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Sondra O. CLARK *v.* DIRECTOR, Employment Security Department, and Northwest Arkansas Radiation Therapy Institute, Inc.

E 95-193 944 S.W.2d 862

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 4, 1997

Stephen Lee Wood, P.A., by: *Stephen Lee Wood*, for appellant.

Phyllis Edwards, for appellee Phil Price.

Cypert, Crouch, Clark & Harwell, by: *Charles L. Harwell*, for separate appellee Robert Reyerson.

JOHN F. STROUD, JR., Judge. This is an employment security case in which appellant, Sondra Clark, was denied unemployment benefits because she was discharged for misconduct in connection with her work. The Appeals Tribunal denied appellant benefits for a period of eight weeks. The Board of Review denied benefits for a period of ten weeks, finding that the misconduct involved dishonesty. We affirm the Board of Review.

Appellant had been employed by appellee, Northwest Arkansas Radiation Therapy Institute, for more than nine years when she was discharged in February 1995. Her duties as a senior staff radiation therapist and clinical supervisor included taking and logging daily equipment readings on six machines. The readings numbered between 150 to 200 each day.

One of the machines monitored by appellant was used to deliver high energy radiation in the treatment of cancer patients. Appellant took twenty-one readings each day on this machine, including one with respect to the machine's water pressure. It was important that the readings not vary from day to day because any deviation from the normal operation of the equipment could affect the delivery of the radiation treatment, conceivably altering

the treatment outcome. Appellant had performed this task since October 1985.

On January 11, 1995, the water-pressure gauge on this machine was replaced by an engineer employed by NARTI. Prior to replacement, the old gauge had consistently read 60 p.s.i. The engineer performed a preventive maintenance inspection on the machine between January 23, 1995, and February 4, 1995. The inspection included a review of the logbook. In making the inspection, he noticed a discrepancy between the actual reading on the newly installed water-pressure gauge and the readings that were recorded in the log book. The new gauge measured 75-76 p.s.i., rather than the 60 p.s.i. that registered on the old gauge. However, appellant continued to record the readings at 60 p.s.i. She was terminated on February 14, 1995, for "falsifying records," an offense calling for immediate termination under NARTI's progressive discipline policy.

Appellant filed a claim for unemployment benefits. The Appeals Tribunal denied her benefits for a period of eight weeks, and the Board of Review denied her benefits for a period of ten weeks, finding that her misconduct involved dishonesty. On appeal to this court, appellant argues that the Board of Review's finding that she engaged in misconduct by intentionally falsifying company records was not supported by substantial evidence. We disagree.

On appeal, the Board of Review's findings of fact are conclusive if they are supported by substantial evidence. *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). 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.* Our review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

Arkansas Code Annotated section 11-10-514 (Repl. 1996) provides in pertinent part:

> (a)(1) If so found by the Director of the Arkansas Employment Security Department, an individual shall be disqualified for

> benefits if he is discharged from his last work for misconduct in connection with the work.
>
> . . .
>
> (3) Except as otherwise provided in this section, disqualification for misconduct shall be for eight (8) weeks of unemployment as defined in § 11-10-512.
>
> (b) If he is discharged from his last work for misconduct in connection with the work on account of dishonesty, . . . or willful violation of the rules or customs of the employer pertaining to the safety of fellow employees or company property, he shall be disqualified from the date of filing his claim until he shall have ten (10) weeks of employment in each of which he shall have earned wages equal to at least his weekly benefit amount.

As we pointed out in *Perry v. Gaddy*, 48 Ark. App. 128, 891 S.W.2d 73 (1995):

> Mere inefficiency, unsatisfactory conduct, failure of good performance as a result of inability or incapacity, inadvertence, and ordinary negligence or good-faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless they are of such degree or recurrence as to manifest culpability, wrongful intent, evil design, *or an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations.*

(Emphasis added.)

[redacted] Here, the Board of Review could reasonably reach the decision it did based upon the evidence that was before it. There was substantial evidence to support the Board's finding that appellant was discharged for misconduct connected with the work on account of dishonesty. After the gauge was replaced and the new gauge consistently registered 75-76 p.s.i., appellant continued to chart the gauge readings at 60 p.s.i. Once the problem was brought to the employer's attention, the gauges and logs were monitored on a daily basis and compared to appellant's readings. The discrepancies between the actual readings and appellant's log entries constituted substantial evidence that appellant's actions surpassed those of mere misreadings to those of not reading the gauges at all and logging false numbers. Such misconduct demon-

strates an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations.

Affirmed.

PITTMAN, AREY, BIRD, and MEADS, JJ., agree.

NEAL, J., dissents.

OLLY NEAL, Judge, dissenting. I respectfully dissent from the majority's decision to affirm. The majority adequately set out the facts; however, there are a few that I believe merit additional discussion. Mel Cheney, the director of patient services, testified that an old gauge on one of the machines that appellant consistently charted as reading 60 p.s.i. was replaced with a gauge that consistently read 75 or 76 p.s.i. After installation of the new gauge, appellant, who had not been informed that the old gauge had been replaced, continued to chart that the gauge read 60 p.s.i. Cheney testified that once the discrepancy in the readings was brought to his attention, the readings charted on the particular gauge were monitored on a daily basis. According to Cheney, any deviation from the normal operation of the equipment could affect the delivery of the radiation treatment and alter the outcome of the patients' treatment as well as the safety of anyone working around the equipment. Although discrepancies in the readings were first noted in January, 1995, appellant was not made aware of the discrepancies until February 13, 1995, when she was placed on suspension and eventually terminated from her employment. The majority found that the facts support the Board's finding that the discrepancies between the log entries and actual readings demonstrate an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations, and support a finding of misconduct due to dishonesty. I disagree.

On review of employment compensation cases, the factual findings of the Board of Review are conclusive if they are supported by substantial evidence; but that is not to say that our function on appeal is merely to ratify whatever decision is made by the Board of Review. *See Carraro v. Director*, 54 Ark. App. 210, 924 S.W.2d 819 (1996). Further, we are not at liberty to ignore our responsibility to determine whether the standard of review has

been met. *Id.* When the Board's decision is not supported by substantial evidence, we will reverse. *Id.*

Arkansas Code Annotated § 11-10-514(a)(1) (Repl. 1996) provides that an individual shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work. "Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer. *Greenberg v. Director*, 53 Ark. App. 295, 922 S.W.2d 5 (1996); *George's Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). However, as the court explained in *Carraro*:

> To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertancies, ordinary negligence in isolated instances, or good-faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.

54 Ark. App. 210, 924 S.W.2d 819 (1996).

It is my belief that the standard of review has not been met. In *Perry v. Gaddy*, 48 Ark. App. 128, 891 S.W.2d 73 (1995), we found that the employee's recurring negligence amounted to misconduct. There, the appellant had worked for her employer for twelve years; however, her error rating consistently exceeded the standard error rate during the years that preceded her termination. In addition, the appellant in *Perry* had been evaluated and warned of poor performance prior to her termination. I think it is of particular importance that although Cheney and others in management were aware that appellant's log of gauge readings was approximately 15 p.s.i. below the readings charted by other employees, appellant received no warning of poor performance prior to the decision to terminate. The facts indicate that simple negligence may be inferred from appellant's misreading of the gauges, but such negligence does not amount to an intentional or

substantial disregard of the employer's interests or of her duties or obligations.

Additionally, appellant read the gauge in question with Cheney looking over her shoulder, and charted the gauge as reading 65 p.s.i. Cheney testified that he made a mental note that he was reading the gauge at 75 p.s.i., and that he did not inform appellant of the discrepancy in the readings. I believe the fact that appellant charted a lower reading with her supervisor present belies the Board of Review's finding that her actions were the result of dishonesty.

For the reasons set forth above I would reverse.

Charles GARRETT *v.* DIRECTOR, Employment Security Department, and Borden, Inc.

E 96-46 944 S.W.2d 865

Court of Appeals of Arkansas
Division I
Opinion delivered June 4, 1997

Appellant, pro se.

Phyllis Edwards, for appellees.

JOHN F. STROUD, JR., Judge. This is an employment security case. Appellant, Charles Garrett, appeals from a decision of the Arkansas Board of Review that found that he left his work voluntarily and without good cause connected with the work. The Board's decision reversed the Appeal Tribunal's finding that appellant had good cause for quitting his job. The appellant is not represented by an attorney, and neither party has filed a brief. We reverse and remand to the Board of Review to award appellant's benefits.

Appellant worked for the employer approximately fifteen years. He left his supervisor position because of problems on the job. Specifically, appellant's own supervisor was not able to hire

enough employees to perform all the work. Consequently, appellant was required to work long hours. He worked fifteen to eighteen hours per day. As a salaried management employee, he was not paid overtime. His employees, who did receive overtime pay, earned more than he did. A former plant manager had promised him a five percent raise and back pay. He admitted that he had received a raise in 1995, but it was not a five percent raise and he did not receive back pay. Company reorganization and restructuring had been taking place for approximately four years prior to appellant's departure from the company. Management changes had resulted in an unstable work environment that was stressful. He complained to his supervisor, but nothing was done. He complained to the plant manager and plant superintendent on September 11, 1995. He said that they also promised changes, but that he believed that changes needed to be made immediately.

The human resources representative testified that appellant's exit statement indicated that he quit because of dissatisfaction with pay, long hours of work, and poor management attitude. He testified that appellant did not have a formal contract, but as a management employee he was exempt under federal law from being paid overtime. He acknowledged that appellant and other supervisors complained about the company's management and that the other supervisors had many of the same complaints voiced by appellant. He stated, however, that the other supervisors did not quit.

"Good cause" is a cause that would reasonably impel an average able-bodied, qualified worker to give up his or her employment. *Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). It is dependent not only on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting, but also on the reaction of the average employee. *Id.* Another element of good cause is whether the employee took appropriate steps to rectify the problem. *Claflin v. Director*, 53 Ark. App. 126, 920 S.W.2d 20 (1996). What constitutes good cause is ordinarily a question of fact for the Board to determine from the particular circumstances of each case. *Perdrix-Wang, supra.*

[redacted] We do not conduct a *de novo* review of the evidence in an appeal from a decision of the Board of Review. *Cowan v. Director*, 56 Ark. App. 17, 936 S.W.2d 766 (1997). The Board's findings of fact are conclusive if they are supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Cowan, supra.* 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.*

[redacted] Here, appellant had worked in an admittedly stressful environment for four years while the company was reorganizing and restructuring. He worked fifteen to eighteen hours per day, with no overtime pay. He had made several attempts to discuss his concerns with his supervisors, but those concerns were never addressed. Viewing the evidence in this case in the light most favorable to the Board's finding, we conclude that the finding is not supported by substantial evidence. We determine that the Board could not reasonably reach its decision that appellant left his job voluntarily and without good cause. We therefore reverse and remand the case to the Board of Review to award appellant his unemployment benefits.

Reversed and remanded.

NEAL and MEADS, JJ., agree.

Connie ROBERSON *v.* WASTE MANAGEMENT

CA 96-1401 944 S.W.2d 858

Court of Appeals of Arkansas
Division II
Opinion delivered June 4, 1997

Denver L. Thornton, for appellant.

Wright, Lindsey & Jennings, by: *Lee J. Muldrow* and *Kristi M. Moody*, for appellee.

JOHN F. STROUD, JR., Judge. Connie Roberson worked as a truck driver for Waste Management. She suffered a compensable injury to her right knee on April 13, 1994, when she lost her footing while opening the truck door and grabbing a chain to keep from falling into the ruts below. She underwent arthroscopic surgery the next month by Dr. W. J. Giller, and she began a weight loss program under the care of a dietician. She weighed 296 pounds at the time of the injury.

At a hearing in November 1995, the administrative law judge found that the claimant had proven that she remained within her healing period, that she was entitled to temporary total disability benefits for the periods she had not worked after the injury, and that she was entitled to reasonable and related medical benefits for treatment by Dr. Giller. The Workers' Compensation Commission reversed the decision of the ALJ, finding that the claimant had failed to prove that she remained within her healing period beyond August 1994, that she was entitled to additional temporary total disability benefits, or that she was entitled to an osteotomy surgical procedure by Dr. Giller. Ms. Roberson contends on

appeal that the Commission's denial of additional temporary total disability benefits and denial of reasonable and related medical treatment is not supported by substantial evidence. We disagree and affirm.

When the Commission denies a claim because of the claimant's failure to meet her burden of proof, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995). Substantial evidence is that relevant evidence which reasonable minds might accept as adequate to support a conclusion. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *J.A. Riggs Tractor Co. v. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The Commission has the duty of weighing the medical evidence as it does any other evidence, *id.*, and its resolution of the medical evidence has the force and effect of a jury verdict. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989).

The evidence at the hearing included letters and medical records of appellant's primary treating physician, Dr.Giller; an independent medical evaluation by Dr. John Slater; and appellant's own testimony. Both doctors are orthopedic surgeons.

The day after Dr. Giller performed arthroscopic surgery on May 23, 1994, he wrote, "It is evident that the patient is going to have continuing difficulties with her knee. It is an absolute must that she lose weight to a more normal range." At the end of May he released appellant to light-duty work with the restrictions that she could not stand or walk for prolonged periods of time and that

she sit with her leg propped up. He wrote in June 1994 that appellant should continue on limited duty at work. In August 1994 he stated, "She will continue with her physical therapy . . . and she will also continue on her diet. She was told that she could return to work so long as she was not required to stand or walk." Finally, on November 30, 1994, Dr. Giller wrote:

> Since the patient was last seen she has lost approximately 70 pounds on the New Directions Weight Loss Program. She tells me that she is still having discomfort in the knee and she has not been working.
>
> . . . .
>
> It is still my recommendation that the patient needs to be scheduled for a tibial osteotomy. . . . In the meantime, she will continue with her weight loss program. . . . She was told that she could work as long as she adhered to the restrictions that have been outlined previously.

Dr. John Slater's report of the independent medical examination on February 28, 1995, included the following: "In reviewing the record, I would ascertain that she reached maximum medical improvement three months after her arthroscopic surgery." He stated that his findings did not suggest a need for surgery, and he recommended that appellant continue with her weight loss. At the hearing, Ms. Roberson testified that she was twenty-six years old and was five feet, six inches tall. She stated that she had weighed 296 pounds at the time of her injury and further testified:

> I now weigh 125 pounds. I had to lose weight because of my knee injury. I needed another surgery and they wanted me to lose the weight so that I could heal better from the surgery. The second surgery has not been done yet. Dr. Giller was going to do a second surgery on my knee when I lost the weight. I've lost the weight.

[redacted] Appellant relies upon Dr. Giller's statements and her own testimony to support her argument that she is still within her healing period and that she needs additional surgery. 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 findings of the Com-

mission and uphold those findings if they are supported by substantial evidence. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996). The issue is not whether this court might have reached a different result from that reached by the Commission or whether the evidence would have supported a contrary finding; if reasonable minds could reach the result in the Commission's decision, we must affirm. *Harvest Foods v. Washam, supra.*

The Commission based its decision that appellant's healing period ended in August 1994 upon Dr. Slater's opinion that the healing period had ended three months after surgery. The Commission also found that appellant had not proven that she suffered a total incapacity to earn wages. This finding was based upon her testimony that although she would return to work if she could find a job where she could sit with her leg elevated and where she could get up and move around, she had not looked for work. The Commission's finding that appellant had failed to prove entitlement to additional temporary total disability benefits was based upon Dr. Slater's independent medical evaluation and the fact that the claimant's condition improved after she lost weight.

We hold that Dr. Slater's findings, as reported in the independent medical evaluation, support the Commission's findings that appellant's healing period ended in August 1994 and that the osteotomy surgery is not reasonable and necessary treatment for her compensable injury.

Affirmed.

ROGERS, J., agrees. CRABTREE, J., concurs.

