The record reveals that he died on the premises of Nucor when the pinch point of a cold-roll welding machine crushed him. As a result, Nucor's insurer, appellee Liberty Mutual Fire Insurance Company (Liberty), paid a total of $75,000 in dependency benefits to appellant Hicks, who is the decedent's widow, and their minor child, appellant C.H. Appellee Death and Permanent Total Disability Trust Fund (Fund) thereafter assumed liability and made weekly payments of $425 to appellants.

Prior to his marriage to appellant Hicks, the decedent and appellee Cheryl Bates (Bates) were involved in a relationship, which ended when Bates was seven months' pregnant. The couple never married but had one child, D.B., who was born on September 14, 1995. Based upon the testimony of Bates and the decedent's mother, the Commission learned that the decedent saw D.B. on the date of his birth and interacted with him on a regular basis. D.B. visited the decedent at his parents' home, at Bates's restaurant, and at a local park. Photographs introduced into evidence depicted D.B. with the decedent's family celebrating holidays together. The decedent made monthly child-support payments to Bates of an agreed-upon $150, an amount never actually ordered by a court. While the decedent's child-support payments became sporadic in 1998, he paid Bates in more frequent, smaller increments until his death in 2002.

Bates married her current husband in 1996, and they resided with D.B. in Dexter, Missouri. During that time, the decedent

continued his periodic visits with his son. When Bates's husband wished to adopt D.B., the decedent would not allow it. While Bates's husband never believed himself to be D.B.'s father, he and Bates nevertheless added his name as the father to D.B.'s birth certificate. On July 30, 2002, Bates learned of the decedent's death, and the decedent's mother recommended to Bates that she apply for social-security survivor's benefits. Following the application, the Social Security Administration found D.B. to be the decedent's natural child, and D.B. began receiving dependency benefits.

Bates became aware of D.B.'s entitlement to workers'-compensation benefits in February 2006. Immediately thereafter, Bates arranged for DNA testing, which concluded that the decedent was D.B.'s biological father. On March 10, 2006, a Missouri circuit court appointed Bates as D.B.'s legal guardian and conservator.

On May 17, 2006, Bates filed a claim for workers'-compensation dependent benefits on behalf of D.B. The administrative law judge (ALJ) conducted a hearing on December 6, 2006, and made the following findings: (1) D.B. was the son of the decedent and Bates; (2) D.B. was wholly and actually dependent upon the decedent at the time of his death, and as a result, D.B. was entitled to dependent benefits pursuant to Arkansas Code Annotated section 11-9-527 (Repl. 2002); and (3) the claim was not barred under the provisions of section 11-9-702.

On December 21, 2007, the Commission entered an opinion in agreement with the ALJ's decision that D.B. was the decedent's minor son and that he was wholly and actually dependent upon the decedent at the time of his death. The Commission also found that D.B.'s claim was not barred by the statute of limitations. However, the Commission disagreed with the ALJ's finding that Nucor was liable for benefits, and subsequently, the Commission entered a second opinion allocating the disbursement of benefits. Appellants now bring this appeal.

For the first point on appeal, appellants argue that the Commission erred in interpreting section 11-9-702 and finding that D.B.'s claim for dependent-death benefits was not barred by the statute of limitations. As a general rule, we recognize a two-year statute of limitations to file a workers'-compensation claim following a death. Ark. Code Ann. § 11-9-702(a)(3). However, an exception to the two-year statute of limitations exists for minors:

> (2) The provisions of subsection (a) or (b) of this section shall not apply to a mental incompetent or minor so long as the person has no guardian or similar legal representative. The limitations prescribed in subsection (a) or (b) of this section shall apply to the . . . minor from the date of the appointment of a guardian or similar legal representative for that person, and where no guardian or similar representative has been appointed, to a minor upon obtainment of majority.

Ark. Code Ann. § 11-9-702(f)(2). In other words, in the case of a minor, the statute of limitations does not begin to run until the minor is appointed a guardian or similar legal representative or until the minor reaches majority.

Appellants contend that the exception provision is inapplicable to D.B. because he was under the care of his mother, a natural guardian, since his birth. Appellants dismiss that part of the exception permitting a minor to file a claim on his or her own behalf after age eighteen by arguing that this particular clause applies only to children "who do not have a living biological parent." Here, it is undisputed that the decedent's work-related death occurred on July 29, 2002; that a Missouri circuit court appointed Bates as D.B.'s guardian and conservator on March 10, 2006; and that Bates filed a claim for workers'-compensation dependent benefits on May 17, 2006. Thus, four years elapsed between the decedent's death and the filing of D.B.'s claim. Therefore, the relevant question in this case is whether the foregoing exception for minors, found in subsection 11-9-702(f)(2), applies to D.B., who lived with his natural parent who was not appointed his guardian until March 10, 2006.

This issue requires us to interpret a workers' compensation statute. We review issues of statutory construction *de novo*. *Weisenbach v. Kirk*, 104 Ark. App. 245, 290 S.W.3d 614 (2009). The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Id.* In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Arkansas Comprehensive Health Ins. Pool v. Denton*, 374 Ark. 162, 286 S.W.3d 698 (2008). We construe the statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. *Id.* When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to resort to rules of statutory

construction. *Mamo Transp., Inc. v. Williams*, 375 Ark. 97, 289 S.W.3d 79 (2008). However, we will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Id.*

The Commission found that section 11-9-702(f)(2) "operates to protect all minors should they not have a legal guardian appointed and their natural guardian fails to act on [his or her] behalf. Once the minor's disability is removed and he or she reaches majority, subsection (f) permits them to file a claim on [his or her] behalf." The Commission further found that, because Bates was appointed D.B.'s guardian on March 10, 2006, she filed a timely claim under section 11-9-702(f)(2).

We agree with the Commission's interpretation of section 11-9-702(f)(2) that Bates was not D.B.'s guardian simply because she was his mother. The term "guardian" is not defined in our workers' compensation statutes. However, we attach great significance to the statute's use of the word "appointment." The concept of appointment connotes a legal action of endowing a formal guardian with the power to protect a minor, his or her legal rights, and his or her estate. *See* Ark. Code Ann. §§ 28-65-201 to -323 (Repl. 2004 and Supp. 2007) (authorizing the appointment, powers, and duties of court-appointed guardians). Furthermore, even if D.B.'s mother had not been court-appointed as his guardian, D.B. could file a claim up to two years beyond reaching the age of majority. Despite appellants' assertions to the contrary, we glean from section 11-9-702(f)(2) that the legislature intended to protect minors, residing with a natural parent who fails to pursue a claim on their behalf, by permitting them to file a claim after age eighteen. Thus, a plain-language reading of the statute as a whole undercuts appellants' claim that D.B. had a "guardian" in his mother prior to her appointment by the Missouri court.