TERRY CRABTREE, Judge, concurring. The accompanying majority opinion sufficiently states the facts surrounding this case, and I agree in substance with the majority opinion's application of the existing law. However, I think it is worth emphasizing the following excerpt from the appellant's abstract of the administrative law judge's decision:

> After observing the demeanor of the claimant as a witness, I found her testimony concerning the symptoms she was experiencing with her knee to be credible. I find that her dramatic

> weight loss under the directions of Dr. Geller indicates that she is cooperating in her medical treatment and has sincere desire to return to a working status.

We have often said that the credibility of witnesses and the weight to be given their testimony are matters solely within the province of the Commission. *See, e.g., Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995); *Maxwell v. Carl Bierbaum, Inc.*, 48 Ark. App. 159, 893 S.W.2d 346 (1995); *Bartlett v. Mead Containerboard*, 47 Ark. App. 181, 888 S.W.2d 314 (1994). Further, when the Commission issues an opinion of its own, we give no weight to the ALJ's opinion. *Jane Traylor, Inc. v. Cooksey*, 31 Ark. App. 245, 792 S.W.2d 351 (1990).

Here, the medical evidence, in the form of Dr. Slater's findings, supports the Commission's decision. However, it is troubling that Dr. Slater, a physician selected by the appellee, apparently spent less than ten minutes with appellant. Further, the ALJ specifically assessed appellant's credibility — favorably — and the Commission ignored this determination in favor of the single report from the company doctor disputing all of appellant's well-documented claims.

Based on the current state of the law, this case must be affirmed. However, it illustrates vividly the legal fiction the Commission engages in when it purports to rule on the credibility of witnesses on a cold record while rejecting the face-to-face determination of the ALJ. This is counterintuitive and contrary to the traditional logic behind appellate courts' deference to the trier of fact on issues of credibility. In the present case, the court must defer to a Commission, a politically appointed body of two distinct interest groups with a chairman who always casts the swing vote, that typically sees no witnesses, hears no live testimony, and is limited to the same cold record as the court. Such deference, though clearly the state of the law, is ill-advised and contrary to the wisdom supporting the deference this court typically gives in other areas of the law to trial judges and juries — the only ones

throughout the process who have the opportunity to look witnesses in the eye and discern their credibility.

Julia P. JONES, et al. *v.* Elizabeth ABRAHAM, et al.

CA 96-648 946 S.W.2d 711

Court of Appeals of Arkansas
Division IV
Opinion delivered June 4, 1997

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Richard F. Hatfield and *Don Chaney*, for appellants.

Robert R. Wright, *Todd Turner*, and *Ray Baxter*, for appellees.

TERRY CRABTREE, Judge. Appellants brought suit in chancery court seeking to enforce an alleged oral contract from 1974 between appellants' mother, Sarah Abraham Klerekoper, and their aunt, Frances Abraham. The substance of the alleged oral contract was that appellants' mother gave her share of appellants' grandfather's estate to appellants' aunt, Frances Abraham, with the understanding that Frances would leave her estate to Sarah Abraham Klerekoper's children, the appellants herein.

In a separate proceeding, appellants also challenged the will of their aunt that left equal shares of her estate to all of her nieces and nephews (appellants' cousins and appellees herein), alleging the will was not executed properly, the testator lacked capacity, and was subject to undue influence.

A will that left equal shares to each of her nieces and nephews was probated at Frances's death in 1994 and did not uphold the alleged oral agreement between Sarah and Frances to leave proportionately more of her estate to appellants. After extensive depositions, submissions of documentary evidence, and argument of counsel, the chancellor ruled for the defendants/appellees on their motion for summary judgment in both cases. The chancellor's ruling on the chancery case was based on the following, as abstracted in appellants' brief:

> In order to prevail at trial [on the chancery case], Plaintiffs would have to produce evidence [of an oral contract] that is

> clear, cogent and convincing. [*Pickens v. Black*, 318 Ark. 474, 481 (1994).]
>
> There are several flaws in Plaintiffs' case at this point. First, a written statement was signed by Sarah Klerekoper which says that she was transferring her interest in her father's estate to her sister, Frances Abraham, "to pay my debt to you." Plaintiffs argue that Sarah never owed Frances any money (according to her husband's affidavit) and that Frances needed funds to acquire the interest in the John Abraham estate from her brothers. Plaintiffs contend that in return for this transfer from Sarah, Frances promised to leave her property to Sarah's children. However, the written statement signed by Sarah at the time made no mention of an agreement of the type alleged. The agreement stated that the consideration for the transfer was in payment of a debt by Sarah to Frances. Further, there is another writing by Sarah Klerekoper discharging Frances Abraham for all actions, claims and demands that now or may hereafter accrue. Both documents were executed in 1973 and 1974, around the time of the alleged oral agreement. Both are exactly contrary to the assertions of Plaintiffs. These are the only two written documents found relative to what happened at that time between the two sisters.
>
> Secondly, the only two people who know what transpired between them were the two long deceased sisters. What has been stated in depositions and affidavits about the alleged agreement between them is predicated almost entirely on inadmissible hearsay. Even if admissible, the statements of Sarah would not be sufficient, standing alone, to establish by "clear, cogent and convincing" evidence "substantially beyond a reasonable doubt" that such an agreement between the two sisters existed.
>
> What is missing is any reliable proof, not grounded in hearsay, to establish an enforceable contract that is the subject of this equity suit.

The chancellor incorporated by reference his memorandum disposing of the chancery case into his memorandum granting summary judgment on the probate case. In part, his reasoning follows, as abstracted:

> No evidence was offered at that hearing nor by way of depositions or affidavits that would suffice even to establish a prima facie case for the invalidity of the Will filed herein. As stated in

> the separate Chancery opinion, attached hereto, much of what was presented was predicated upon hearsay. The Plaintiffs' case seems largely to have depended on their ability to establish an enforceable oral contract between these two deceased sisters, which they failed to do in the Chancery case.

For purposes of appeal, the chancery and probate cases were consolidated. From the chancellor's two memorandum opinions, appellants challenge the grant of summary judgment and dispute that affidavits were properly excluded from consideration as hearsay not within an exception.

1. *Summary Judgment*

Summary-judgment disposition is governed by Arkansas Rule of Civil Procedure 56, and a thoroughly developed body of accompanying case law. In pertinent part, Rule 56 reads:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Ark. R. Civ. P. 56(c). Here, the summary-judgment evaluation was aided by a multitude of affidavits and documentary evidence from both sides.

Although affidavits and documents in support of motions for summary judgment are construed against the moving party, once a *prima facie* showing of entitlement to summary judgment is made, the responding party must discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. *J.M. Prod. v. Arkansas Capital Corp.*, 51 Ark. App. 85, 90, 910 S.W.2d 702, 704 (1995) (citing *Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988)).

A. Chancery Case — Oral Contract to Make a Will

In *McDonald v. Petty*, 254 Ark. 705, 496 S.W.2d 365 (1973), the supreme court stated that an oral contract to make a will to devise or to make a deed to convey real estate is valid when

the testimony and evidence to establish such a contract is clear, cogent, satisfactory, and convincing. Further, the evidence must be so strong as to be substantially beyond reasonable doubt. *Id. See also Pickens v. Black*, 318 Ark. 474, 481, 885 S.W.2d 872, 876 (1994). Post-1981 contracts to make a will are governed by Ark. Code Ann. § 28-24-101 (1987), requiring such contracts to be proven by a writing or express reference. However, the purported agreement in the present case is pre-1981 and, therefore, not controlled by the statute.

However, appellees fail to show where this heightened burden of proof has ever been applied at the summary-judgment level. *Cf. Pickens, supra.* (court affirmed grant of partial summary judgment on a different issue). Even if the facts will require a heightened standard of proof at trial, this does not change the controlling law that trial courts must use when evaluating summary-judgment motions. Requiring "clear, cogent and convincing" evidence at the summary-judgment level amounts to an impermissible weighing of the evidence. Accordingly, it was error for the chancellor to award summary judgment based on the heightened standard of proof required of oral contracts under *Pickens, supra.*

B. Standard of Review — Probate Case

The proper analysis for considering the summary-judgment disposition of the probate case is also based on Ark. R. Civ. P. 56, discussed above. While appellants' claims against the will may appear weak and not very well developed, that is a weighing of the evidence, which is inappropriate when the chancellor should merely view the pleadings and affidavits to ascertain whether issues exist to be litigated.

The facts in the probate case still leave some gaps that could fairly be characterized as fact questions. For instance, sworn testimony from Frances's physician stated that her mental prowess began to diminish in 1987, the same year that the contested will was executed. While other testimony contradicts this, it is not the role of summary judgment to weigh and resolve conflicting testimony, but to simply decide whether such questions exist to be resolved at trial. Further, while Fairfax Abraham, Jr., did not take

a disproportionate share under the challenged 1987 will, that is only one factor to consider in whether he exercised undue influence by taking Frances to his own attorney, taken together with Fairfax's developing confidential relationship with his ailing aunt. Again, these facts may stack up weakly against the contradicting testimony, but the summary-judgment analysis does not evaluate evidence beyond the question of whether a dispute exists.

Further, it was improper for the chancellor to exclude evidence that he suspected was inadmissible hearsay, without ruling on its admissibility in light of the present-intent exception to the hearsay rule. Ark. R. Evid. 803(c).

2. *Admissible Evidence*

The Arkansas Supreme Court has recognized that Rule 56(e) requires affiants to support their summary-judgment testimony not with mere conclusions, but with admissible testimony. A line of cases show the court excluding hearsay statements from the summary-judgment analysis since such statements would be inadmissible at trial and violate the rule's own call for "such facts as would be admissible in evidence." Ark. R. Civ. P. 56(e).

> ARCP Rule 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." This court has stated that affidavits which are conclusory rather than factual are insufficient. *See McDonald v. Eubanks*, 292 Ark. 533, 731 S.W.2d 769 (1987). Mrs. Swindle's affidavit merely declares that she was told Wright was the owner of the real estate company by its agents. Her affidavit does nothing more than assert a conclusion that is based on hearsay. Nothing in the affidavit indicates Mrs. Swindle had personal knowledge that Wright was the owner of Wright Realty. Mrs. Swindle's affidavit does not meet the requirements of Rule 56(e), and therefore does not create a dispute as to the fact of ownership of Wright Realty.

Swindle v. Lumbermans Mut. Casualty Co., 315 Ark. 415, 421-22, 869 S.W.2d 681, 684 (1993).

In the present case, the chancellor apparently refused to give any weight to the appellants' affidavits and excluded them as inadmissible under Ark. R. Evid. 803. Appellants cite the hearsay exception involving intent to make a will pursuant to Ark. R. Evid. 803(3), and cite three cases purporting to apply that exception. *Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979); *Williams v. Robinson*, 251 Ark. 1002, 476 S.W.2d 1 (1972); and *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 755 (1996).

Without an adversarial hearing on the issue, it is impossible to determine if the affidavits in question may be admissible, and may further the appellants' defense against the summary-judgment ruling on the probate case. The chancellor's sweeping summation that "some of the evidence is inadmissible hearsay" is not adequate to support his conclusion.

Accordingly, the granting of summary judgment on both claims is reversed and remanded.

Reversed and remanded.

GRIFFEN and ROAF, JJ., agree.

Terry KENYON *v.* STATE of Arkansas

CA CR 96-1288 946 S.W.2d 705

Court of Appeals of Arkansas
Division II
Opinion delivered June 4, 1997

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Lawrence A. Wright, Jr. and *Russ Hunt*, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

TERRY CRABTREE, Judge. Appellant Terry Jay Kenyon appeals his conviction of two counts of negligent homicide for which he was sentenced to a term of imprisonment of twelve months and fined $2,000. Appellant raises three points on appeal. He first argues that the trial court should have suppressed the results of the blood-alcohol test obtained by the State because the private laboratory that performed the test and then stored the remainder of the blood sample removed the sample from refrigeration, causing it to be useless for further testing by appellant. Appellant then argues that the judgment should be reversed because the trial court allowed the introduction of graphic photographs of the victims. Finally, appellant argues that the trial court should have granted his motion for a mistrial because spectators attending the trial and sitting near the front of the courtroom were wearing buttons with the picture of one of the victims and coming and going often, thereby drawing attention to themselves. Finding no error, we affirm.

The tragic facts of this case are that appellant and his wife, Rhonda Kenyon, invited three couples to a small "get-together" on their houseboat on Greers Ferry Lake at Heber Springs, Arkansas, on the evening of July 3, 1995. The couples grilled, drank beer and margueritas, and watched fireworks. From the testimony, it appears that appellant acted as host throughout the evening, serving the guests and grilling. According to the testimony by the guests on appellant's houseboat, appellant did not appear to be intoxicated during the evening. Appellant's testimony was that he had between three and four beers during the course of the evening. He testified that he had no difficulty cleaning up the boat and loading everyone's cars at the end of the evening. He felt that he was in an acceptable condition to drive. After the guests left at approximately 11:30 p.m., appellant and his wife straightened and cleaned the houseboat before leaving. Everyone was returning to Searcy, Arkansas, by way of Highway 16. Appellant's wife reclined her seat and slept on the way home while appellant drove. Appellant, who was driving a Ford Explorer, testified that he did not remember anything from the time that he left the parking lot at the lake.

Meanwhile, Melissa Patrick was spending the evening with her parents; a friend's child; her boyfriend, victim Steven Seitz; and her one-month-old son, victim Cody Patrick. At the end of the evening, Melissa Patrick, Steven Seitz, and Cody started to return to Hickory Flat, Arkansas, by way of Highway 16. Melissa was driving her pickup truck, and Steven was following in a Ford Escort with Cody strapped in an infant carseat in the backseat. Melissa's testimony was that she was driving fifty-five miles an hour when appellant's car entered her lane, hitting her truck, and causing her to wreck. Melissa was able to climb from her truck through a window and saw that the Escort in which Steven and Cody were riding also had been hit. Steven Seitz and Cody Patrick were killed instantly in the wreck. After the accident, Melissa was taken to the hospital in the same ambulance as appellant, but she was hysterical and could not recall if he smelled of alcohol.

Passengers in a car that immediately came upon the wreck and stopped testified that appellant had passed them on a double yellow line at a high rate of speed a mile or less before the acci-

dent. One passenger testified that he smelled alcohol in appellant's Ford Explorer. Another testified that he smelled a strong odor of intoxicants, but did not know if it was alcohol, anti-freeze, or something else.

The state trooper who went to the scene testified that he smelled alcohol on appellant and listed that as a contributing factor in the accident report. Both paramedics who came to the scene smelled a strong odor of intoxicants coming from appellant. Appellant's nurse at Central Arkansas Hospital testified that she smelled the distinct odor of alcohol coming from appellant.

Corporal Lindsey Williams of the Arkansas State Police testified that he is certified to reconstruct accidents. He arrived at the scene several hours after the accident. From the skid marks, measurements, and photographs, he concluded that the accident occurred on a stretch of straight, flat highway. It was Williams's definite opinion that the impact occurred in the victims' lane of traffic. Williams testified that his conclusion was that appellant crossed the center line, hit Melissa Patrick, then continued across the center line and hit the Ford Escort in which Steven Seitz and Cody Patrick were riding. He saw no sign of braking by appellant before the initial impact.

At the hospital, appellant signed a statement of rights form for administration of a blood-alcohol test. Appellant agreed to take the test. On the rights form, he indicated that he did not wish to have his own blood, urine, or breath test. Appellant put the wrong date on this form. He also wrote "I was not driving." The result of the legal blood test was that appellant had a blood-alcohol level of .10. The hospital also performed tests. The result of the medical tests performed by the hospital was that appellant's blood-alcohol level was .120. Melissa Patrick had a blood-alcohol level of .00, as did Steven Seitz.