Additionally, we note that Arkansas Code Annotated section 11-9-801 (Repl. 2002) authorizes benefits to be paid to a minor's "legally appointed guardian."[1] This statute further demonstrates the legislative intent that a guardian is one who is sanctioned by judicial action. It also unequivocally allows Bates to act in her capacity as the appointed guardian. Our case law requires us to reconcile statutory provisions relating to the same subject to

[1] Section 11-9-801 approves the payment of a claim to the guardian of the minor's estate. This statutory provision provides in pertinent part:

make them sensible, consistent, and harmonious. *Weisenbach, supra.* When we read subsection 11-9-702(f)(2) and section 11-9-801 together, we are convinced that the legislature contemplated court action for the appointment of a guardian. For the foregoing reasons, we hold that the Commission properly allowed D.B.'s claim for dependent-death benefits pursuant to subsection 11-9-702(f)(2), and we affirm the Commission's decision.

For the second point on appeal, appellants argue that D.B. was not "wholly and actually dependent" upon the decedent at the time of his death under Arkansas Code Annotated section 11-9-527(c) (Repl. 2002). With regard to the Commission's findings of fact, this court will view the evidence in the light most favorable to the Commission's decision and affirm when that decision is supported by substantial evidence. *Parson v. Arkansas Methodist Hosp.*, 103 Ark. App. 178, 287 S.W.3d 645 (2008). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Doris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005). The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm the decision. *Id.* The substantial-evidence standard of review requires that we affirm if the Commission's decision displays a substantial basis for the grant of relief. *Williams v. Arkansas Oak Flooring, Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979). 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.* Dependency is a fact question to be determined in light of the surrounding circumstances. *Finley v. Farm Cat, Inc.*, 103 Ark. App. 292, 288 S.W.3d 685 (2008). When the Commission makes a finding of fact, that finding carries the weight of a jury conclusion. *Id.*

Arkansas Code Annotated section 11-9-527(c) provides in pertinent part:

(c) If the compensation beneficiary is a mental incompetent or minor of tender years or immature judgment, the Workers' Compensation Commission, in the exercise of its discretion, may direct that payment shall be made to a legally appointed guardian of the estate of the incompetent minor.

> Subject to the limitations as set out in §§ 11-9-501 – 11-9-506, compensation for the death of an employee shall be paid to those persons *who were wholly and actually dependent upon the deceased employee* . . . .

Ark. Code Ann. § 11-9-527(c) (emphasis added). Subsection (h) provides that "[a]ll questions of dependency shall be determined as of the time of the injury." Ark. Code Ann. § 11-9-527(h).

The supreme court discussed the application of subsection 11-9-527(c) in *Lawhon Farm Services v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998), where the court noted that, in cases where children are not living with the employee at the time of the employee's death, there must be some showing of actual dependency. "Actually dependent" does not require total dependency but rather a showing of actual support or a reasonable expectation of support. *Fordyce Concrete v. Garth*, 84 Ark. App. 256, 139 S.W.3d 154 (2003).

In the instant case, substantial evidence supports the Commission's finding that D.B. was "wholly and actually dependent" upon the decedent at the time of his death. Although he was not listed as the father on D.B.'s birth certificate, the decedent acknowledged D.B. as his son beginning at the time of his birth. The evidence as a whole demonstrated that the decedent saw D.B. on the day of his birth, that the decedent maintained regular visits with D.B., and that the decedent celebrated holidays with his son. Moreover, the decedent contributed, albeit sporadically at times, child-support payments to Bates for D.B.'s support until his death. We also recognize that the Social Security Administration regards D.B. as the decedent's natural child and that D.B. received social-security dependency benefits. Based upon our standard of review, we conclude that, pursuant to section 11-9-527(c), substantial evidence supports the Commission's finding that D.B. was "wholly and actually dependent" upon the decedent at the time of his death. Accordingly, we affirm the Commission's findings.

Affirmed.

GLADWIN and BAKER, JJ., agree.

Christina and Robert RATLIFF *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 08-1060 292 S.W.3d 870

Court of Appeals of Arkansas
Opinion delivered February 11, 2009

Deborah R. Sallings, Arkansas Public Defender Comm'n, for appellant.

Tabitha Baertels McNulty, Office of Chief Counsel, for appellee.

Chrestman Group, PLLC, by: *Keith L. Chrestman*, attorney ad litem for the minor child.

KAREN R. BAKER, Judge. Christina and Robert Ratliff appeal from an order terminating their parental rights in D.R. (born September 5, 1999). We affirm the termination order.

In July 2004, the Arkansas Department of Human Services (DHS) opened a protective-services case on the Ratliff family based on environmental neglect and inadequate supervision of their five sons. The Ratliffs separated shortly thereafter and the children remained with their mother, Christina. On October 13, 2004, DHS received a report that Christina was assessed for hospitalization due to mental instability and psychotic behavior. The next day, the three youngest boys, including five-year-old D.R., were seen walking to school in the rain along Highway 65. Christina explained to DHS that she had overslept and that she did not have time to take her prescribed medication. After reviewing the family's mental-health records and history of involvement with the Department, which included two prior protective-services cases, DHS placed a seventy-two-hour hold on all five children. The court granted emergency custody to DHS on October 18, 2004.

On December 7, 2004, the court adjudicated the children dependent-neglected based on Christina's stipulation that her mental illness and instability prevented her from appropriately parenting or supervising the children. The court noted that, in a prior attempt to fill out a background form, Christina had listed the children's father as Jesus Christ. Christina was ordered to take her medication, attend counseling, and visit the children. The court declared the oldest son emancipated and allowed DHS to investigate the Boys Ranch in Harrison, Arkansas, as a possible placement for the other children. In a second adjudication order entered on March 8, 2005, after Robert was located and served, the court cited Robert's stipulation that the children were dependent neglected. The order implied that some of the children were then staying at the Boys Ranch. Both adjudication orders established a goal of reunification.

In October 2005, the four unemancipated boys were placed with a paternal aunt in Ohio. Thereafter, the Ratliffs reconciled, obtained a home, and were repairing it in hopes of regaining custody. In June 2006, the aunt informed DHS that the placement was causing too much turmoil in her household and that D.R. had been very disruptive. The court allowed the children to return to Arkansas and authorized a thirty-day trial placement of the three oldest boys with their parents. D.R. was placed in therapeutic care.

On November 16, 2006, the court declared in a permanency-planning order that the three oldest boys had been successfully returned to their parents' custody. The court ruled that the parents had complied with the case plan and court orders, that they had made significant measurable progress toward achieving the goals established in the case plan, and that they had diligently worked toward reunification. The court maintained D.R. in DHS custody "due to his emotional instability and not the fault of the parents."

By the time the court entered its next order in June 2007, the second-oldest son was in the National Guard and would soon age out of the case. The court found that the middle sons, E.R. and M.R., had been suspended from school and had other behavioral and academic problems. On DHS's recommendation, the court returned E.R. and M.R. to the Boys Ranch, although they remained in the legal custody of their parents. The court continued D.R. in DHS custody, finding that he needed "more supervision than the parents can provide at this time."