We first address appellant's argument that the trial court should have suppressed the blood-alcohol test result showing his blood-alcohol level to be .10 because his right to have his own test performed was destroyed when the laboratory that performed the test removed his blood sample from refrigeration. He asserts that when a defendant's right to run his own tests is violated, his rem-

edy is the exclusion of the State's evidence because to do otherwise deprives the defendant of due process. The trial court correctly denied appellant's motion to suppress the result of the blood-alcohol test.

The facts pertinent to this point are that following the accident, appellant signed the statement of rights form as to the blood-alcohol test. The form explained his rights with regard to the test and explained his right to have his own test performed if he agreed to take the test. He agreed to submit to the blood-alcohol test and checked the box by the "no" following the question as to whether he would like a blood, urine, or breath test. Appellant signed this form at 2:05 a.m. on July 4, 1995. Then, on November 16, 1995, appellant filed a motion requesting an order directing the laboratory that stored the blood to make a portion of the blood available for independent testing. At this time it was discovered that an employee of the laboratory, which was privately owned and operated, had removed the blood from refrigerated storage, and the blood was no longer in a suitable condition for testing for the blood-alcohol level.

Section 5-65-204 of the Arkansas Code Annotated provides in pertinent part:

> (e) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his own choice administer a complete chemical test in addition to any test administered at the direction of a law enforcement officer.
>
> (1) The law enforcement officer shall advise the person of this right.
>
> (2) The refusal or failure of a law enforcement officer to advise such person of this right and to permit and assist the person to obtain such test shall preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer.

Ark. Code Ann. § 5-65-204(e) (Repl. 1993).

Appellant relies on the above statute and the case of *California v. Trombetta*, 467 U.S. 479 (1984), in support of his argument. In

Trombetta, the issue before the United States Supreme Court was "whether the Due Process Clause requires law enforcement agencies to preserve breath samples of suspected drunken drivers in order for the results of breath-analysis tests to be admissible in criminal prosecutions." *Id.* at 481. The Court held that "the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial." *Id.* at 491. In reaching its conclusion, the Court stated that the authorities in the case did not destroy the defendant's breath samples in a calculated effort to circumvent the disclosure requirements previously established by the Court; rather, the authorities acted in good faith. Secondly, the Court stated that, more importantly, the duty to preserve samples must be limited to evidence that "might be expected to play a significant role in the suspect's defense." *Id.* at 488. The Court stated that to meet this standard, the evidence must possess exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means. The Court noted that the evidence from the breath samples would be much more likely to be inculpatory rather than exculpatory. Finally, the Court pointed out that the defendants had other methods of demonstrating their innocence, such as presenting evidence of how the tests could be inaccurate.

In *Wenzel v. State*, 306 Ark. 527, 815 S.W.2d 938 (1991), the Arkansas Supreme Court followed *Trombetta*, *supra*, in affirming a defendant's conviction when he appealed on the basis that the State had used all the semen found on vaginal swabs during DNA testing, and he was, therefore, unable to conduct his own tests. The court stated that the defendant made no showing that the evidence possessed exculpatory value before it was destroyed. The court also cited *Arizona v. Youngblood*, 488 U.S. 51 (1988), in stating that the defendant failed to show bad faith on the part of the State, which was necessary in order to constitute a denial of due process.

Applying *Trombetta* and *Wenzel* to the present case, the trial court correctly admitted the evidence of the blood-alcohol test. First, the authorities did not destroy the leftover blood sample in

bad faith. To the contrary, the State did not destroy the sample at all; an employee of a private laboratory left the sample out of refrigeration after appellant had waived his right to have his own analysis performed. We do not agree that the private laboratory employee's inadvertent destruction of the blood sample was "tantamount to bad faith on the part of the State" as argued by appellant. As appellant's attorney admitted to the trial court, there is no evidence that the State or any other person requested, hinted, schemed, or in any way caused the lab employee to remove the blood from refrigeration. Second, all indications are that another test performed on the blood sample would have proven inculpatory rather than exculpatory. Not only had the State's test revealed a blood-alcohol level of .10, but the hospital's test, which was introduced by appellant, obtained a result of .12. Thus, the alleged exculpatory value of the test was not at all apparent before the sample was left out of refrigeration. Thirdly, appellant had other means to demonstrate his innocence, which he did, through the testimony of his expert, who attacked the accuracy of the particular test run on the State's sample.

In sum, appellant waived his right to have his own analysis performed; there was no evidence of bad faith; the exculpatory value of the sample was not apparent, in fact further tests probably would have proven inculpatory; and appellant put on evidence through his expert that the test results could be inaccurate. The trial court properly admitted the test result.

We now turn to appellant's argument that the judgment should be reversed because the trial court admitted inflammatory photographs of the victims. It is appellant's position that the probative value of the photographs was outweighed by the prejudicial value since there were other methods available for the State to prove the death of the victims.

We do not determine this argument on the merits because appellant failed to provide a copy of the photographs in issue in the abstract. Although appellant requests in his reply brief that this court waive the requirement that the photographs be included in the abstract, he cites no authority for doing this and presents no convincing argument that the court should do so in

this case. The law is well established that the appellate court will not consider the admissibility of photographs when the appealing party fails to include copies in the abstract.

[redacted] In *Coney v. State*, 319 Ark. 709, 894 S.W.2d 583 (1995), the supreme court stated that when the admission of photographs is an issue on appeal, the failure to include them in the abstract is fatal to the point because the reviewing court cannot have a clear understanding of the objection that forms the basis of the appeal. The court reiterated the rule that there is only one record, and it is essential that the material parts of the record be abstracted.

In *Schalski v. State*, 322 Ark. 63, 907 S.W.2d 693 (1995), the supreme court did not consider an argument on appeal concerning photographs when black-and-white photocopies of the photographs were in the abstract. The court stated that the State described the photographs, but the appellant's abstract contained only black-and-white photocopies, and the court could not tell what the photos depicted and whether they were without probative value. The court stated that, therefore, it could not state that the trial court abused its discretion in admitting the photographs.

The record on appeal is limited to that which is abstracted. *Moncrief v. State*, 325 Ark. 173, 925 S.W.2d 776 (1996). Without the photographs in issue to consider, this court cannot say that the trial court abused its discretion in admitting them into evidence.

Even if we were to decide this issue on the merits, we would affirm. The trial court specifically stated that it would rule on each photograph individually. The State wished to introduce eight photographs taken by the state police and seventeen photographs taken by the coroner's office. The trial court found that, while the State had the right to prove the cause of death through the method and manner it wished, the number of photographs was excessive. The trial court refused to allow the introduction of duplicative photographs, finding that allowing such duplication would inflame and prejudice the jury. The court allowed the introduction of three of the photographs.

The first photograph depicts victim Cody Patrick. It shows the cause of death and that Cody was strapped in a carseat. The second photograph shows both victims in the car. From the second photograph, one can see the damage to the car and the injury to the victims. The third photograph shows victim Steven Seitz, still strapped in the driver's seat, and also shows the damage to the car. The second and third photograph demonstrate the speed at which the collision occurred and the impact of the cars. *See Prunty v. State*, 271 Ark. 77, 607 S.W.2d 374 (1980).

Whether to admit photographs into evidence is a matter left to the sound discretion of the trial judge, and his determination will not be reversed absent a clear abuse of that discretion. *Morris v. State*, 302 Ark. 532, 792 S.W.2d 288 (1990). Photographs may be admissible even if they are cumulative to other evidence presented. *Id.* Even inflammatory photographs are admissible if they shed light on an issue, help a witness to better describe what is portrayed, or enable the jury to understand the testimony. *Id.* Rather than routinely accepting, carte blanche, graphic and repetitive photographs, the trial court should weigh the probative value of photographs against their prejudicial nature. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

In the present case, the trial court did not give carte blanche acceptance to the photographs. Rather, the court considered the photographs and excluded all but three. The witness testifying as to the three photographs in issue stated that the photographs would help him to describe the victims' injuries and how they died. He testified that the photographs helped show the severity of the collision. The witness testified that the photographs would much better depict the nature of the victims' deaths than he could describe. The trial court did not abuse its discretion in admitting the photographs.

As his third point for reversal, appellant argues that the judgment should be reversed because the trial court denied his motion for a mistrial. His motion was based on the fact that spectators who were sitting near the front of the courtroom were wearing badges with the photograph of one of the victims on them. According to appellant's attorney's statement to the trial court,

these people were coming and going often. It is appellant's position that these individuals prejudiced the jury.

After the selection of eight jurors and during the noon recess before finishing voir dire, appellant's attorney addressed the trial court, stating that it was brought to his attention during the middle of his voir dire that there were people in the front row of the audience who were wearing badges with a picture of one of the victims on them. From the discussion of the lawyers and the judge, it appears that the badges were approximately four inches in diameter, but contained writing as well as the photograph, so that the photograph was about the size of a driver's license picture. Appellant's attorney asserted that the people with the badges had continually walked back and forth in the courtroom and periodically left and come back, thus drawing attention to themselves and their grief. Appellant's attorney stated that this was very prejudicial and requested a mistrial. The trial court denied the motion for mistrial, stating that appellant had had no objection to the trial court deferring action until the first break. The trial court noted that the prosecutor had advised the people during lunch to take the badges off. The trial court also noted that it had seen only two people get up and leave from the front row. The court did not think that the jury had been prejudiced, but stated that appellant's attorney could inquire of the panel to determine if they had been. The abstract does not contain any questioning of the jury panel by appellant's attorney as to this matter.

[redacted] The granting of a mistrial is a drastic remedy. *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996). A trial court should only resort to mistrial when there "has been an error so prejudicial that justice cannot be served by continuing the trial." *Id.* at 204, 926 S.W.2d at 837. The determination of whether to grant a motion for mistrial is a matter within the trial court's sound discretion, and a denial of a motion for mistrial will not be reversed absent an abuse of that discretion. *Johnson, supra.* In the present case, it has not been demonstrated that the jury saw the badges being worn by some spectators or, if they did, that this affected their ability to be fair jurors. Also, it is not clear that the jury members, if they saw that some people were wearing badges, could tell what was on them. Appellant did not question the

panel with regard to whether they saw the buttons and could tell what they were and whether this would influence their ability to sit fairly on the jury. Appellant has not demonstrated prejudice, as is necessary in order for this court to reverse, *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied* 470 U.S. 1985 (1985), and has failed to demonstrate that the trial court abused its discretion in denying his motion for mistrial.

Affirmed.

ROGERS and STROUD, JJ., agree.

Michael G. LAY *v.* UNITED PARCEL SERVICE, et al.

CA 96-1349 944 S.W.2d 867

Court of Appeals of Arkansas
Division IV
Opinion delivered June 4, 1997

Dunn, Nutter, Morgan & Shaw, by: *Nelson V. Shaw*, for appellant.

Rieves & Mayton, by: *David S. Wilson, III*, for appellees.

ANDREE LAYTON ROAF, Judge. This is a workers' compensation case. The appellant, Michael G. Lay, worked as a delivery driver for the appellee, United Parcel Service ("UPS"). Lay claimed that he sustained right tennis elbow as a result of repeated lifting of packages and an electronic clip board, and that he further injured the elbow when he attempted to lift an unusually heavy package. On appeal, he asserts that the Commission's decision finding that he failed to prove a compensable injury from either a specific identifiable incident or rapid repetitive motion was not supported by substantial evidence. We affirm.

The evidence in this case and the disposition by the Commission may be summarized as follows. Michael Lay worked for twenty-one years as a delivery driver for UPS. His duties, in addition to driving, included picking up packages weighing up to 150 pounds, and typing a record of his transactions on a one-foot square, two-inch thick, four-to-five-pound electronic clip board called a diad board. Lay claimed that he was required to remove the board from its holder, which was mounted at arm's length on the dashboard of his truck, and replace it, each time he made one of his estimated seventy-five to eighty daily pick-up or delivery stops.

Beginning in December of 1992, Lay began experiencing elbow problems, diagnosed later that month by Dr. Jeffrey DeHaan as "lateral epicondylitis," commonly known as tennis elbow. Dr. DeHaan treated Lay with a cortisone shot. Over the next two years, Lay returned to Dr. DeHaan six times for the same treatment, but Dr. DeHaan's notes indicated the effectiveness of the treatments steadily decreased.

Lay further claims that on January 30, 1995, he attempted to lift a box that weighed considerably more than the seventy pounds or less that was indicated by the lack of a warning label required by UPS on heavy packages. Lay testified that he immediately felt a "pop," followed by elbow pain. Lay claims this injury was witnessed by several fellow-employees and that he immediately reported his injury to a supervisor, Allen Berry.

Lay did not seek immediate medical attention. He claims that he chose instead to endure the pain until his next scheduled appointment to receive a cortisone shot on February 10. When that treatment proved ineffective, he returned to be examined by a Dr. Alkire in the absence of Dr. DeHaan, on February 14. Dr. Alkire performed surgery on Lay's right elbow three days later.

Lay returned to work on April 3, 1995, and worked his regular shift until a week later, when he took a four-day vacation. On April 17, 1995, while unloading computers, he again felt a "pop" and pain in his right elbow. Lay claims he also informed supervisory personnel of this injury. Dr. DeHaan performed a second surgery on Lay's elbow, and Lay returned to work on June 4, 1995.

Lay did not file a Workers' Compensation claim until after the first surgery on February 17, 1995. He ultimately sought temporary, total disability benefits from February 17, 1995, through April 3, 1995, and from April 20, 1995, through June 2, 1995, along with payment of his medical bills and compensation for a five percent disability to the right upper extremity. UPS denied that Lay suffered a job-related injury, and the ALJ found that Lay did not sustain a compensable injury attributable to either a specific identifiable incident or rapid repetitive motion. Lay appealed to the Workers' Compensation Commission, which affirmed the ALJ, and adopted his findings.

Lay argues that the Commission should have found his injury compensable as either a "specific incident" injury, or as a "rapid repetitive motion" injury. We will address each theory in turn.

1. Specific incident

Lay was denied benefits under this theory because the Commission found that the medical evidence was silent as to the causal connection between his elbow problems and a specific traumatic incident as required by Ark. Code Ann. § 11-9-102(5) (Repl. 1996). Lay argues that his own testimony proves the specific time and place of the alleged incident, and that several other UPS employees witnessed the accident. Moreover, he argues that the

medical evidence does not rule out the possibility that he did in fact suffer a traumatic injury on January 30, 1995.

It is well settled that determining the credibility of witnesses and the weight to be given to their testimony is exclusively within the province of the Commission. *James River Corp. v. Walters*, 53 Ark. App. 59, 918 S.W.2d 211 (1996). Moreover, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Jackson v. Circle T. Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995). This court views the evidence and all reasonable inferences deducible therefrom in a light most favorable to the findings of the Commission and affirms that decision if it is supported by substantial evidence. *Broadway v. B.A.S.S.*, 41 Ark. App. 111, 848 S.W.2d 445 (1993).

The Commission's decision finding that Lay failed to prove that his injury was attributable to a specific incident is supported by substantial evidence. As the Commission noted, the medical records that were made part of the record fail to mention Lay's alleged traumatic injury. The records do, however, indicate that the elbow injury was of long standing and gradually increasing severity. Dr. DeHaan's notes for October 6, 1994, Lay's last visit before his purported January 30, 1995, accident, are illustrative:

> Michael is here F/U bilateral tennis elbow. He's having a flare-up of his problems and we once again went through a long dissertation on surgery vs. not surgery. Once again he wished injections in lieu of surgery. We'll do this and I'll see him back here again on a prn basis.

Furthermore, the testimony of the only other witness to appear at the hearing besides Lay, Eddie Magness, the manager of the UPS distribution center where Lay worked, did not support Lay's claim of a traumatic injury. Magness testified that he was not made aware of the alleged injury until after Lay's first surgery on February 14, 1995, but that he had been aware that Lay was experiencing elbow problems for some time prior to the purported January 30, 1995, injury. Additionally, Magness denied that Allen Berry mentioned Lay's alleged accident. Finally, Lay himself testified

that he did not seek medical help for this injury until an already scheduled appointment some eleven days later.

Consequently, there is substantial evidence to support the Commission's finding that Lay did not prove that he sustained a compensable traumatic injury on January 30, 1995.

2. Rapid repetitive motion

Lay also argues that loading and unloading packages, as well as pulling out and replacing the four-to-five pound diad board each time he made one of his seventy-five to eighty pick-up or delivery stops each day, constitutes rapid repetitive motion, and he asserts that Dr. DeHaan's expert medical testimony provides the necessary causal connection to the etiology of his injury.

To find an injury compensable under this theory, a claimant must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his employment; (2) that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) that the injury was caused by rapid repetitive motion; (4) that the injury was a major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(5) (Repl. 1996). Additionally, to be compensable, the injury must be established by medical evidence, supported by "objective findings." Ark. Code Ann. § 11-9-102(5)(D) (Repl. 1996).

In rejecting Lay's claim for benefits, the Commission found that, while he had satisfied the requirements relative to objective medical evidence and "major cause," he had failed to prove that the job he performed was either rapid or repetitive. Further, the Commission relied on their narrow interpretation of what constituted "rapid repetitive motion" stated in their opinion in *Baysinger v. Air Systems, Inc.*, which this court subsequently reversed. 55 Ark. App. 174, 934 S.W.2d 230 (1996).

In *Baysinger*, the Commission found not compensable a welder's carpel tunnel syndrome caused by hammering and grinding metal, because he failed to prove that it was caused by "rapid repetitive motion." In reversing, this court found that the Com-

mission had interpreted Ark. Code Ann. § 11-9-102(5) (Repl. 1996) too narrowly, when it required performance of a single repetitive movement for prolonged periods of time for his injury to be compensable. On remand, this court ordered the Commission to consider Baysinger's multiple tasks together to determine compensability.

We do not find the holding of this court in *Baysinger* to be dispositive of this case. The precise issue addressed by the court in *Baysinger* was whether multiple tasks involving different movements could be considered together to satisfy the repetitive element of "rapid repetitive motion." In Lay's case, the Commission determined that Lay had not proved that his job was *either* rapid or repetitive. Although the multiple tasks Lay performed, involving loading and unloading boxes, and lifting the clipboard may be considered together, as repetitive under the holding in *Baysinger*, the statute further requires that the motions be rapid. Lay asserts that his motions were rapid because he made nearly eighty deliveries per day in a ten-to-eleven-hour shift, an average of one every eight minutes. He does not assert that driving the delivery truck or making the deliveries constituted a part of the rapid repetitive tasks. Rather, he, in essence, claims that he briefly performed several different rapid motions, and that those motions were repeated at differing intervals, during which he was required to drive to various locations, make the deliveries, return to his truck, and drive to the next location.

Although we do not provide a comprehensive definition of what constitutes "rapid repetitive motion," we conclude that the motions as described by Lay, separated by periods of several minutes or more, do not constitute rapid repetitive motion under the meaning of section 11-9-102(5)(A)(ii)(a). Consequently, we cannot say the Commission erred in ruling that Lay had not met his burden of proving that his job involved rapid repetitive motions.

Affirmed.

GRIFFEN, J., agrees.

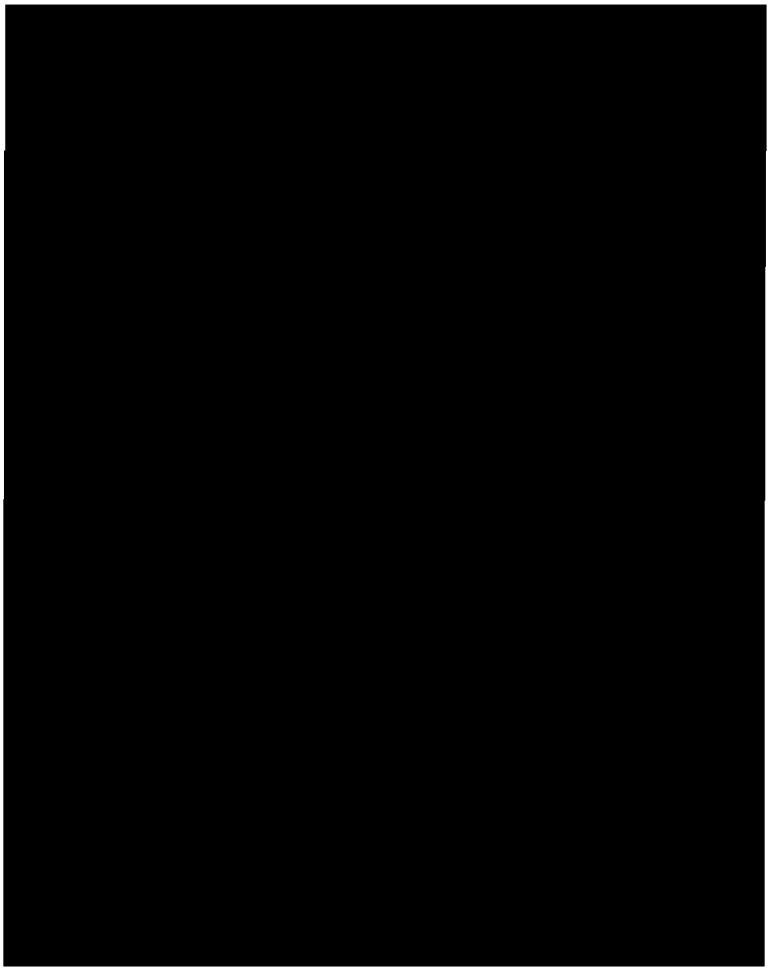
CRABTREE, J., concurs.

Monid B. MEARNS *v.* Joyce C. MEARNS

CA 96-683 946 S.W.2d 188

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 4, 1997

[Petition for rehearing denied July 2, 1997.]



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Shawn Sibley, and *Bonner Law Firm, PA*, by: *Douglas W. Bonner, Jr.*, for appellant.

Dennis C. Sutterfield, for appellee.

ANDREE LAYTON ROAF, Judge. The appellant, Monid Burl Mearns, Jr., appeals from a decree of divorce, raising five points for reversal. Mr. Mearns asserts that the chancellor erred in: 1) setting the amount of child support he was ordered to pay; 2) refusing to award him alimony from the appellee, Joyce Coffman Mearns; 3) refusing to award him seventy-five per cent of the marital property; 4) finding him in contempt for planting a listening device in Mrs. Mearns's telephone; and 5) awarding Mrs. Mearns $8,000 of the $10,000 realized from the sale of the parties' 1961 Corvette. We hold that the chancellor abused his discretion in making the award of child support and in refusing to award alimony to Mr. Mearns, and reverse and remand on those two issues. However, we find no error with respect to the other three points raised by Mr. Mearns and affirm as to those issues.

On October 10, 1994, Monid Burl Mearns, Jr. (Monid), appellant herein, filed suit for divorce from his wife of 20 years, the appellee Joyce Coffman Mearns (Joyce). Monid had been the family's principal breadwinner for the first fifteen years of the marriage. When the Mearnses married, Joyce stopped working to raise the couple's two children. When the children reached school age, Joyce began working part-time.

In 1986, Dow Chemical closed its facility in Russellville where Monid worked on the production line. Rather than relocate to a Dow facility in Texas, Monid chose to remain in Arkansas, purportedly at his wife's behest. He invested all of his Dow retirement, savings, and stock in an auto-parts business. Later, Joyce convinced him that the family should also purchase a chicken farm from her relatives for her to operate.

However, shortly after they purchased the chicken farm in 1989, Joyce received a full-time position with the U.S. Postal Service, and Monid found that he could not operate both the auto parts store and the chicken farm. The Mearnses decided to sell the auto parts business and applied the proceeds to the mortgage debt on the chicken farm. Consequently, in 1989, raising chickens became Monid's full-time occupation. While chicken farming provided some tax advantages, it afforded the family relatively little regular income, so Joyce became the family's primary wage-earner. Monid also began to suffer from back and prostate problems as well as asthma and arthritis.

In 1994, Joyce allegedly left Monid for another man, taking the parties' teenage son with her. The break-up was acrimonious. Monid sold for $10,000 a 1961 Corvette that the Mearnses had hoped would bring as much as $35,000. Monid also apparently planted a listening device in Joyce's telephone. Joyce liquidated certain marital assets, and gassed Monid with pepper spray after ransacking his residence.

In the final decree, the chancellor awarded child support in the amount of $37.50 per week, without making reference to the Arkansas child-support chart or making any other findings of fact; denied Monid's prayer for alimony; divided equally all marital property not specifically apportioned by agreement of the parties; and found that the value of the 1961 Corvette was $16,000 and awarded Joyce $8,000 of the $10,000 sale price. Additionally, the chancellor found Monid in contempt for bugging Joyce's telephone and Joyce in contempt for committing battery upon Monid with pepper spray, and ordered each party to pay the other $500 in attorney fees.

1. Child Support

At the conclusion of the final hearing, Monid moved in open court to have his child support reduced from $37.50 per week, the amount indicated by his original support affidavit dated October 24, 1994, which he had agreed to pay at the initial separation hearing. Monid argues that his income is below the corresponding family support chart amount awarded by the court. He con-

tends that the chancellor should have calculated his child-support obligation from his current support affidavit, dated October 19, 1995, which showed that his net income from all farming activities over the last ten months was a loss of $347.18. Moreover, he contends that his sole source of income was his chicken farm, and the court required him to abandon that endeavor to facilitate the sale of the farm.

Ordinarily, the amount of child support lies within the sound discretion of the chancellor, and the chancellor's findings will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Scroggins v. Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990). While other factors may be considered in determining support, reference to the family support chart is mandatory. *Black v. Black*, 306 Ark. 209, 812 S.W.2d 480 (1991). A chancellor is allowed by statute to deviate from the family support chart, but the chart's presumptions shall be rebutted,

> [o]nly upon a written finding or specific finding in the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart . . . .

Ark. Code Ann. § 9-12-312(a)(2) (Supp. 1995).

Regarding self-employed payors, like Monid, the basis for support:

> shall be calculated based on last year's federal and state income tax returns *and the quarterly estimates for the current year.* Also the court shall consider the amount the payor is capable of earning or a net-worth approach based on property, lifestyle, etc.

In re: Guidelines for Child Support, 314 Ark. 644, 647, 863 S.W.2d 291, 294 (1993) (emphasis added). Clearly, this directive contemplates the continued self-employment of the payor. By ordering the chicken farm sold, the court relieved Monid of the source of income upon which his child support was based; his future income from the farm will be zero. Accordingly, simply assessing the same level of support that was based upon the income from his then viable business misapplies the guidance found in the supreme court's per curiam order. *See Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993).

Although the chancellor's deviation from the family support chart without making appropriate findings of fact constitutes an abuse of discretion, it does not relieve Monid of his obligation to support his child. We therefore reverse and remand the child-support issue to the chancery court to reconsider Monid's future child-support obligation, consistent with the dictates of Ark. Code Ann. §9-12-312(a)(2).

2. *Alimony and Property Settlement*

Although Monid raises as separate issues the chancellor's decision to award him neither alimony nor a disproportionate share of the marital property, because these arguments are related, we discuss them together.

Monid argued that the equities dictated that he should have been awarded both alimony and a larger share of the marital assets, because he needed these provisions to survive. While Joyce disputed Monid's entitlement to alimony and a more advantageous property settlement, she nonetheless conceded that Monid's long work history primarily involved manual labor, and although she claimed that he was a good auto-parts salesman, she nonetheless described his auto-parts store as a failure. Moreover, Joyce verified that Monid indeed had the health problems that he claimed.

While it is true that an award of alimony is not mandatory, and is solely within the chancery court's discretion, *Ducharme v. Ducharme*, 316 Ark. 482, 872 S.W.2d 392 (1994), we can reverse if the chancellor has failed to address the equities involved. *See Stevens v. Stevens*, 271 Ark. 248, 608 S.W.2d 17 (1980). We find that the instant case is just such a situation and is analogous to *Warren v. Warren*, 270 Ark. 163, 603 S.W.2d 472 (Ark. App. 1980), in which we reversed a chancellor's denial of an alimony award to an ex-wife of fifteen years, who lacked special job skills, and did not receive a property settlement that was substantially more than fifty percent of the marital assets.

The primary factors to be considered in the award of alimony are the needs of the spouse requesting alimony and the other's ability to pay. *Mulling v. Mulling*, 323 Ark. 88, 912 S.W.2d 934 (1996). In *Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17

(1980), the supreme court articulated a list of factors that a court may consider determining whether to award alimony. The list includes:

> [1] the financial circumstances of both parties,
>
> [2] the couple's past standard of living,
>
> [3] the value of jointly owned property,
>
> [4] the amount and nature of the income, both current and anticipated, of both husband and wife,
>
> [5] the extent and nature of the resources and assets of each of the parties,
>
> [6] the amount of income of each that is "spendable," available to each of the parties for the payment of living expenses,
>
> [7] the earning ability and capacity of both husband and wife,
>
> [8] property awarded or given to one of the parties, either by the court or the other party,
>
> [9] the disposition made of the homestead or jointly owned property,
>
> [10] the condition of health and medical needs of both husband and wife,
>
> [11] the duration of the marriage,
>
> [12] the amount of child support.
>
> (citations omitted)

Id. 268 Ark. at 124, 594 S.W.2d at 20.

When we apply the *Boyles* factors to the instant case, we are compelled to conclude that the chancellor abused his discretion in failing to make an award of alimony to Monid. The evidence reflects that Monid is unemployed and without independent financial means, while Joyce has a secure job paying more than $40,000 per year, in addition to being the beneficiary of a trust fund set up by her parents. For most of the marriage, the Mearnses lived a comfortable lifestyle, residing in a single family residence and able to afford a variety of cars and trucks. The value of all the parties' property, real and personal, does not appear from

the record to be exceptional, and the proceeds from one of the most valuable assets, the 1961 Corvette, was divided $8,000/ $2,000 in Joyce's favor. As already noted, Monid is unemployed, but more importantly, at age 57 and in declining health, and without a college degree or professional license, it is unlikely that he will find a job that will enable him to approach a standard of living comparable to what he enjoyed during the marriage. Conversely, Joyce has a secure income, and during the pendency of the divorce was able to place a substantial portion of her salary into savings. Moreover, Joyce has retained the main instrumentality that enables her to earn her livelihood, her specially adapted delivery vehicle, while the court ordered the sale of the chicken farm that Monid had been operating. At age 43, Joyce is also apparently in better health than Monid. There is considerable evidence in the record documenting Monid's prostate and back problems, as well as asthma and arthritis, all of which was corroborated by Joyce's testimony. This is also a marriage of long duration: the Mearnses had been married some 20 years at the time they separated.

Because we find that the evidence in this case clearly supports an award of alimony to Monid, we reverse and remand to the chancellor to set an appropriate amount.

With regard to Monid's argument for a greater share of the marital property, alimony and property settlements are complimentary devices that a chancery court must employ to make the dissolution of a marriage of long standing as equitable as possible. *See Boyles v. Boyles, supra*; *see also Tortorich v. Tortorich*, 50 Ark. App. 114, 902 S.W.2d 247 (1995). While we agree with Monid's argument that the same facts and circumstances that would justify an award of alimony would also support an award of a disproportional share of the marital property, our review of the record supports Joyce's contention that virtually all of the marital property was disposed of by agreement of the parties, leaving only her savings accounts and retirement subject to division by the court. We note that the value of these assets apparently do not much exceed $10,000 and therefore, we cannot conclude that, in light of our decision to direct the chancellor to award alimony, giving him a greater than fifty percent share of these assets would

better redress the inequity complained of. We therefore direct the chancellor to look only to alimony to provide for Monid.

3. *Contempt*

Monid argues that there was no basis in law or fact for finding that he violated the temporary order, which enjoined the parties in "any manner from molesting or harassing each other." We disagree. The finding of contempt is a factual finding that will not be reversed unless it is clearly against the preponderance of the evidence. *Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991). A review of the evidence presented at the contempt hearing clearly justifies the chancellor's finding.