On October 31, 2007, the court entered a permanency-planning order that continued the goal of reunification as to D.R. and allowed the Ratliffs to retain custody of E.R. and M.R. so long as the children remained at the Boys Ranch. The order stated that the parents had partially complied with the case plan and court orders but that Robert's work history had been extremely unstable and he was currently unemployed.

On January 17, 2008, the court changed the goal of the case to termination of parental rights and adoption as to D.R. The other two boys, E.R. and M.R., were ordered to remain in Robert's legal custody, so long as he kept them in treatment at the Boys' Ranch. The termination hearing was held on June 19, 2008, by which time D.R. was eight years old and had been out of the Ratliffs' home for over three and a half years.

At the hearing, DHS supervisor Nancy Graves testified that she had been involved with the Ratliff family since the first protective-services case was opened in 1999. She said that DHS had offered numerous, intensive services to the Ratliffs over the years and that, during the present case, she averaged four contacts a week with the family. She recommended termination of parental rights and adoption for D.R. based on the Ratliffs' inability to provide for his needs and the child's need for permanency. Graves said that D.R. had been in the same therapeutic foster care home

for two years and that he continued to improve when given the proper reinforcement. According to her, it was very doubtful the Ratliffs could provide the necessary reinforcement and structure for D.R., even though they loved him. She observed that Robert was disabled by poor health and had a sporadic work history, and she expressed concern about his ability to be D.R.'s sole parent if he should have to raise the child without Christina, whose mental illness was documented in the adjudication order. Graves also noted that the Ratliffs had been unable to control D.R.'s older brothers and that, as a result, the court remanded the brothers to the care of the Boys Ranch. Graves testified that, if the brothers had not been placed at the Boys Ranch, DHS would have taken them back into custody.

Graves also described the Ratliffs' unpredictable behavior during the case, stating that they would improve then "drop back down again." She characterized her relationship with them as "wonderful" at the moment but said that "it has not always been that way." She related an incident where Robert threatened her prior to a staffing, telling her, "You'd better get law enforcement over there, because I don't know what I'm going to do when I come in the door to you. And you need safety." She also noted that the boys' visit home in March 2006 turned problematic after Robert was arrested for intoxication and the terroristic threatening of a police officer.

Graves further said that DHS considered sending D.R. to the Boys Ranch so he could be with his brothers. However, she determined that the Boys Ranch would not be right for him because he needed a consistent family environment. She said that D.R. had expressed his desire to be adopted and have a "regular home." According to Graves, adoption would most likely produce the best results for D.R., and he could stay in his current foster home until he was adopted. Graves additionally testified that the Ratliffs' unsupervised visits with D.R. in June 2006 did not go well, causing him to regress.

Therapist Dianne Martaus testified that D.R. needed permanency and that his emotional need for attachment would not be met in a setting like the Boys Ranch. She concluded that a group-home environment would in fact be detrimental to D.R. According to Martaus, D.R. would be very successful in an adopted home and would fare better if parental rights were terminated. She also stated that D.R.'s visits with his parents created tremendous conflict for him.

Adoption specialist Don Mears testified that D.R. was adoptable. He also said that the Department would try to accommodate D.R.'s desire to continue to see his brothers.

Joan Shepard, D.R.'s counselor for two years, testified that the child had made considerable progress and had asked to be adopted. According to her, D.R. stated that, if he were returned to his parents, he would "be in therapy for the next 10 to 12 years." He also said, "my behavior would be so outrageous, that I'd be in therapy. I'd be so out of control." Shepard said that the boy was not coached in these statements. She also said that she could not envision D.R. at the Boys' Ranch and that he would "blossom" in an adoptive home.

Sheila Corder of Ozark Counseling testified that Christina had attended day treatment for two years. She said they worked on socialization and activities of daily living and that Corder said that she had seen a lot of social improvement in Christina. Corder said she had not worked with Christina on parenting.

DHS worker Heather Fendley testified that she had observed four face-to-face visits between D.R. and his parents and that D.R. was not very active during them. She further stated that "there was no participation of the parents with D.R. without encouragement from me." Fendley related a conversation she had with Robert about his ability to maintain a household, be a parent, and take care of Christina. According to her, Robert said that his health was poor and that he appreciated the Boys' Ranch because "he knew his wife couldn't care for the boys and he didn't feel that he'd always be there to care for the boys." Fendley additionally testified that D.R. was very adamant with her in stating that he needed a family.

D.R.'s foster father, Robert Robinson, testified that D.R. had greatly improved over the last two years due to a daily regimen. He said that D.R. had seen other foster children adopted and that he wanted to be adopted as well. According to Robinson, D.R. would prefer having a home and a secure family to remaining in foster care for another ten years.

At the close of the evidence, parents' counsel asked that the Ratliffs' parental rights not be terminated and that D.R. be placed at the Boys' Ranch. The court ruled that D.R. needed to be where he could attach to a family and have a lasting bond. The court therefore entered the termination order from which this appeal is taken.

Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Albright v. Ark. Dep't of Human Servs.*, 97 Ark. App. 277, 248 S.W.3d 498 (2007). However, courts are not to enforce parental rights to the detriment or destruction of the health and well-being of a child. *Id.*

An order terminating parental rights must be based upon a finding by clear and convincing evidence that 1) termination of parental rights is in the best interest of the children, considering the likelihood that the children will be adopted if the parents' rights are terminated and the potential harm caused by returning the children to the parents' custody, and 2) at least one ground for termination exists. *See* Ark. Code Ann. § 9-27-341(b)(3)(A) and (B) (Repl. 2008). We review termination-of-parental-rights cases de novo. *Lee v. Ark. Dep't of Human Servs.*, 102 Ark. App. 337, 285 S.W.3d 277 (2008). However, we will not reverse the circuit court's finding of clear and convincing evidence unless that finding is clearly erroneous. *See Albright, supra.* 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.*

In this appeal, the Ratliffs do not contest the circuit court's finding that termination was in D.R.'s best interest. They argue that the circuit court failed to specify a ground for termination and that there was insufficient evidence of a ground for termination. Their first assignment of error is based on an omission in the termination order. The order states as a ground for termination:

> The Court finds by clear and convincing evidence, that DHS has proven the grounds of the juvenile being out of the home for a period in excess of twelve months and the child cannot be returned to the custody of the parents and the child has been adjudicated dependent neglect. [sic]

The court was clearly attempting to cite the ground contained in Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(*a*) as a basis for termination, but neglected to recite the ground in its entirety. The statute reads:

> That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

The Ratliffs contend that the termination order is invalid because it contains no finding that the parents failed to remedy the conditions that caused removal. They further contend that there was no evidence of any conditions that they failed to remedy.

We need not address this argument because, in our de novo review, we may hold that other grounds for termination were proved, even when not stated in the circuit court's order. *See Smith v. Ark. Dep't of Human Servs.*, 100 Ark. App. 74, 264 S.W.3d 559 (2007); *Johnson v. Ark. Dep't of Human Servs.*, 78 Ark. App. 112, 82 S.W.3d 183 (2002). In its petition to terminate parental rights, DHS pled the following as a ground for termination:

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

Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(*a*) (Repl. 2008).