An eavesdropping device was found on Joyce's phone by a telephone company employee, after Monid had unmonitored access to the instrument. Monid admitted at the hearing that he had used Joyce's phone after the separation hearing. A transmitter was also found attached to Joyce's phone lines, and Monid admitted that he was familiar with how to record a telephone conversation, and knew where to buy electronic equipment designed for that purpose. William Parks, the constable of Hector, Arkansas, observed Monid sitting in his truck, wearing headphones, within receiving range of the device, which could be received by a standard FM radio, and Monid confirmed that he was at that location on three or four occasions. Finally, Joyce testified that she did not place the device on her own phone, and that she felt "harassed" and frightened by Monid sitting outside her residence. Consequently, we cannot say that the finding of contempt was clearly against the preponderance of the evidence.

4. *Apportionment of the Corvette Proceeds*

In its November 3, 1994, Temporary Order, the chancellor directed Monid to repurchase the 1961 Corvette that he had sold for $10,000 shortly before filing his petition for divorce. The buyer refused to reconvey the automobile, and at the final hearing, the court heard testimony as to its value. In the final decree, the chancellor awarded Joyce half of the value that the court assigned to the car, or $8,000. Monid argues that the sale was proper and

that the chancellor erred in dividing the proceeds disproportionately.

A chancellor has discretion to determine whether an offset is appropriate when parties to a divorce expend marital property during the pendency of proceedings. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993). Among the factors to be considered is whether overreaching occurred. *Id.* The court may even intervene to defeat a fraudulent act by an estranged spouse before a petition for divorce is filed. *See Renn v. Renn*, 207 Ark. 147, 179 S.W.2d 657 (1944). We find that the chancellor properly exercised his discretion in this case.

Monid also argues that the court abused its discretion in qualifying Joyce's expert witness who testified about the value of the Corvette. We find this argument has no merit. Under Rule 702 of the Arkansas Rules of Evidence, the test for admissibility of expert testimony is whether specialized knowledge will aid the trier of fact in understanding the evidence or in determining a fact in issue. *Williams v. Ingram*, 320 Ark. 615, 899 S.W.2d 454 (1995). Whether to allow a witness to give expert testimony rests largely within the sound discretion of the trial court, and that determination will not be reversed absent an abuse of that discretion. *Wade v. Grace*, 321 Ark. 482, 902 S.W.2d 785 (1995). Absolute expertise concerning a particular subject is not required to qualify a witness as an expert. *Dildine v. Clark Equip. Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984).

Joyce's witness, John Rogerson, a serious collector and Corvette enthusiast for twenty-six years, had entered Corvettes that he owned in classic auto shows, was familiar with the market value of older Corvettes, and had actually driven the car in question. We find no abuse of discretion in allowing Mr. Rogerson to offer expert testimony.

Finally, Monid argues that the value set by the court was clearly erroneous. He recounts a number of minor mechanical defects, and points to the testimony of his own expert witness who appraised the value as between $10,000 and $12,000 as support for his contention that the chancellor's finding was clearly against the preponderance of the evidence. We disagree.

[redacted] We will not reverse a chancellor's finding of fact unless the decision was clearly erroneous. *Jones v. Jones, supra.* There is certainly substantial evidence to support the chancellor's finding. Experts for both Monid and Joyce agreed that the value of the Corvette exceeded $10,000, as did Monid himself, when he testified at the separation hearing. Moreover, it was undisputed that the Mearnses had hoped to get as much as $35,000 out of the vehicle when they sold it. Joyce testified that there was over $20,000 invested in the car, not counting the considerable number of hours Monid had spent refurbishing it. Finally, $16,000 was within the range of values stated by expert testimony. We find that the court was not clearly erroneous when it found the value of the Corvette to be $16,000.

Affirmed in part; reversed in part and remanded.

BIRD, GRIFFEN, and NEAL, JJ., agree.

PITTMAN and JENNINGS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I respectfully dissent from that part of the majority opinion that reverses and remands the chancellor's decision regarding the child support and alimony.

Although this court reviews chancery cases *de novo* on the record, we will not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence or clearly erroneous. *Lytle v. Lytle*, 301 Ark. 61, 781 S.W.2d 476 (1989); Ark. R. Civ. P. 52(a). In our review, we are to give deference to the chancellor's superior position in evaluating the witnesses and their testimony. *Lytle, supra.* Because there was conflicting testimony, the chancellor was in the best position to resolve the conflicts, and I am not convinced that his decision is clearly erroneous.

As to the issue of child support, the majority finds that the chancellor made his award without making reference to the child-support chart or making any findings of fact. Then, instead of simply remanding for the court either to refer to the chart or to make findings, the majority first finds error in "assessing the same level of support that was based upon the income from [appellant's] then viable business" because "[b]y ordering the chicken farm sold, the court relieved [appellant] of the source of income

upon which his child support was based." I disagree on both counts.

In October 1994, appellant filed an affidavit of financial means showing his weekly take-home pay to be $159.85. In the ensuing temporary order, appellant's child-support obligation was set at $37.50 per week, the exact amount referenced by the chart for one with appellant's admitted income. One year later, appellant submitted another affidavit, this one reflecting a net loss of $46.56 per week. Appellant testified that the value of chickens and his income from raising them had fallen sharply since his first affidavit. He also testified that he has health problems and is basically unemployable. Clearly, the court was not obligated to accept appellant's second affidavit or to believe appellant's testimony that he had a negative income as a chicken farmer and was otherwise unemployable. Notably, despite appellant's asserted inability to pay, he had been paying the $37.50 in weekly support during the pendency of the divorce action. Obviously, the chancellor believed that there had been no material change in appellant's income since 1994 and simply declined to reduce the amount of child support previously set, which was unmistakably the presumptive amount payable under the chart for appellant's previously admitted income. In my opinion, this satisfies the requirement that the court refer to the chart, and, since there was no deviation, no additional findings were necessary. I find no reversible error in the chancellor's award of child support.

Nevertheless, if the majority feels that it must remand the case for a more specific reference to the chart or for findings, it should do so without commenting on the correctness of the amount set in light of the order that the farm be sold. First, I cannot see that appellant has made any such argument in his brief. To the contrary, as I read his brief, appellant simply argues that the trial court was bound to accept as true his evidence of his present income as a chicken farmer, that the award therefore constituted a deviation from the chart, and that the court failed to make findings to support a deviation. Second, it has been our practice in such cases simply to remand for the chancellor to follow the dictates of the statute requiring reference to the chart or findings to support deviation therefrom. *See Black v. Black*, 306 Ark. 209, 812

S.W.2d 480 (1991); *Fontenot v. Fontenot*, 49 Ark. App. 106, 898 S.W.2d 55 (1995); *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993). Third, to the extent that the majority's comment might imply that the chancellor's award is too high and should be reduced on remand, it overlooks a number of other factors that a chancellor could otherwise consider in making an award, including the amount a payor is capable of earning, *see McJunkins v. Lemons*, 52 Ark. App. 1, 913 S.W.2d 306 (1996), and the sums that a payor is likely to realize from a court-ordered sale of marital assets.

The majority has also found that, based on a disparity in the parties' incomes and "considerable evidence" of appellant's health problems, an alimony award to appellant is required. I disagree. There is very little in the record concerning appellant's purported health problems; most of what does appear consists of appellant's general, nondescriptive, and vague testimony. Moreover, the testimony fails to demonstrate that appellant is unemployable. Appellant testified that he has back problems that hinder his mobility and breathing, that he has prostate problems (consisting of an infection that "comes and goes"), and difficulty with his esophagus. The only medical testimony came from appellant's chiropractor, who stated that appellant has a degenerative and progressive condition in his spine called "ankylosis spondylitis," which restricts his mobility and his ability to stand or walk for extended periods of time. He thought appellant was fifteen percent impaired and that his condition was manageable. The chiropractor opined that appellant would be disabled in approximately ten years and that presently appellant could perform work using his head and hands. Although appellant testified that he was unable to do any physical labor and that he did not know of any job that he was capable of performing, he was a chicken farmer up until the court ordered the farm sold. Also, appellant said that he had not applied for social security disability benefits.

The record reflects that appellant was fifty-six years old at the time of trial, that he had a high school education, and that he had mechanic, carpentry, and welding skills. Appellant also testified that he had experience as an auto-parts salesman. Although appellant may have been required to change employment, I do not believe the record commands an award of alimony on that basis.

Moreover, appellee's latest affidavit of financial means dated October 1995 reflected a weekly take-home pay of $560.00, or an approximate $28,000.00 annual net pay. Appellee's receipt of compensation in excess of this amount was to reimburse her for the personal use of her automobile on her mail carrier route, which she said was about eighty-eight miles each day. Appellee also testified that she was paying the college tuition and expenses for the parties' son. In my opinion, the evidence was such that the chancellor could reasonably have found that the difference in appellee's income and appellant's earning capacity was not significant.

Further, in making its decision concerning alimony, the chancellor may take into account the property awarded to the parties. *Bolan v. Bolan*, 32 Ark. App. 65, 796 S.W.2d 358 (1990). Here, appellant was awarded one-half of the sale proceeds from the marital home, one-half of seven bonds in $500.00 denominations, and one-half of appellee's retirement and savings plan.

It is well established that an award of alimony is left to the sound discretion of the chancellor and his decision will not be reversed absent a clear abuse of discretion. *Bolan, supra.* I cannot say that the chancellor abused his discretion in declining to award alimony to appellant.

I would affirm.

JENNINGS, J., joins in this dissent.

Entron ROLLINS *v.* DIRECTOR, Employment Security Department, and Lamb And Associates, Inc.

E 95-240 945 S.W.2d 410

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 11, 1997

No briefs filed.

OLLY NEAL, Judge. Appellant, Entron Rollins, appeals the decision of the Arkansas Board of Review disqualifying him from receiving unemployment compensation benefits based on a finding that he was discharged for misconduct connected with the work. The issue before us, in this appeal submitted without briefs, is whether the Board's decision is supported by substantial evidence. We hold that it is not and reverse.

Appellant worked for the employer as a machine helper for more than a year. The employer manufactures corrugated containers. On May 9, 1994, appellant entered the break room and found his lunch sitting on a trash can. Appellant asked the cleaning man if he knew who put his lunch on the trash can. The cleaning man kiddingly said he put the lunch there. During the exchange between appellant and the cleaning man, a co-worker, Carl Jones, intervened, telling appellant that the cleaning man did not put the lunch on the trash can and implying that he knew who did. Appellant responded to Jones saying, "I'm not talking to you. This is between [me] and this guy. What are you talking about? You need to shut up." Jones responded, "You make me shut up." Appellant declined and walked out of the breakroom. Jones followed appellant out of the breakroom and according to appellant "got nose to nose, right up in my face." Jones then drew back his arm and it appeared to appellant that appellant was

going to be hit by Jones. Appellant grabbed Jones to avoid being hit. They struggled until the supervisors came and broke them apart. Appellant had started outside to smoke a cigarette, when Jones struck him from behind with a two-by-four. As Jones prepared to hit appellant a second time, appellant ran into him to keep from being hit. They again struggled until the supervisors separated them.

The Board found that the appellant twice retreated from violence with Jones and only fought to the extent necessary and reasonable to protect himself from physical attacks. However, the Board found that appellant's "harsh and provocative" speech led directly to violent events and, as such, constituted misconduct connected with the work.

[redacted] On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. *George's Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). 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.* Our review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

[redacted] Arkansas Code Annotated § 11-10-514(a)(1) (Repl. 1996) provides that an individual shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work. "Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer. *Greenberg v. Director*, 53 Ark. App. 295, 922 S.W.2d 5 (1996). However, as the court explained in *Nibco, Inc. v. Metcalf & Daniels*, 1 Ark. App. 114, 613 S.W.2d 612 (1981):

> To constitute misconduct, however, *the definitions require more than* mere inefficiency, *unsatisfactory conduct*, failure in good performance as the result of inability or incapacity, inadvertancies, *ordinary negligence in isolated instances, or good faith error in judgment or*

> *discretion.* There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design. *Carraro v. Director,* 54 Ark. App. 210, 924 S.W.2d 819 (1996). (Emphasis added.)

Therefore, there is an element of intent associated with a determination of misconduct. *George's, Inc., supra.*

In the present case, the misconduct at issue revolves around the words spoken by the appellant to a co-worker immediately preceding a fight. Appellant was found to have acted in self defense during the scuffle, but the Board of Review found that he was guilty of misconduct by saying what amounted to "stop meddling in my business" and "shut up" to the co-worker, because those words were "harsh and provocative." While it is true that these words may have been spoken in poor judgment, we cannot say that they rise to the level of misconduct as defined by statute and as applied by this court. Even assuming that appellant spoke out of lack of judgment, his actions can not be said to constitute such negligence that they evidence a malicious or willful intent. Furthermore, there was no evidence that appellant had ever engaged in such conduct on any job before this incident; thus, there was no recurrence of poor judgment in this case.

Reversed and remanded for award of benefits.

ROAF, GRIFFEN, JENNINGS, and BIRD, JJ., agree.

PITTMAN, J., dissents.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent from a reversal of the Board's decision because it represents a departure from our standard of review.

The Board found that the employer discharged appellant for a cause that involved appellant's willful disregard of the employer's interests and his willful failure to conform to a standard of behavior that the employer had a right to expect of its employees. Specifically, the Board found that (1) appellant was not without fault in the incidents that led to his discharge; (2) appellant knew that the coworker was apt to cause trouble among employees in the work place; (3) appellant addressed the coworker in a manner that

was both unnecessary and unreasonable; and (4) appellant's words were provocative and led to the events that caused the physical confrontation that resulted in his discharge.

It is for the Board to translate the evidence before it into findings of fact, and it is our function, upon review, only to determine whether those findings are supported by substantial evidence. As noted by the Board, appellant, a long-term employee, knew that the coworker was an individual who meddled in the business of other employees. Thus, the Board reasoned that this was not a case of mere inefficiency or the failure of good performance as the result of inability, but rather a case where the appellant's actions manifested an intentional disregard of his employer's interest, and that appellant should have anticipated the coworker's reaction. The majority's characterization of appellant's words as "spoken in poor judgment" does not take into account the Board's finding that appellant should have known that his comments would provoke a response.

Whether an employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question for the Board of Review to decide. Ark. Code Ann. § 11-10-514(a); *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). I think that the Board's denial of unemployment compensation based on a finding of misconduct is supported by substantial evidence and should be affirmed.

Floyd H. FULKERSON *v.* Waymon L. CALHOUN and Pauline Lindsey Davis Watson

CA 96-1074 946 S.W.2d 714

Court of Appeals of Arkansas
Division III
Opinion delivered June 11, 1997

Wright & Bonds, by: *Edward L. Wright*, for appellant.

Steven D. Durand, for appellees.

TERRY CRABTREE, Judge. Appellant Floyd Fulkerson leased farmland along an oxbow lake on the Arkansas River, described as Willow Beach Island, from appellees Waymon Calhoun and Pauline Watson from roughly 1946 to 1992. In 1973, appellant acquired a deed to property bounding the lease held, known as the Bryson Place, purporting to convey the southern half of section 18, which encompasses the southeastern quarter of Willow Beach Island. In 1992, appellant acquired a deed from the Commissioner of State Lands purporting to convey the northern half of section 18, encompassing the northeastern quarter of the island. This deed was based on an erroneous certification from the Pulaski County Assessor declaring the land tax delinquent. Less than three months later (in violation of the deed confirmation requirements of Ark. Code Ann. § 18-60-607 (1987)), appellant presented the deed from the Land Commissioner to the chancery court seeking to quiet title in the parcel, without naming appellees as interested parties.