Our review of the evidence convinces us that this ground warrants termination of the Ratliffs' parental rights. The evidence shows that, despite the many services provided to the Ratliffs since 2004, they are simply not capable of being reunified with D.R. *See generally Meriweather v. Ark. Dep't of Human Servs.*, 98 Ark. App. 328, 255 S.W.3d 505 (2007) (recognizing that a termination order may be affirmed where the appellants are willing to try and be the parents that the child needs but are simply unable to do so). Here, Christina Ratliff stipulated in the adjudication order that her mental illness and instability prevented her from parenting or supervising the children. Her counselor testified that Christina had made social improvement, but she said that they had not worked on parenting. Robert virtually conceded Christina's inability to care for D.R., saying he knew his wife couldn't care for the boys, and he expressed doubt about his own capabilities, telling Heather Fendley that "he didn't feel that he'd always be there to care for the boys." Additionally, witness Nancy Graves recounted the Ratliffs' inability to sustain any improvements they made and noted their erratic behavior, including Robert's unstable work history and his making a violent threat to her.

The proof further reveals that, at some point, the Ratliffs lost their ability to function as parents in a household setting. During the case, they regained custody of their two middle sons but were unable to control them. As a result, the court ordered that the children be sent to the Boys Ranch and remain there until they graduated. We believe it is telling that, at the termination hearing, the Ratliffs did not ask the circuit court to return D.R. to their home and their personal care; rather, they asked that he also be sent to the Boys Ranch. The DHS witnesses were unanimous in their testimony that the Ranch was not a desirable placement for D.R., given his young age and his need for family attachment. It is even less desirable when we consider that D.R., like his brothers, might easily remain there until his education is complete, which, in his case, could be as much as ten years. To proceed as the Ratliffs suggest would afford them custody of D.R. in name only during the remainder of his childhood while denying him the opportunity to achieve the permanency of an adoptive home.

We therefore conclude that the facts of this case demonstrate the Ratliffs have manifested an incapacity to remedy the factors that prevent D.R. from being returned to them. The intent of our termination statute is to provide permanency in a juvenile's life in all instances in which the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective. Ark. Code Ann. § 9-27-341(a)(3) (Repl. 2008). D.R. has spent well over four years in foster care. To reverse a termination decision so that he might be placed in an institutional environment for which he is not suited, rather than be available for adoption, is contrary to that goal. We therefore affirm the termination of the Ratliffs' parental rights.

The Ratliffs make a final argument that section 9-27-341(b)(3)(B)(vii)(*a*) is unconstitutionally vague in its use of the phrase "other factors and issues." For a statute to avoid being vague, it must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden and it must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. *Thompson v. Ark. Social Servs.*, 282 Ark. 369, 669 S.W.2d 878 (1984). The law allows somewhat greater flexibility with regard to termination statutes because any parent should have some basic understanding of his obligations to his children. *See*

Davis v. Smith, 266 Ark. 112, 583 S.W.2d 37 (1979). Flexibility and reasonable breadth in a statute, rather than meticulous specificity or great exactitude, are permissible so long as the statute's reach is clearly delineated in words of common understanding. *See id.* Impossible standards of specificity are not required, and a statute meets constitutional muster if the language used conveys sufficient warning when measured by common understanding and practice. *See id.* It is not necessary that all kinds of conduct falling within the reach of the statute be particularized. *Id.* Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute. *Shipley, Inc. v. Long*, 359 Ark. 208, 195 S.W.3d 911 (2004). If it is possible to construe a statute as constitutional, we must do so. *Id.*

We decline to hold section 9-27-341(b)(3)(B)(vii)(*a*) unconstitutional. Flexibility and breadth in the statute's language are necessary to allow for the myriad factors and issues that could arise during a dependency-neglect case after the original petition is filed. Furthermore, the statute specifies that the other factors or issues must demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare. Additionally, there must be proof that the parents manifested an incapacity or indifference to remedy the subsequent issues or factors. Thus, neither DHS's nor the court's discretion is unfettered, and the statute does not allow a judge to operate without a fixed legal standard.

Affirmed.

GLADWIN and HENRY, JJ., agree.

Dorothy Jean RICE, Winston Lee Rice, Jr., Dianne Anderson, and Gay Roberts *v.* Duncan RAGSDALE and Gerald Coleman

CA 08-186 292 S.W.3d 856

Court of Appeals of Arkansas
Opinion delivered February 11, 2009

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

Wright, Lindsey & Jennings, LLP, by: *Edwin L. Lowther, Jr.* and *Gary D. Marts, Jr.*, for appellee Gerald Coleman.

Duncan E. Ragsdale, Jr., pro se appellee.

WAYMOND M. BROWN, Judge. This appeal is from a judgment on the pleadings entered in a legal-malpractice case that appellants Dorothy Rice, Winston Rice, Jr.,

Dianne Anderson, and Gay Roberts filed against appellees, attorneys Duncan Ragsdale and Gerald Coleman, who represented them in a previous medical-malpractice case following the June 29, 2000 death of Winston Rice, Sr. We affirm the judgment for appellees.

On January 16, 2002, appellees mistakenly filed the medical-malpractice action without first causing a personal representative to be appointed or joining all of the wrongful-death beneficiaries. The statute of limitations on the medical claims ran on June 29, 2002, and on May 10, 2004, a defendant filed an answer challenging appellants' capacity to sue. The defendants then filed motions for summary judgment, which the trial court granted on September 30, 2004. On June 23, 2005, the supreme court affirmed the summary judgment. *Rice v. Tanner*, 363 Ark. 79, 210 S.W.3d 860 (2005).

Appellants sued appellees for legal malpractice in this action on May 3, 2006, asserting claims for negligence and under Ark. Code Ann. § 16-22-306 (Repl. 1999), which states that, if a lawsuit is dismissed on account of the negligence of an attorney, the attorney shall be liable for all damages his client may have sustained by the dismissal or any other neglect of duty by the attorney. Appellees moved to dismiss on the basis of the three-year statute of limitations, Ark. Code Ann. § 16-56-105 (Repl. 2005). Appellants filed an amended complaint adding a claim for breach of fiduciary duty and alleging that appellees' fraudulent concealment had tolled the limitations period. Appellees then filed motions for judgment on the pleadings on the basis of the statute of limitations.

On November 5, 2007, the circuit court granted the motion for judgment on the pleadings, making the following findings:

> 4. The Court finds that the claim of negligence asserted in Count I of the complaint is governed by the three-year statute of limitations, which statute ran no later than June 29, 2005, three years after the last day upon which the underlying action could have been timely commenced. The Court therefore finds, based upon the allegations of Plaintiff's First Amended Complaint, that Defendants are entitled as a matter of law to a judgment on the claim of negligence asserted in Count I of Plaintiffs' First Amended Complaint.
>
> . . . .
>
> 6. The Court finds that Plaintiffs' cause of action under Ark. Code Ann. § 16-22-306 is governed by the three-year, rather than

> the five-year, statute of limitations and that the statute of limitations as to Defendants' statutory liability under Ark. Code Ann. § 16-22-306 ran no later than June 29, 2005, three years after the last day the medical malpractice action could have been properly instituted.
>
> . . . .
>
> 8. The Court finds that Plaintiffs' claim based upon the allegation of breach of fiduciary duty is governed by the same statute of limitations as that of a claim based upon Defendants' alleged negligence and that the statute of limitations on both claims expired on the 29th day of June, 2005, or three years from the last date on which the underlying medical action could have been commenced.
>
> . . . .
>
> 10. The Court finds that under the facts alleged in Count IV of Plaintiffs' First Amended Complaint, Plaintiffs had an independent duty to investigate the accuracy of Defendants' assurance, and that their failure to do so bars their claim that the three-year statute of limitations was tolled by Defendants' alleged fraudulent concealment.
>
> 11. The Court further finds that on the face of Plaintiffs' First Amended Complaint, all claims against Defendants, arising out of Defendants' handling of the underlying medical malpractice case, ran on June 29, 2005. Because Plaintiffs' First Amended Complaint was filed herein on May 3, 2006, it is time-barred. Accordingly Defendants' motion for judgment on the pleadings is granted as to all claims asserted in Plaintiffs' First Amended Complaint and this case should be and hereby is ordered dismissed with prejudice.

Appellants filed a timely appeal on November 28, 2007.

Motions for judgments on the pleadings are not favored by courts. *Landsnpulaski, LLC v. Ark. Dep't of Correction*, 372 Ark. 40, 269 S.W.3d 793 (2007). Such a judgment should be entered only if the pleadings show on their face that there is no defense to the suit. *Id.* When considering the motion, the court views the facts alleged in the complaint as true and in the light most favorable to the party seeking relief. *Id.*

In their first point, appellants ask us to hold that the trial court erred in ruling that the expiration of the limitations period for the medical-malpractice case marked the commencement of

the statutory period as to their negligence claims against appellees. In making this request, they urge us to overrule supreme court precedent dating back to 1877. We must, however, follow the precedent set by the supreme court, and are powerless to overrule its decisions. *Brewer v. State*, 68 Ark. App. 216, 6 S.W.3d 124 (1999). Further, under the doctrine of *stare decisis*, the appellate courts are bound to follow prior case law. *Chamberlin v. State Farm Mut. Auto. Ins. Co.*, 343 Ark. 392, 36 S.W.3d 281 (2001). The policy of *stare decisis* is designed to lend predictability and stability to the law. *Id.* It is well settled that precedent governs until it gives a result that is so patently wrong or manifestly unjust that a break becomes unavoidable. *Id.* The test is whether adherence to the rule would result in great injury or injustice. *Id.* This is not such a case.

The limitations period for legal malpractice actions, set forth in Arkansas Code Annotated § 16-56-105(3) (Repl. 2005), is three years. *Delanno, Inc. v. Peace*, 366 Ark. 542, 237 S.W.3d 81 (2006). The same statute applies to claims for negligence, fraud, and breach of fiduciary duty. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996); *Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995). Absent concealment, the statute of limitations begins to run upon the occurrence of the wrong, *Delanno, Inc. v. Peace, supra*, and not when it is discovered. *Stoltz v. Friday*, 325 Ark. 399, 926 S.W.2d 438 (1996). This rule applies even when there is an interval between the allegedly tortious act and the damage suffered by the plaintiff. *See, e.g.*, *Moix-McNutt v. Brown*, 348 Ark. 518, 74 S.W.3d 612 (2002). The "occurrence rule" has remained the law since 1877, even though the supreme court has been invited to change it on numerous occasions. *Stoltz v. Friday, supra*. The supreme court has refused to adopt an alternative to the traditional "occurrence rule" in the following cases: *Moix-McNutt v. Brown, supra*; *Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998); *Stoltz v. Friday, supra*; *Morris v. McLemore*, 313 Ark. 53, 852 S.W.2d 135 (1993); *Chapman v. Alexander*, 307 Ark. 87, 817 S.W.2d 425 (1991); and *Riggs v. Thomas*, 283 Ark. 148, 671 S.W.2d 756 (1984).

Appellants ask us to reject the "occurrence rule," and adopt an alternative rule known as the "injury rule" or "damage rule," because their cause of action was not yet complete when the alleged malpractice occurred. They contend that, until they sustained actual, not simply nominal, damages, all of the elements of their cause of action were not present. They argue that the earliest event that completed their cause of action was when their capacity

to sue was put in issue in the wrongful-death action, May 10, 2004, which was within three years of the filing of the complaint in this action. They are incorrect, because when the statute of limitations on their medical-malpractice claims ran on June 29, 2002, they lost a valuable property right. *See Bunt v. Bunt*, 294 Ark. 507, 744 S.W.2d 718 (1988).

There are at least three common approaches taken to determine when a cause of action for legal malpractice accrues. One current trend is the "termination of employment" rule, whereby the statute of limitations does not begin to run until the attorney-client relationship has ended; another is the "damage rule" or "injury rule" (which also has a variation termed the "discovery rule"), under which the statute begins to run from the time injury results from the negligent act. *Chapman v. Alexander, supra.* Under the "occurrence rule," the malpractice action (like ordinary tort and contract actions) accrues when the last element essential to the cause of action occurs, unless the attorney actively conceals the wrongdoing; the rationale is to prevent attorneys from having to defend stale claims, to preserve evidence, and to treat all plaintiffs equally. *Id.* Our supreme court has acknowledged the appeal of the other approaches, but concluded that our courts' traditional rule, established in *White v. Reagan*, 32 Ark. 281 (1877), has a countervailing fairness about it:

> First, everyone is treated in the same manner. Second, an abstractor, accountant, architect, attorney, escrow agent, financial advisor, insurance agent, medical doctor, stockbroker, or other such person will not be forced to defend some alleged act of malpractice which occurred many years ago. The problem with the delay is that his or her records or witnesses may no longer be available. For example, in the oral argument of this case, it was developed that under the "discovery rule" an attorney could be forced to defend the validity of a mortgage 25 to 30 years after the preparation of the instrument, long after his records and witnesses are no longer available.

Chapman v. Alexander, 307 Ark. at 88, 817 S.W.2d at 426.