Appellant then instituted the present action to quiet title in Willow Beach Island, alleging title in fee simple to the south half of section 18, partly encompassing Willow Beach Island, and naming appellees as interested parties. Appellees counterclaimed to quiet title in Willow Beach Island and to declare the Commissioner's deed invalid.

The chancellor ruled in favor of appellees, citing the erroneous certification of the tax delinquency of the disputed land that was the basis for the Commissioner's deed, the lack of notice and premature confirmation of the Commissioner's deed in chancery court, the appellant's actual notice of appellees' conflicting claims to the property, and appellees' survey and expert testimony estab-

lishing ownership in appellees of all of Willow Beach Island by metes and bounds.

Appellant brings this appeal challenging the chancellor's decree invalidating appellant's deeds and quieting title in appellees.

While both parties to this appeal discussed at length the law of accretions and reliction, we find that neither principle of water law is necessary to an understanding of the chancellor's decree or relevant to the issues appealed. Further, appellant's failure to follow the rules on abstracting the relevant portions of the record prevents us from engaging in a meaningful review of the issues raised on appeal and requires us to affirm for noncompliance with the rule.

Arkansas Supreme Court Rule 4-2(a)(6) discusses what a litigant must present to the court for successful consideration of an appeal. In pertinent part, the rule reads:

> The appellant's abstract or abridgment of the record should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision. *A document, such as a will or contract, may be photocopied and attached as an exhibit to the abstract. However, the document or the necessary portions of the document must be abstracted. Mere notation such as "plaintiff's exhibit no. 4" is not sufficient.* On a second or subsequent appeal, the abstract shall include a condensation of all pertinent portions of the record filed on any prior appeal. Not more than two pages of the record shall in any instance be abstracted without a page reference to the record. In the abstracting of testimony, the first person (i.e., "I") rather than the third person (i.e., "He, She") shall be used. The Clerk will refuse to accept a brief if the testimony is not abstracted in the first person or if the abstract does not contain the required references to the record. In the abstracting of depositions taken on interrogatories, requests for admissions, and the responses thereto, and interrogatories to parties and the responses thereto, the abstract of each answer must immediately follow the abstract of the question. *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*

> *attach it to the copies of the abstract filed in the Court and served upon the opposing counsel,* unless this requirement is shown to be impracticable and is waived by the Court upon motion.

Ark. R. Sup. Ct. 4-2(a)(6) (Emphasis added.)

In this deed dispute, the chancellor's decision and the arguments of both appellant and appellees are fraught with references to plats, sections, deeds, leases, accretions, metes and bounds, surveys, and maps. It is readily apparent that these supporting documents are the basis for the appellant's claims, appellees' counterclaim, and the chancellor's ruling. However, appellant failed to abstract or photocopy and attach in exhibit form the necessary documents. Without an abstract of these supporting documents, it is impossible for this court to engage in a meaningful review of the merits of the appeal. In a complex and contentious dispute challenging the validity of deeds, an abstract of only the complaint, counterclaim, decree, and limited testimony is flagrantly deficient when considered against all the underlying documents necessary to a full understanding of the issues that are absent from the abstract.

When an exhibit is necessary to an understanding of the testimony about an issue, but is not included in the abstract, the issue is summarily affirmed. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993). Here, the unabstracted results of competing surveys and maps derived from those surveys are essential to an understanding of the testimony.

Further, where the crucial document necessary for an understanding of one argument was not abstracted, the supreme court held that it amounted to a gross violation of the rule. *Haynes v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993). In the present case, the disputed deeds are not even abstracted or attached in exhibit form for the court to consider.

Finally, where the appellant has failed to abstract exhibits to his complaint, the supreme court has affirmed for noncompliance with the rule. *Chrysler Credit Corp. v. Scanlon*, 319 Ark. 758, 894 S.W.2d 885 (1995). Appellant's complaint in the present case was accompanied by an unabstracted exhibit, and appellee's counterclaim included several unabstracted exhibits. Read with-

out these supporting documents, both pleadings are rendered largely meaningless to the court on appeal. Based on these flagrant deficiencies and pursuant to Ark. R. Sup. Ct. 4-2(b)(2), we affirm for noncompliance with the Rule.

However, based on the limited information in the abstract, we would also affirm the chancellor's decision on the merits. First, the chancellor heard expert testimony regarding the metes and bounds descriptions of the appellees' estates occupying the entire Willow Beach Island. Further, appellant's longstanding lease of the disputed property and his admission to the U.S. Agricultural Soil Conservation Service of ownership of the island in appellees for crop subsidy purposes makes a subsequent claim of ownership in the disputed land a far-fetched proposition. Also, appellees' chain of title, based on what little information was properly before this court to review, was far superior to appellant's questionable claims based on subsequently voided deeds. Finally, the defects in the tax deed secured from the Commissioner of State Lands are fatal to any claim appellant had to the disputed land. Specifically, the fact that the parcel was erroneously certified as tax delinquent by the county assessor and the fact that the deed-confirmation proceeding before the chancery court took place without notice to appellees and before the statutorily prescribed two-year period for the right of redemption for tax deeds, *see* Ark. Code Ann. § 18-60-607 (1987), both cast grave doubt on the validity of appellant's deed and support the chancellor's judgment for appellees.

Based on these facts adduced from the briefs and oral arguments, we would affirm this case on the merits even if the flagrantly deficient abstract did not require us to affirm for noncompliance with Rule 4-2.

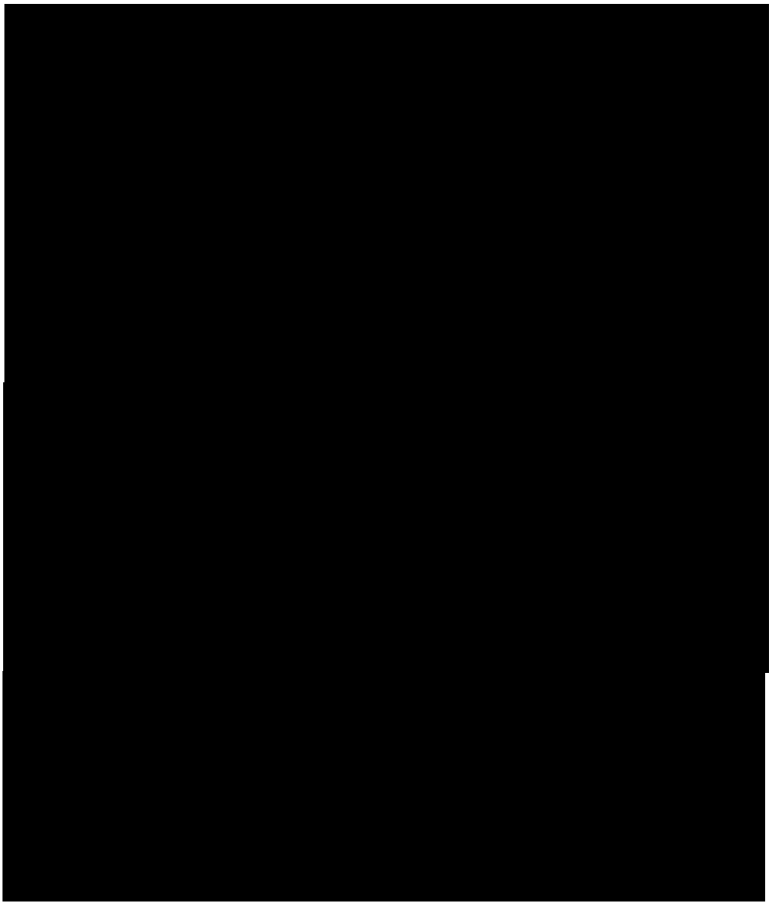
Affirmed.

PITTMAN and MEADS, JJ., agree.

Lavenia McGUIRE and Roderick McGuire *v.* Edith SMITH, Personal Representative of the Estate of George McGuire

CA 96-340 946 S.W.2d 717

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 11, 1997



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John David Myers, for appellants.

The Cortinez Law Firm, P.A., by: *Robert S. Tschiemer*, for appellee.

TERRY CRABTREE, Judge. Appellants Lavenia and Roderick McGuire, mother and son, appeal the order of the probate court denying their motion to set aside the court's order approving settlement of a wrongful-death claim and authorizing

attorney's fees in the amount of thirty percent of the settlement amount. Finding no error, we affirm.

George McGuire died intestate on October 21, 1992. Appellee Edith Smith filed a petition for appointment as administratrix of the estate on June 17, 1993. The probate court appointed appellee administratrix of the decedent's estate. Appellants Lavenia McGuire and Roderick McGuire, as widow and son of the deceased, contested the appointment, stating that they had not received notice of the petition and that appellee was not a daughter of the deceased. Appellants requested, in part, that appellee be removed as administratrix. Appellee responded that she was the daughter of the deceased and that, even if she were not, she was qualified to serve as personal representative. Appellants filed an amended motion asserting that appellee apparently was contending that she was an illegitimate daughter of the deceased and that if appellee was an illegitimate child of the deceased, her claim of inheritance was barred by Ark. Code Ann. § 28-9-209(d) (1987). Appellants also requested that no attorneys' fees, costs, or expenses attributable to establishing appellee's claim be taken from the assets of the estate. On January 5, 1994, the probate court entered an order striking appellee and another illegitimate sister from being characterized as, or having the status of, heirs at law of the decedent.

On January 7, 1994, appellee filed a petition for authorization to settle the wrongful-death claim of the decedent. The petition stated that the decedent had died as a result of a collision with a car driven by a North Little Rock police officer. The petition stated that North Little Rock had minimum liability coverage of $25,000 and that North Little Rock offered appellee $25,000 to settle any claim. The petition further stated that the decedent had automobile liability insurance with State Farm Insurance Company that afforded underinsured coverage of $25,000. Appellee sought to settle the claims for $50,000, with her attorney's fee being thirty percent of the recovery. The probate court entered an order authorizing the settlement on January 28, 1994.

On August 11, 1994, appellants filed a motion to set aside the order approving the compromise, asserting that they had not been

served with the petition and had only learned of the petition and order granting it five and one-half months after the fact, while reviewing the court file. Appellants asserted that they were entitled under the Arkansas Rules of Civil Procedure to be served with a copy of the petition. They alleged that, had they been served, they would have opposed the petition, particularly the distribution of nearly one-third of the recovery to appellee's attorney. Appellants asserted that their attorney had been offered policy limits by the insurance companies and that appellee's attorney sought and collected $15,000 for telling the insurers where to send the check. Appellants asked the probate court to set aside the order authorizing settlement and require appellee's attorney to return the $15,000 to the estate.

Appellee responded that the motion to set aside the order was untimely and that appellants did not allege or prove any grounds that would authorize setting the order aside pursuant to Ark. R. Civ. P. 60. Appellee further contended that appellants had no standing to contest the order authorizing settlement, as the personal representative is the one authorized to compromise a claim. Appellee also asserted that appellants were not entitled to notice. Appellants amended their motion to set aside the order to state that by failing to include a certificate of service on the petition and by not serving the petition on appellants, appellee had perpetrated fraud on the court.

After hearing arguments, the probate court denied the motion to set aside the order. The court found that failure to serve appellants with the petition for authorization did not constitute fraud that would allow the court to set aside the order after the expiration of ninety days, because a personal representative is not required to give notice of such a petition. The court cited Ark. Code Ann. § § 28-49-104 (1987) and 16-62-102 (Supp. 1995) and *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961), as authority supporting her ruling.

Appellants argue on appeal that the trial court erred in failing to set aside its order approving settlement. Appellants assert that appellee was required to serve them with the petition to settle the wrongful-death claim of the decedent, George McGuire. It is

appellants' position that the failure of appellee to serve them with notice constituted fraud, thus allowing the probate court to set aside the order approving the settlement more than sixty days after it was entered. Appellants argue that without notice to the beneficiaries, there could be no input as to what the best interests of the beneficiaries were and that the trial court did not have sufficient facts upon which to base an opinion that the settlement was in their best interest. Appellants rely on Rules 1 and 5 of the Arkansas Rules of Civil Procedure in arguing that they were entitled to notice.

Appellee responds that appellants' motion to set aside the order approving the settlement was untimely filed pursuant to Ark. R. Civ. P. 60. Appellee asserts that appellants were not entitled to be served with the petition to settle the claim and that, therefore, there could be no fraud based on not serving them with the petition. Appellee states that the wrongful-death claim is not an asset of the estate, and therefore, it is understandable that it would not be necessary to give the heirs notice of any settlement of the wrongful-death claim.

Pursuant to Rule 60(b) of the Arkansas Rules of Civil Procedure, a court may modify or set aside an order to correct any error or mistake or to prevent the miscarriage of justice, upon motion of any party or the court, within ninety days of the order having been filed with the clerk. Appellants' motion to set aside the order approving the settlement was filed long after the expiration of ninety days. However, after the expiration of ninety days, a court may vacate or modify a judgment or order upon certain, enumerated bases. Ark. R. Civ. P. 60(c). Appellants moved the court to set aside the order on the basis that appellee had practiced fraud on the court in obtaining the judgment pursuant to Ark. R. Civ. P. 60(c)(4).

In *First National Bank v. Higginbotham*, 36 Ark. App. 65, 818 S.W.2d 583 (1991), the supreme court explained Rule 60(c)(4):

> The fraud for which a decree will be canceled must consist in its procurement and not merely in the original cause of action. *Alexander v. Alexander*, 217 Ark. 230, 229 S.W.2d 234 (1950). It is

> not sufficient to show that the court reached its conclusion upon false or incompetent evidence, or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, an issue in the proceeding before the court which resulted in the decree assailed. *Id.* Even though the fraud that vitiates a judgment may be constructive rather than actual, constructive fraud is nonetheless a species of wrongdoing. *Ark. State Hwy. Comm'n. v. Clemmons*, 244 Ark. 1124, 428 S.W.2d 280 (1968). Constructive fraud is defined as a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others. Neither actual dishonesty nor intent to deceive is an essential element. *See RLI Ins. Co. v. Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991). The party seeking to set aside the judgment has the burden of showing that the judgment was obtained by fraud, *see Karam v. Halk*, 260 Ark. 36, 537 S.W.2d 797 (1976), and the charge of fraud must be sustained by clear, strong, and satisfactory proof. *Ark. State Hwy. Comm'n. v. Clemmons, supra.*

Id. at 69, 818 S.W.2d at 585.

[redacted] In the present case, appellee did not practice fraud in order to obtain the order granting authority to settle the wrongful-death claim. It is undisputed that the petition for authorization to settle the wrongful-death claim did not contain a certificate of service representing to the trial court that the petition had been served upon appellants. This being so, failure to serve appellants cannot constitute fraud. There is no evidence that appellee represented to appellants that she would serve them with a copy of the pleadings if she petitioned the court to approve settlement. Nor is there evidence that appellee represented to the court that she had served appellants with the petition. This is simply a situation in which appellee petitioned the court for authority to settle the wrongful-death claim and did not serve appellants with the petition. The court then made its decision. The fact that the court may have reached a decision that appellants consider to be erroneous is not grounds to set aside an order after ninety days from the date of filing has expired. *Smart v. Biggs*, 26 Ark. App. 141, 760 S.W.2d 882 (1988). There is no evidence in this case that

the order was obtained through fraud, and the trial court properly refused to set aside its order approving the compromise of the wrongful-death claim pursuant to Rule 60(c)(4).

Furthermore, applying statutory and case law, appellee was not required to serve appellants with notice of her petition to settle the lawsuit. Appellants rely on Rules 1 and 5 of the Arkansas Rules of Civil Procedure in arguing that they were entitled to be served with the petition to authorize settlement. Rule 1 of the Arkansas Rules of Civil Procedure provides that the rules shall govern the procedure in circuit, chancery, and probate courts in all actions of a civil nature with the exceptions stated in Rule 81. Rule 81 provides that the rules apply to all civil actions, "except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply." Rule 5 of the Arkansas Rules of Civil Procedure provides in part:

> Except as otherwise provided in these rules, every pleading and every other paper, including all written communications with the court, filed subsequent to the complaint, except one which may be heard ex parte, shall be served upon each of the parties, unless the court orders otherwise because of numerous parties.