The supreme court went further to explain that, if a change in this rule is to be made, it must come from the General Assembly:

> It would be incongruous for us, rather than the legislature, to now change it. More importantly, the issue is one of statutory construction and, since 1877, we have construed our statute under the

> "traditional rule." Legislative silence after such a long period gives rise to an arguable inference of acquiescence or passive approval of our construction of the statute. Actually, we find even stronger legislative approval. In 1979 the General Assembly amended the medical malpractice statute to provide: "The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time." The statute further provides that the above sentence shall control unless the doctor conceals a foreign substance in the patient's body, and then the statute of limitations begins to run when the foreign substance is discovered or should have been discovered. Ark. Code Ann. § 16-114-203(b) (1987). This legislative expression in the medical malpractice statute is consistent with the way we have long construed the malpractice statute of limitations. We can only conclude we are interpreting the statute as the legislature intends.
>
> There is yet another significant reason we do not retroactively adopt the "discovery rule," "date of injury rule," or "termination of employment rule." Many abstractors, accountants, architects, attorneys, and other similar professionals surely have relied on our traditional and longstanding rule. In doing so, they had no reason to keep records for longer than three (3) years. As a consequence, if we retroactively changed the rule, they might easily have no materials to use in their defense. Similarly, most professional people insure themselves against malpractice suits. The terms of malpractice insurance policies may have changed over the last 25 years, so that a professional person who was insured years ago might not be covered today under a retroactive application of the statute of limitations. The General Assembly is best suited to hold hearings on such issues and determine whether a change, if any, should be made and whether it should be made retroactively, prospectively from the date of the change, or prospectively from a future date which would give all professional people time to acquire adequate insurance under a different statute of limitations.

307 Ark. at 90-91, 817 S.W.2d at 427.

Appellants assert that the supreme court has, in fact, *not* followed the "occurrence rule" in *Wright v. Compton, Prewitt, Thomas & Hickey*, 315 Ark. 213, 866 S.W.2d 387 (1993); *Pope County v. Friday, Eldredge & Clark*, 313 Ark. 83, 852 S.W.2d 114 (1993); and *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (1989). They are incorrect; the supreme court expressly rejected this

argument in *Ragar v. Brown, supra*; *Stolz v. Friday, supra*; and *Goldsby v. Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992). Accordingly, we affirm on this point.

In their second point, appellants argue that the circuit court erred in applying the "occurrence rule" to their claims brought under Ark. Code Ann. § 16-22-306. They contend that, in enacting this statute, the General Assembly intended to create a new and separate cause of action, which would not be complete until the dismissal of their medical-malpractice case, not when the attorneys' alleged negligence, occurred. This question has not yet been addressed by the supreme court. Arkansas Code Annotated § 16-22-306 provides:

> If any suit in any court of record in this state is dismissed on account of the negligence of any attorney at law, or for his nonattendance at the court without having a just and reasonable excuse for such absence, it shall be at the costs of the attorney at law. Such attorney at law shall be liable for all damages his client may have sustained by the dismissal or by any other neglect by the attorney at law of his duty, in an action in any court within this state having jurisdiction thereof.

This statute does not add anything to a common-law negligence action. However, we need not decide whether the legislature intended to create a new cause of action, because it would make no difference to the outcome of this case.

Section 16-22-306 does not state which statute of limitations will apply. As discussed above, the statute of limitations applicable to negligence cases in general also applies to attorney-malpractice cases, and the supreme court has interpreted section 16-56-105 as incorporating the "occurrence rule." It is well-settled that any interpretation of a statute by the supreme court subsequently becomes a part of the statute itself. *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). The General Assembly is presumed to be familiar with the supreme court's interpretations of its statutes, and if it disagrees with those interpretations, it can amend the statutes. *Id.* Without such amendments, the supreme court's interpretations of the statutes remain the law. *Id.* The General Assembly's silence over a long period gives rise to an arguable inference of acquiescence or passive approval to the court's construction of the statute. *Chamberlin v. State Farm Mut. Auto. Ins. Co.*, 343 Ark. 392, 36 S.W.3d 281

(2001). It will not be presumed that the legislature intended to require the court to pass again upon a subject where its intent is not expressed in unmistakable language. *Colburn v. State*, 352 Ark. 127, 98 S.W.3d 808 (2003).

■ Sections 16-22-306 and 16-56-105 should be construed together. It is the appellate court's duty, if possible, to reconcile our state's statutes to make them consistent, harmonious, and sensible. *Darr v. Bankston*, 327 Ark. 723, 940 S.W.2d 481 (1997). When construing any statute, the statute is placed beside other statutes relevant to the subject matter in question so that its meaning and effect can be derived from the combined whole. *Williams v. Harmon*, 67 Ark. App. 281, 999 S.W.2d 206 (1999). With these considerations in mind, we believe that the legislature did not intend to abolish the "occurrence rule" for claims brought under section 16-22-306 and also affirm on this issue.

In their third point, appellants contend that, as their attorneys, appellees had a fiduciary duty to advise them that the statute of limitations was running on any claims they had against appellees after the "fatal flaw in the medical case came to light . . . ." Appellants contend that appellees' failure to do so, when the lack-of-capacity issue was raised in the medical-malpractice case on May 10, 2004, amounted to self-dealing. They also argue that appellees' failure to disclose this information was evidence of an intent to conceal, which would toll the statute of limitations. We will address the tolling question in the next point.

■ A person standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of the duty imposed by the relationship. *See Cherepski v. Walker*, 323 Ark. 43, 913 S.W.2d 761 (1996). There is no dispute that appellees stood in that capacity when representing appellants in the previous lawsuit. *See Allen v. Allison*, 356 Ark. 403, 155 S.W.3d 682 (2004). However, appellants have not cited any authority that supports their position nor have we found any that would expand the scope of an attorney's fiduciary duty to his client in such a way. We therefore affirm on this point.

In their last point, appellants argue that appellees' assurances that the trial court's decision in the medical-malpractice case was wrong and would be reversed on appeal, and their failure to inform appellants that the limitations period was running on any claims they might have against appellees, amounted to fraud sufficient to

toll the statute of limitations. Fraud suspends the running of the statute of limitations, and the suspension remains in effect 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, supra.* In order to toll the statute of limitations, the fraud perpetrated must be concealed. *Id.* The elements of fraud are (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Id.* 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. *Floyd v. Koenig,* 101 Ark. App. 230, 274 S.W.3d 339 (2008). The 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, 653 S.W.2d 128 (1983).