Rules 1 and 5 of the Arkansas Rules of Civil Procedure are not controlling in this matter.

Applying Ark. Code Ann. §§ 16-62-102 (Supp. 1995) and 28-49-104 (1987) and the case of *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961), appellants were not entitled to notice. Section 16-62-102, entitled "Wrongful death actions — Survival," provides in pertinent part:

> (b) Every action shall be brought by and in the name of the personal representative of the deceased person. If there is no personal representative, then the action shall be brought by heirs at law of the deceased person.
>
> . . .
>
> (d) The beneficiaries of the action created in this section are the surviving spouse, children, father and mother, brothers and sisters of the deceased person, persons standing in loco parentis to the deceased person, and persons to whom the deceased stood in loco parentis.

> (e) No part of any recovery referred to in this section shall be subject to the debts of the deceased or become, in any way, a part of the assets of the estate of the deceased person.
>
> . . .
>
> (g) The judge of the court in which the claim or cause of action for wrongful death is tried or is submitted for approval of a compromise settlement, by judgment or order and upon the evidence presented at trial or in connection with any submission for approval of a compromise settlement, shall fix the share of each beneficiary, and distribution shall be made accordingly. However, in any action for distribution shall be made accordingly. . . .
> (h) Nothing in this section shall limit or affect the right of probate courts having jurisdiction to approve or authorize settlement of claims or causes of action for wrongful death, but the probate courts shall consider the best interests of all the beneficiaries under this section and not merely the best interest of the widow and next of kin as now provided by § 28-49-104.

Ark. Code Ann. § 16-62-102(b), (d), (e), (g), and (h) (Supp. 1995). Section 28-49-104 of the Arkansas Code Annotated provides in material part:

> (a) When it appears to be for the best interest of the estate or in the case of an action for wrongful death or for the best interest of the estate or widow or next of kin, the personal representative, upon the authorization of or approval by the court, may effect a compromise settlement of any claim, debt, or obligation due or owing to the estate, whether arising in contract or tort, or he may extend, renew, or in any manner modify the terms of any obligation owing to the estate.

Ark. Code Ann. § 28-49-104(a) (1987).

[redacted] In *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961), the Arkansas Supreme Court addressed the appellant's argument that the trial court erred in holding that he had received notice of the settlement of a wrongful-death action. The appellant was the decedent's son, who appeared through his grandmother. The appellee was the decedent's widow, who was the administratrix of the estate, and who, as the administratrix, had filed an action for wrongful death and settled it. The appellant challenged the appellee's use of part of the settlement proceeds to pay debts of the estate. The supreme court rejected the appellant's

argument that the trial court erred in determining that he had been given notice of the administratrix's actions, simply stating:

> The probate court did find that the "exceptor had notice through counsel of steps taken by the administratrix" and it appears from the record that the matter of the settlement of the death claim was discussed informally between counsel. We do not think the matter of notice was important. In *Reed, et al v. Blevins, et al*, 222 Ark. 202, 258 S.W.2d 564, this court said:
>
> > "Under the foregoing Statute [Act 53 of 1883 which is similar to the one in question here] we have always held that when a personal representative was appointed, such personal representative was the only person who could maintain a suit for damages for wrongful death * * *" and in *Southwestern Gas & Electric Company v. Godfrey*, 178 Ark. 103, 10 S.W.2d 894, it was said that joining of party plaintiffs other than the personal representatives was error, though not prejudicial.

Id. at 851-52, 349 S.W.2d at 340. Applying this language from *Dukes* to the present case, it is apparent that appellee, as the personal representative, was the only person who could pursue the action for wrongful death, and appellants were not entitled to notice of the petition for authority to settle the claim.

The court in *Dukes* went on to address the appellant's argument that the trial court erred in holding that the amount recovered in the wrongful-death claim should be applied to the debts of the estate. The court held that this was error, because:

> "The damages are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. * * * The administrator is the formal party to the maintenance of the action, and becomes a mere trustee for those entitled under the statute to the amount recovered."
>
> It therefore becomes evident that the administratrix has but one relationship to the recovery for a wrongful death and that is as a trustee of conduit and beyond that status, in these circumstances, she may not go.

Id. at 853, 349 S.W.2d at 341 (quoting in part *Adams v. Shell*, 182 Ark. 959, 961, 33 S.W.2d 1107, 1108 (1931)). *Dukes* supports appellee's position that she was not required to serve appellants

with her petition for authority to settle the wrongful-death claim. Appellee is the personal representative in this case and, thus, the only one authorized to pursue the wrongful-death claim. Additionally, the damages recovered from the settlement of the wrongful-death claim did not become assets of the estate.

In *Cude v. Cude*, 286 Ark. 383, 691 S.W.2d 866 (1985), the Arkansas Supreme Court explained that the personal representative of the decedent, not the beneficiaries, has the right to pursue a wrongful-death action and to choose an attorney for that purpose. In *Cude*, the appellant, who was the decedent's widow, sought to have the administrator of the estate removed for unsuitability. The appellant contended that the administrator had made misrepresentations and had a conflict of interest. The administrator had asked two attorneys to pursue a wrongful-death claim and did not notify the appellant concerning the arrangement. The appellant hired her own attorneys to pursue a wrongful-death action on behalf of herself and her daughter. The supreme court noted that the appellant failed to understand that such an action can only be pursued by the administrator. The court explained:

> We are cited to no authority showing that Burrel had a duty to consult with Angelia about his pursuit of a wrongful death action. The personal representative of the decedent, in this case the administrator, is clearly the party to bring the action. Ark. Stat. Ann. 27-907 (Supp. 1983). While the widow and daughter of the deceased are beneficiaries of any wrongful death recovery, Ark. Stat. Ann. 27-908 (Repl. 1979), we are cited to no case or statute giving them standing as parties to the action. Therefore, it was not they, but Burrel, whose duty and right it was to pursue the action, subject to the probate court's approval, and to choose Counsel for that purpose.

Id. at 385-86, 691 S.W.2d at 867. In concluding, the court pointed out that the appellant could have counsel to see that her interests are protected, but that she would not be a party to the suit. Applying *Cude* to the present case, appellants would not be parties to any wrongful-death action. Appellee is the only one with the duty and right to file an action or settle the claim and to choose counsel for that purpose. It follows that appellants are not

entitled to notice of the petition for authorization to settle the claim.

The court in *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990), cited both *Dukes* and *Cude* in rejecting the appellant's argument that counsel retained by her, as a beneficiary, were entitled to fees on a portion of the wrongful-death proceeds attributable to the beneficiary. The court stated that, pursuant to Ark. Code Ann. § 16-62-102(b), every wrongful-death action shall be brought by the personal representative of the deceased person, if there is a personal representative. The court explained that the wrongful-death provisions do not create an individual right in a beneficiary to bring suit. The court further explained:

> It is the duty of the personal representative, not the beneficiaries, to choose counsel to pursue a wrongful death claim pursuant to our wrongful death code provisions.

Id. at 362, 784 S.W.2d at 158 (citing *Cude*, *supra*). Thus, in the present case, it was appellee's right and duty to choose counsel to pursue the wrongful-death claims and to decide how to contract with the counsel concerning his fee.

While this court does not approve of or encourage the practice of not serving the beneficiaries with notice of a petition for authority to settle a wrongful-death claim, the probate court did not err in denying the motion to set aside the order approving settlement and authorizing payment of thirty percent of the recovery to appellee's attorney. The probate court correctly found that appellee did not perpetrate fraud on the court in obtaining the order. We affirm.

PITTMAN, STROUD, and MEADS, JJ., agree.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I concur in the decision of the court. However, I write separately to point out that the probate judge had the authority to reconsider the award of attorney's fees, but on a ground not argued by the appellants below or in their brief in this court.

The appellants in this case have sought to set aside that portion of an order previously entered by the probate court authorizing the payment of an attorney's fee, based on a claim that the amount of the fee was excessive. In the Probate Code, the subject of attorney's fees is covered by Ark. Code Ann. § 28-48-108 (1987), which provides in pertinent part:

> A personal representative, upon election, may fix . . . the fees of the attorneys of the estate . . . without prior approval of the court, but the reasonableness of the compensation of any person so employed . . ., either on petition of any interested person, on petition of the personal representative, or on the court's own initiative, shall be reviewed by the court. Any person who has received excessive compensation from the estate for services rendered may be ordered to make appropriate refunds.

This statute plainly suggests that the compensation of attorneys retained by the personal representative is subject to scrutiny by the probate court. Indeed, a probate court has the discretion to fix the amount of attorney's fees in accordance with the value of the services rendered. *Nabers v. Estate of Setser*, 310 Ark. 194, 833 S.W.2d 375 (1992). And, an administrator has no right to make a contract for legal services that is binding on the court. *Black v. Thompson*, 237 Ark. 304, 372 S.W.2d 593 (1963).

Although the case has been presented to this court as being one controlled by Rule 60 of the Rules of Civil Procedure, the authority of a probate court to set aside a previous order is not limited by that rule. Arkansas Code Annotated § 28-1-115(a) (1987) provides that, for good cause, a probate court may vacate or modify an order, or grant rehearing, at any time before the time for appeal has elapsed after the final termination of the estate. It has been said that this statute is designed to afford a probate court greater flexibility with regard to the finality of its orders. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975). We have recognized that a probate court has the authority to vacate, modify, or reconsider its orders for "good cause" pursuant to the statute, notwithstanding the provisions of Rule 60. *White v. Toney*, 37 Ark. App. 36, 823 S.W.2d 921 (1992).

Based then on Ark. Code Ann. § 28-1-115, the probate court had the authority to reconsider the fee award under the

"good cause" standard enunciated in the statute. A finding of fraud under Rule 60 was simply not necessary to justify reconsideration of the order. Although the specter of Rule 60 was interjected by appellee, appellants never argued to the probate court that it had the power to revisit the issue pursuant to this statute, and the matter was tried as if the order could only be set aside under Rule 60. Moreover, appellants have made no argument in this appeal based on Ark. Code Ann. § 28-1-115. Under these circumstances, we cannot rest our decision upon the statute. It is a familiar rule of practice that an appellate court does not reverse on a ground not argued by the appellant, even when the record is subject to *de novo* review on appeal. *See Cummings v. Boyles*, 242 Ark. 923, 415 S.W.2d 571 (1967). Consequently, I must agree to affirm.

Paul FRETTE *v.* STATE of Arkansas

CA CR 96-477 947 S.W.2d 15

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 18, 1997

Kenneth Osborne, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Paul Frette was charged with violating Ark. Code Ann. § 27-23-113 (Supp. 1993), which prohibits a person from operating or being in physical control of a commercial motor vehicle while having alcohol in his system. His pretrial motion to suppress evidence obtained as a result of his arrest was denied. Pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure, he entered a conditional guilty plea to the charge, reserving the right to appeal the denial of his motion to suppress. He was fined $250.00, plus costs, and his driver's license was suspended for 120 days. Our review of the record requires us to conclude that his motion to suppress should have been granted; therefore, we reverse to permit appellant to withdraw his guilty plea as provided for in Rule 24.3(b).

Appellant was arrested on June 15, 1995, based on information provided by a tip called in to the dispatch office of the Springdale Police Department by a person identifying himself as Jerry Smith, a truck driver from Jonesboro, Georgia. Smith reported that he had seen an older man drinking beer while seated behind the wheel in the cab of a red tractor-trailer that was parked in a commercial truck parking lot behind the McDonald's restaurant. Based solely upon the information provided by the dispatch office, an officer was sent to the location to investigate and found appellant seated in the driver's position in the parked truck. The officer approached the driver's side of the truck and ordered appellant to get out. When appellant exited his vehicle, the officer noted an odor of intoxicants and observed appellant's poor balance. The officer ordered appellant to perform field sobriety tests. When appellant failed all of the officer's field sobriety tests, he was placed under arrest and transported to the Springdale Police Department for booking where he made incriminatory statements and regis-

tered .08 on a breathalyzer test. Appellant contends that prior to the stop, the officer observed nothing that would indicate wrongful activity on appellant's part and that the trial court erred in denying his motion to suppress because the arresting officer lacked reasonable suspicion to stop him. The trial court found that appellant was lawfully stopped and detained and denied appellant's motion to suppress evidence as a result of the stop.

Arkansas Rule of Criminal Procedure 3.1 provides that a law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit a felony, or misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. "Reasonable suspicion" is defined under Rule 2.1 as "suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion."

[redacted] Justification for an investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity. *United States v. Cortez*, 449 U.S. 411 (1981); *Terry v. Ohio*, 392 U.S. 1 (1967); *Johnson v. State*, 319 Ark. 78, 889 S.W.2d 764 (1994); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, *cert. denied* 459 U.S. 882 (1982). The reliability of an informant reporting possible criminal activity may be shown by police observations that tend to corroborate the information provided. *Alabama v. White*, 496 U.S. 325 (1990); *Bliss v. State*, 33 Ark. App. 121, 802 S.W.2d 479 (1991). However, an accurate description of a particular vehicle, standing alone, does not establish an informant's reliability, *see Kaiser v. State*, 296 Ark. 125, 752 S.W.2d 271 (1988), and the mere fact that a caller identifies himself in no way establishes his trustworthiness, *see Evans v. State*, 33 Ark. App. 184, 804 S.W.2d 730 (1991).

The informant in the present case was a person unknown to and unseen by law enforcement officers, who had not previously provided information to them, and was not otherwise established to be reliable. *Cf. Adams v. Williams*, 407 U.S. 143, 146-47 (1972) (informant known to police officer personally provided information to officer that was immediately verifiable at the scene; ". . .informant might have been subject to immediate arrest for making a false complaint had [police officer's] investigation proved the tip incorrect"); *Brooks v. State*, 40 Ark. App. 208, 212, 845 S.W.2d 530 (1993) (citizen informant, not previously known to police officer, came forward and personally provided to officer information ". . .relating criminal activity that he had observed [and] supplied the officer with the description of the vehicle, its occupants and its license number"; prior to stop of vehicle, police officer verified informant's description of vehicle, its license number, and number of occupants). Here, the information given by the informant was limited to a description of a vehicle, its location, and that it was occupied by an elderly man seen drinking.

In reviewing a trial court's denial of a motion to suppress evidence, we make an independent determination based on the totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Phillips v. State*, 53 Ark. App. 36, 918 S.W.2d 721 (1996). We hold that appellant's motion to suppress should have been granted. *Kaiser v. State; supra*; *Evans v. State, supra*. This does not mean that police must verify the reliability of an informant before conducting an investigation based on the information provided by the informant, as the information may be a "catapult to launch" an investigation. *Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989). Upon police investigation and independent verification of the information provided, reasonable suspicion may be established. *Id.* However, conspicuously absent from the case before us is any police investigation or reasonable suspicion before the officer made an investigatory seizure.

The State argues that the officer acted under the authority of Ark. R. Crim. P. 2.2 which permits a law enforcement officer to request a person to furnish information in investigation of a crime; and that there was not a "seizure" by the officer approaching the

vehicle to question appellant. The State relies on *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990), in which the Arkansas Supreme Court found that it was not a seizure under the Fourth Amendment for a police officer to approach a car parked in a public place to determine whether there was anything wrong. However, the court in *Thompson* held that there was not a seizure, noting that there was no evidence that the officer restrained the defendant's liberty by means of physical force or a show of authority, as the officer did not order the defendant out of his vehicle until after the officer noticed an odor of alcohol and had reasonable suspicion. The present case, however, is distinguishable from *Thompson* because here the officer ordered appellant out of his truck before making any investigation or establishing reasonable suspicion. Only after appellant stepped from his truck did the officer first smell intoxicants and observe poor balance sufficient to have reasonable suspicion.