Even if the allegations in appellants' complaint were true, appellees' representations about their chances on appeal did not amount to misrepresentations of *fact.* Constructive fraud requires that material misrepresentations of fact be made. *South County, Inc. v. First W. Loan Co.*, 315 Ark. 722, 871 S.W.2d 325 (1994). Further, the misrepresentation must relate to a past event or a present circumstance, not a future event. *Id.* As a general rule, fraud cannot be predicated upon misrepresentations as to matters of law, nor upon opinions on questions of law based on facts known to both parties. *Pambianchi v. Howell,* 100 Ark. App. 154, 265 S.W.3d 788 (2007). Additionally, in the context of legal-malpractice cases, it is clear that, not only must there be fraud, but the fraud must be furtively planned and secretly executed so as to keep the fraud concealed. *Delanno, Inc. v. Peace, supra.* Though the question of fraudulent concealment is usually one of fact, when there is no evidentiary basis for a reasonable difference of opinion, a trial court may resolve the question as a matter of law. *Id.* Also, if a plaintiff, by the exercise of reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it, and the suspension ceases as of the date it should have been discovered. *Id.*

The supreme court addressed this subject in *Delanno, Inc. v. Peace, supra*:

> In the instant case, attorney Peace made a representation to Delanno that conflicted with the information that Delanno had received from the State; at that point, Delanno was on notice that either his attorney or the State was incorrect, but he made no effort to contact the State to investigate the situation any further. As stated above, if a plaintiff, by the exercise of reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it. [*O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997)]; *see also Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003); *Alexander v. Flake,* 322 Ark. 239, 910 S.W.2d 190 (1995) (where the appellant did not fulfill his duty to exercise reasonable diligence in examining the disputed agreements or in reading the materials provided to him, he could not avail himself of the benefit of tolling based on fraudulent concealment). Here, Delanno failed to exercise reasonable diligence; had he done so, he could have detected the alleged fraud. His failure to do so triggers the presumption that he had reasonable knowledge of the fraud. Consequently, the trial court did not err in determining, as a matter of law, that fraudulent concealment did not toll the statute of limitations.
>
> Delanno also argues that because the attorney stands in a fiduciary relationship to his client, the client should be able to rely without qualification upon the statements of the attorney, and to hold otherwise would undermine the fiduciary duties owed by lawyers to their clients. The acceptance of this argument would unduly restrict the applicability of the statute of limitations to legal malpractice actions based on misstatements by attorneys. We are unwilling to say that the fiduciary duty owed by an attorney to his client eliminates the client's duty to exercise reasonable diligence in analyzing the accuracy of the attorney's statements. Clients cannot be absolved of all responsibility for testing the veracity of statements made by their lawyers. In the present case, the appellant received information from an authoritative source which directly contradicted the representations made by the appellees. In such a situation, it was incumbent upon the appellant to attempt to reconcile the contradiction by some action other than obtaining a repetition of the assurances given by the appellees. Further inquiries, such as asking for proof of a tax clearance letter from either its attorneys or the State, would have alerted Delanno to the severity of the problem, but appellant took no further action for approximately

> three years. For the foregoing reasons, we hold that in these particular circumstances, the appellant's failure to make further inquiry falls below the standard of reasonable diligence.

366 Ark. at 548-49, 237 S.W.3d at 86-87.

Appellants received information from an authoritative source that directly contradicted the representations made by appellees when the medical negligence case was dismissed by the trial court, and, therefore, it was incumbent upon appellants to reconcile the contradiction by doing something other than accepting assurances by appellees. Thus, the statute of limitations on all of appellants' claims ran before they filed their complaint against appellees, and the circuit court did not err in its holding on this point.

Affirmed.

PITTMAN and HART, JJ., agree.

DEATH & PERMANENT TOTAL DISABILITY TRUST FUND, Buster Roberts Logging, American Interstate Insurance Company *v.* Francisca Guevara RODRIGUEZ, Lavona Kay Haury, Estate of Modesto Sustaita Herrera

CA 08-842 292 S.W.3d 827

Court of Appeals of Arkansas
Opinion delivered February 11, 2009

David L. Pake, for appellant Total Disability Trust Fund.

Guy Davis, for appellee.

WAYMOND M. BROWN, Judge. Modesto Sustaita Herrera was involved in a fatal workplace accident on December 9, 2004. He was survived by two "wives" and four children, three of whom were minors at the time of his death. By opinion dated April 22, 2008, the Workers' Compensation Commission found that the minor children, all alien nonresidents, were entitled to survivor benefits. The Death and Permanent Total Disability Trust Fund ("Trust Fund") appeals from that finding, contending that the chil-

dren were not dependent on the decedent and that they were barred from receiving benefits under Ark. Code Ann. § 11-9-111(a) (Repl. 2002). We affirm.[1]

Factual and Procedural History

Evidence presented at a hearing before an administrative law judge (ALJ) shows that the decedent, a Mexican citizen, married Francisca Guevara Rodriguez in Mexico in 1986. The couple had four children, three of whom (Eber Sustaita Guevara, Marlen Sustaita Guevara, and Erendria Magaly Sustaita Guevara) were minors at the time of the decedent's death. The decedent entered the United States illegally in June 1996 to work and provide for his family. The decedent sent the family $100 per month, but the payments slowed and eventually stopped in July or August 2003. Rodriguez explained that she last saw him in 1996, but that she could not divorce him because Mexican law had no process to get a divorce when a husband abandons a wife. She had little hope that the decedent would return to her. The decedent married Lavona Kay Haury under the name "Francisco Javier Sustaita" in June 2000. He later obtained employment from Buster Roberts Logging under the name "Cresentiano Lerma Pina" a little over a year before suffering a fatal workplace accident in December 2004. Haury received death benefits for five weeks, but payments ceased when the dispute arose over the decedent's identity.

After concluding that the decedent was indeed Modesto Sustaita Herrera, the ALJ found that Rodriguez was the decedent's legal wife, but that she was not entitled to survivor benefits because she was not actually dependent upon the decedent. However, the ALJ awarded benefits to the minor children, finding that the children "by virtue of their age were entitled to an expectation of support sufficient to establish that they were wholly and actually dependent on their father at the time of his accident." The Commission affirmed and adopted the opinion of the ALJ. Furthermore, it considered the provisions of Ark. Code Ann. § 11-9-

[1] Counsel for the minor children challenges the constitutionality of Ark. Code Ann. § 11-9-111. However, no cross-appeal was filed on this issue. Accordingly, the constitutionality of the statute is not properly before us. *See Hoffman v. Gregory*, 361 Ark. 73, 204 S.W.3d 541 (2005) (stating that a notice of cross-appeal is required when an appellee seeks affirmative relief not granted below).

111(a) and found that the statute did not bar the minor children from receiving survivor benefits. An appeal to this court followed.

Analysis

The sole issue here is whether the decedent's minor children were entitled to survivor benefits. In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if that decision is supported by substantial evidence. *Smith v. City of Ft. Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, we must affirm the decision. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Arkansas Code Annotated section 11-9-527(c) (Repl. 2002) outlines the benefits to be paid to the family of a worker who dies in the course and scope of his employment. The statute mandates that compensation "be paid to those persons who were wholly and actually dependent upon the deceased employee." Dependency is a fact question to be determined in light of the surrounding circumstances. *Fordyce Concrete v. Garth*, 84 Ark. App. 256, 139 S.W.3d 154 (2003). "Actual dependency" does not require a finding of total dependency; it may be established by showing either actual dependency or a reasonable expectancy of future support, even if no actual support has been provided. *Hoskins v. Rogers Cold Storage*, 52 Ark. App. 219, 916 S.W.2d 136 (1996); *Pinecrest Mem. Park v. Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983). The question of dependency is determined as of the time of the decedent's injury. Ark. Code Ann. § 11-9-527(h); *Hoskins, supra.*

In finding that the minor children were entitled to benefits, the ALJ relied upon *Roach Manufacturing Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979). There, the decedent married his wife in 1965, and the couple had a child together the following year. In 1975, the decedent left the family and moved to Memphis, where he married another woman without divorcing his first wife. The first wife did what she could to support the couple's daughter without seeking support from the decedent, who died in a work-

place accident in May 1976. The supreme court affirmed the Commission's decision that the first wife was not entitled to benefits, based upon the wife's failure to establish dependency. However, it also affirmed the award of benefits to the decedent's daughter. In doing so, it quoted from Professor Larson's famous treatise: "Proof of bare legal obligation to support, unaccompanied by either actual support or reasonable expectation of support, is ordinarily not enough to satisfy the requirement of actual dependency." *Id.* at 912-13, 582 S.W.2d at 270-71 (quoting Larson, *Workmen's Compensation Law*, § 63 (1976)). However, in affirming the award of benefits to the daughter, the court wrote:

> On the other hand, the Commission could also find, with respect to a 10-year-old child who was being supported by her mother, that the same lapse of 11 months without legal action on the mother's part did not demonstrate, in Larson's language, that there was no longer any "reasonable expectation of support" on the part of the father. The child was not able to act for herself. Her necessary expenses would naturally increase as she grew older, with the concurrent possibility that her mother would not be able to maintain the child in "her accustomed mode of living," as we expressed it in *Smith v. Farm Service Cooperative*, [244 Ark. 119, 424 S.W.2d 147 (1968)]. Thus a reasonable expectation of future support could be found.

Id. at 913, 582 S.W.2d at 271; *see also Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998) (affirming an award of dependency benefits despite the children not receiving formal child support).

The Trust Fund asserts that *Roach Manufacturing* is inapplicable to this case for three reasons. First, it argues that *Roach Manufacturing* predates Act 793 of 1993, which substantially altered portions of the workers' compensation code. The Trust Fund correctly states that the law now requires the Commission and reviewing courts to construe the provisions of the workers' compensation code strictly. *See* Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2002). However, our supreme court has expressly held that prior case law dealing with dependency benefits was not in conflict with the Act and, therefore, was still controlling. *See Lawhon Farm Servs.*, *supra.*

Second, the Trust Fund states that, when *Roach Manufacturing* was decided, claimants were given the benefit of the doubt in workers' compensation cases. They correctly state that the law

today requires the Commission to weigh the evidence without giving the benefit of the doubt to any party. *See* Ark. Code Ann. § 11-9-704(c)(4). However, nothing in the *Roach Manufacturing* decision required the Commission to be partial to either party.

Finally, the Trust Fund contends that *Roach Manufacturing* does not support the conclusion that the natural children of deceased employees are always automatically entitled to benefits as a matter of law. The Trust Fund is correct in this regard, as there must always be proof of actual dependency before a person is entitled to dependency benefits. *See Bankston v. Prime West Corp.*, 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981) (citing *Roach Manufacturing*, but holding that it was distinguishable because the minor child had always received support from another person and at no time received support from the decedent). However, the record contains ample evidence that there was a reasonable expectation of support, despite the mother's testimony that she never expected to see the decedent again. Similar to *Roach Manufacturing*, the decedent here provided for his family until 2003, when he abandoned them for his new "wife," and the children, by virtue of their ages, could not have been expected to pursue support on their own. The record supports the Commission's finding that the decedent's minor children were wholly and actually dependent upon decedent.

The Trust Fund also argues that the minor children were barred from receiving benefits under the provisions of Ark. Code Ann. § 11-9-111(a). That statute provides:

> Compensation to alien nonresidents of the United States or Canada shall be the same in amount as provided for residents, except that alien nonresident dependents in any foreign country shall be limited to the surviving wife or children or, if there is no surviving wife or children, to the surviving father or mother whom the employee has supported, either wholly or in part, for the period of one (1) year prior to the date of the injury.

The Trust Fund argues that the statute limits the class of beneficiaries of alien nonresidents to the surviving wife, his children, and his parents, and that the statute bars them from receiving benefits unless the decedent supported them for the one-year period prior to his death.

To address the Trust Fund's argument, we must construe the meaning of the statute. We review issues of statutory construction

de novo, as it is for this court to decide what a statute means. *Johnson v. Bonds Fertilizer, Inc.*, 365 Ark. 133, 226 S.W.3d 753 (2006). As mentioned previously, the provisions of the Workers' Compensation Act are to be construed strictly. *See* Ark. Code Ann. § 11-9-704(c)(3). Strict construction requires that nothing be taken as intended that is not clearly expressed, and its doctrine is to use the plain meaning of the language employed. *American Standard Travelers Indem. Co. v. Post*, 78 Ark. App. 79, 77 S.W.3d 554 (2002). The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. *Teasley v. Hermann Cos.*, 92 Ark. App. 40, 211 S.W.3d 40 (2005). Statutes are to be construed such that no word is left void, superfluous, or insignificant. *Estate of Slaughter v. City of Hampton*, 102 Ark. App. 373, 285 S.W.3d 669 (2008). When the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Baker Refrigeration Systems, Inc. v. Weiss*, 360 Ark. 388, 201 S.W.3d 900 (2005).

The Trust Fund argues that the General Assembly intended to create two separate and distinct burdens of proof for resident and nonresident alien beneficiaries when it enacted §§ 11-9-111 and 11-9-527. It further contends that the phrase "supported, either wholly or in part, for the period of one (1) year prior to the date of the injury" must necessarily apply to the surviving wife or children. Otherwise, it claims, a surviving wife or child would have to present no proof of dependency at all, which would be an absurd result. We disagree.

■ Section 11-9-111(a) ensures that residents and nonresidents receive equal compensation and limits the class of alien nonresident dependents. Nothing in § 11-9-527 excludes alien nonresidents from receiving benefits, and nothing in § 11-9-111 renders the provisions of § 11-9-527 inapplicable except to the extent that certain beneficiaries are excluded. Alien nonresident dependents must still meet the requirements set forth in § 11-9-527 to receive dependency benefits.

■ We also reject the Trust Fund's interpretation that the phrase "supported . . . for the period of one (1) year prior to the date of the injury" applies to the surviving wife or children. It is apparent from the statute that it is written disjunctively. Depen-

dents include the surviving wife and children, or, if that class of persons does not exist, then to the surviving mother or father "whom the employee has supported." The Trust Fund's interpretation would also bar from benefits those alien nonresident spouses who were married for less than one year and alien nonresident children who were less than one year old. We doubt that the General Assembly intended such a result. The interpretation that makes more sense is that the one-year clause only applies to the surviving father and mother.

The Commission did not err in finding that the minor children had a reasonable expectation of support from the decedent or that the minor children were not barred by § 11-9-111 from receiving benefits. Therefore, we affirm.

Affirmed.

PITTMAN and HART, JJ., agree.

[redacted]

[redacted]