[redacted] Whether a person has been seized within the meaning of the Fourth Amendment depends on whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Phillips v. State, supra.* A "seizure" occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *Thompson v. State, supra*; *Cf. Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997). We conclude that a "seizure" occurred in this case by the officer ordering appellant to step from his vehicle, so that this was an investigatory stop under Rule 3.1, and not a Rule 2.2 request for information. *Thompson v. State, supra*; *see Phillips v. State, supra*; *accord Popple v. State*, 626 So.2d 185, 187 (Fla. 1993) (police officer approached defendant, who was seated in vehicle, in order to request information; defendant seized when officer directed defendant to exit vehicle).

The dissenting opinion maintains that this seizure of appellant was reasonable under the circumstances for reasons having to do with officer safety. This analysis is flawed for two reasons. In the first place, the informant did not provide any information to the Springdale Police Department that would give rise to a reasonable suspicion that the appellant was armed with a weapon of some sort or was otherwise presently dangerous to the officer. *Cf.*

Adams, 407 U.S. at 145 (informant told police officer that suspect "had a gun at his waist"). It is true, as the dissenting opinion points out, that when the officer initially approached appellant, he was seated in the cab of an eighteen-wheel tractor-trailer truck. According to the dissenting opinion, this situation posed a danger to the officer's safety and, therefore, provided the legal basis for the officer's seizure of appellant by ordering him to get out of the cab of the tractor-trailer truck. This is the second flaw in the dissent's analysis — it is applicable in every "officer approaches car" case. Every time a police officer approaches an individual seated on the driver's side of a parked vehicle of any size, the officer can always truthfully state that he was concerned for his safety in that the individual could try to run over him or could produce a firearm or other weapon from the interior of the passenger compartment of the vehicle. Police officers can order the driver of a vehicle and any passengers to exit the vehicle; however, a police officer may do so only after having validly stopped the vehicle. *See Maryland v. Wilson*, 117 S.Ct. 882 (1997).

Appellant finally contends that the facts to which he stipulated and the facts recited by the prosecuting attorney were insufficient to support the charge against him and that the trial court erred in accepting his guilty plea. We do not address these issues as they are not properly before this court. When one pleads guilty pursuant to Rule 24.3(b), the only claim cognizable on direct appeal is a challenge to the denial of a pretrial motion to suppress illegally obtained evidence. *See Scalco v. City of Russellville*, 318 Ark. 65, 883 S.W.2d 813 (1994); *Jenkins v. State*, 301 Ark. 586, 786 S.W.2d 566 (1990); *Fullerton v. State*, 47 Ark. App. 141, 886 S.W.2d 887 (1994).

Reversed and remanded.

AREY, ROGERS, and STROUD, JJ., agree.

CRABTREE and MEADS, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I cannot agree with the majority opinion that this case should be reversed. At trial, the appellant alleged that his stop and detention were illegal, and therefore, the items observed by the officer and the subsequent test

administered by the officer should be suppressed. The items he asked to suppress were "statements of the Defendant, blood alcohol analysis, physical description of the Defendant on the date of his arrest, statements of an informant, descriptions of field sobriety tests, and a physical of the Defendant. . . ." The majority opinion rejects the State's argument that the officer was entitled to make inquiry pursuant to Ark. R. Crim. P. 2.2 and instead finds that there was a seizure of the person pursuant to Rule 3.1. On the facts of this case, I believe this to be an incorrect determination.

On June 15, 1995, Jerry Smith telephoned the Springdale Police Department and informed them that he was a truck driver from Jonesboro, Georgia. Smith told the police that there was an older male in a red tractor trailer who was drinking beer in the cab of his truck in the parking lot at McDonald's. Based on this information, and without making independent observations of appellant, Officer Kawano went to the door of appellant's cab and ordered him out. When the appellant got out of his truck, the officer smelled intoxicants and noticed that appellant had certain mannerisms and poor balance. These observations caused the officer to have appellant undergo field sobriety tests, which appellant failed. Officer Kawano placed appellant under arrest and took him to the police station for booking. Appellant indicated that he had consumed alcoholic beverages before getting in his truck.

First, this is not the typical case in which an informant is working for the police and obtains information. The informant, Jerry Smith, identified himself by name, address, and occupation. Surely, a concerned citizen is entitled to some credibility in a situation such as this one. There was not any indication in the record that Smith had a grudge against the appellant or had any reason to falsify his report to the police officers. Accordingly, it does not appear that this case falls into the category of anonymous tips.

Second, I cannot agree with the majority that this case involved a detention of the person without probable cause or reasonable suspicion. The officer had obtained information that was verified when he arrived at the location described by Smith. It was entirely reasonable for the officer to make inquiry of the driver of the truck as to his status. Rule 2.2 is more applicable to

this case than Rule 3.1 in that the officer, for his own safety, had to ask the driver of the truck to step down. Otherwise, the officer would be put in considerable danger merely because of his relative position to the driver in an eighteen-wheel tractor-trailer truck. Once the driver stepped to the ground, the officer immediately smelled an odor of intoxicants and noticed certain other indicia of intoxication leading ultimately to the arrest of the defendant. Officers' safety has long been recognized as a reason to make minor intrusions into the sanctity of personal privacy. *Saul v. State*, 33 Ark. App. 160, 163, 803 S.W.2d 941, 944 (1991). ("When the safety of the officer is the proposed justification for the intrusion on privacy, that consideration is both legitimate and weighty.") However, in this case, the expectation of privacy was diminished considerably because the appellant was on a public parking lot and in a commercial vehicle. Asking the driver to step down from his vehicle was a very minor intrusion when considered against the interest of the State in preventing the death of others because of drunk driving. In *Thompson v. State*, 303 Ark. 407, 797 S.W. 2d 450 (1990), the court stated:

> In his motion to suppress and here on appeal, the appellant contends that Officer Parsons' approaching his parked car constituted a seizure or detention and that this seizure was unlawful under the fourth amendment because the officer had no reason to suspect that the appellant had committed or was about to commit a crime. The appellant's argument is contrary to established fourth amendment law. Because this court has never addressed this argument, we take this opportunity to clarify the law in this area.
>
> Not all personal intercourse between policemen and citizens involves "seizures" of persons under the fourth amendment. *See Terry v. Ohio*, 392 U.S. 1 (1967). A "seizure" occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *Id.*
>
> Police-citizen encounters have been classified into three categories. *See U.S. v. Hernandez*, 854 F.2d 295 (8th Cir. 1988). The first and least intrusive category is when an officer merely approaches an individual on a street and asks if he is willing to answer some questions. Because the encounter is in a public place and is consensual, it does not constitute a "seizure" within

the meaning of the fourth amendment. *Id.* The second police encounter is when the officer may justifiably restrain an individual for a short period of time if they have an "articulable suspicion" that the person has committed or is about to commit a crime. *Id.* The initially consensual encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. The final category is the full-scale arrest, which must be based on probable cause. *Id.*

Here, Officer Parsons' approach to investigate the appellant's car parked in a public place fits into the first category, and thus is not a "seizure" within the meaning of the fourth amendment. *See W. LaFave, Search & Seizure*, § 9.2(h), at 408-09 (1987); *see also* cases cited therein *Atchley v. State*, 393 So.2d 1034 (Ala. Crim. App. 1981) (court held there was no seizure under the fourth amendment where the police, having no knowledge of any criminal activity in the area, approached a car legally parked with its lights off after midnight and asked the driver if there was any problem and for some identification); *State v. Harlan*, 301 N.W.2d 717 (Iowa 1981) (court held there was no seizure, where a police officer stopped behind and approached the defendant's parked car and observed that the defendant had bloodshot eyes and smelled of alcohol. Although the officer had no reports of crime in the area, had not seen the defendant commit any crimes, or suspected him of committing any specific crime, the officer felt the defendant was trying to evade him earlier when the officer had passed his car); and *State v. Vohnoutka*, 292 N.W.2d 756 (Minn. 1980) (court held no stop or seizure where officers saw driver of a motor vehicle shut off the car's lights and drive into a parking lot of a closed service station and approached the car and asked the defendant if anything was wrong and subsequently discovered marijuana in the car)."

Id. at 408-10, 797 S.W.2d at 451-52.

Similarly, I am of the opinion that this case falls in the first category and the officer was justified in requesting cooperation under Rule 2.2. For the foregoing reasons, I dissent.

MEADS, J., joins in this dissent.

Charles T. MEYER and Myer's Bakeries Incorporated *v.* RIVERDALE HARBOR MUNICIPAL PROPERTY OWNERS IMPROVEMENT DISTRICT NO. 1 of Little Rock, Arkansas; Marion B. Burton, Agent; Riverdale Harbour Incorporated; Walker Real Estate; H. Bradley Walker; Marion B. Burton; and Hugh Murphy

CA 96-1254 947 S.W.2d 20

Court of Appeals of Arkansas
Division IV
Opinion delivered June 18, 1997

Gill Law Firm, a professional association, by: *John P. Gill*, for appellants.

Anderson & Kilpatrick, by: *Mariam T. Hopkins*, for appellees Riverdale Harbour Incorporated, Walker Real Estate, and H. Bradley Walker.

D. FRANKLIN AREY, III, Judge. The appellant in this chancery case purchased a lot in Canal Pointe, a residential subdivision, from Riverdale Harbor Incorporated. After a dispute regarding security in the subdivision, the appellant sued the appellees for fraud and breach of contract. The chancellor found that the suit was barred by the three-year statute of limitations applicable to tort claims, and granted summary judgment against the appellant. This summary judgment was appealed, and, in an unpublished decision delivered on February 21, 1996, we held that the chancellor properly applied the three-year statute of limitations because the appellant's cause of action, in substance, sounded in tort. Subsequently, the appellees petitioned the chancery court for an award of attorney's fees pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1994). After a hearing, the chancellor awarded attorney's fees to the appellees. This appeal followed.

The appellant contends that the chancellor erred in concluding that the appellees were entitled to an award of attorney's fees under Ark. Code Ann. § 16-22-308 (Repl. 1994). We agree, and we reverse.

Arkansas Code Annotated § 16-22-308 provides that:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.

This section has been held to authorize an award of attorney's fees to a party who successfully defends against a contract claim. *Cumberland Financial Group, Ltd. v. Brown Chemical Co.*, 34 Ark. App. 269, 810 S.W.2d 49 (1991). However, § 16-22-308 does not per-

mit an award of attorney's fees in tort actions. *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992).

Although both contract and tort claims were advanced in the case at bar, the action was not based primarily in contract. Our prior opinion was premised on our holding that the appellant's claims were based primarily in tort. Nonetheless, attorney's fees were awarded to appellees subsequent to our prior opinion, upon findings that appellees were the prevailing party and that the contract claim advanced by the appellants was a "substantial issue" before the trial court.

We do not disagree with the chancellor's finding that the appellees are the prevailing party. However, we do not think it is sufficient to base a fee award under § 16-22-308 upon a finding that a contract claim is a "substantial issue." Where both contract and tort claims are advanced, an award of attorney's fees to the prevailing party is proper only when the action is based primarily in contract. *See Wheeler Motor Co., Inc. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993); *Security Pacific Hous. Servs., Inc. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993); *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992); *Kinkead v. Union Nat'l Bank*, 51 Ark. App. 4, 907 S.W.2d 154 (1995).

In *Wheeler Motor Co., Inc. v. Roth*, the prevailing party cross-appealed from the trial court's denial of an award of attorney's fees. The prevailing party's case had been submitted to the jury on alternate contract and tort theories. Special interrogatories were utilized; one jury instruction allowed an award of damages consistent with the tort theory, and another jury instruction authorized an award of damages consistent with breach of contract. In determining whether the denial of attorney's fee was proper, our supreme court examined the basis of the prevailing party's claim:

> When the prevailing party's claim is based in tort, an award of attorney's fees cannot be justified under section 16-22-308. . . . Because the jury gave [the prevailing party] an award in the amount of the purchase price, it must have based its award on restitution for revocation. This rests in tort. The jury obviously found deceit which formed the basis of revocation and the resti-

> tutionary award. We cannot say the trial judge erred in declining to award attorney's fees.

Wheeler Motor Co., Inc., 315 Ark. at 329, 876 S.W.2d at 451 (citations omitted). Even though a contract claim was litigated and submitted to the jury, our supreme court looked to the basis of the prevailing party's claim in determining whether an award of fees was justifiable under § 16-22-308.

In *Security Pacific Housing Services, Inc. v. Friddle*, our supreme court reversed an award of attorney's fees to the prevailing party. At trial, the prevailing party pursued its counterclaim for breach of contract and conversion. After judgment was entered in its favor, the trial court awarded the prevailing party attorney's fees. The losing party appealed, claiming that fees could not be justified under § 16-22-308 because the prevailing party prevailed on its claim in tort for conversion, not on its claim for breach of contract. The supreme court agreed.

> [W]e conclude [the prevailing party's] recovery was based primarily in the tort of conversion. We make this finding with full awareness that [the prevailing party's] counterclaim included a claim for breach of contract. Merely alleging a claim for breach of contract does not mean the jury awarded damages on that basis. The evidence presented focused on the wrongful repossession and the tort of conversion. The relatively large award of punitive damages indicates the jury awarded its verdict based on the tort claim.

Security Pacific Hous. Services, Inc., 315 Ark. at 186, 866 S.W.2d at 379. Thus, litigation of a breach-of-contract claim alone was not sufficient to justify fees under § 16-22-308; the award of fees was reversed. *Id.*

The denial of attorney's fees was appealed by the prevailing party in *Stein v. Lukas*. At trial, the prevailing party advanced both deceit and breach-of-warranty claims. The circuit court instructed the jury on both of these claims. Nonetheless, our supreme court affirmed the denial of fees under § 16-22-308.

> Arkansas' fee statute for civil actions does not embrace tort actions such as deceit. *See* Ark. Code Ann. § 16-22-308 (1987).

> In this case deceit lies at the heart of the claim leveled by the [prevailing party] against the [losing party].

Stein, 308 Ark. at 83, 823 S.W.2d at 837. The court noted that "[t]his was essentially a deceit action sounding in tort." *Id.*, 308 Ark. at 82, 823 S.W.2d at 836. Therefore, even though a contract claim was litigated and presented to the jury, fees were denied.

Each of these cases involved a contract or breach-of-contract claim; the claims must have been substantial enough to justify presentation to the jury. Nonetheless, in each case our supreme court denied fees to the prevailing party because the action was based primarily in tort.

Kinkead v. Union National Bank presents a different fact pattern. The prevailing party, a bank, brought a foreclosure action on its note and mortgages. The losing party counterclaimed on various tort theories, and under a federal statute. The trial court granted judgment to the prevailing party on its foreclosure complaint and on all counts of the losing party's counterclaim; the prevailing party was awarded attorney's fees. The losing party argued that the bank may have been entitled to receive an attorney's fee on its foreclosure action, but it was not entitled to a fee for defending the counterclaim, since the latter was based upon tort theories and a federal statute. Our court did not agree.

> We find that *Stein v. Lukas*, *supra*, is not controlling in this fact situation. In that case, the [prevailing party's] complaint was brought on theories of deceit and breach of warranty. Here, although [the losing party] made unsubstantiated allegations of tort in their counterclaim, the trial was basically an action for foreclosure.

Kinkead, 51 Ark. App. at 18, 907 S.W.2d at 162. Thus, because the action was based primarily in contract — "basically an action for foreclosure" — an award of attorney's fees was proper to the prevailing party that defended a counterclaim based in tort and a federal statutory cause of action.

In the case at bar, our prior opinion was premised on our holding that the appellant's claims were based primarily in tort. We must follow this characterization of the appellant's action, because it is the law of the case. Matters decided on a

prior appeal are the law of the case and govern the appellate court's actions on the subsequent appeal. *Thurman v. Clark Industries, Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994).

Because the appellant's action was based primarily in tort, we reverse the award of attorney's fees. In light of our decision on this issue, the appellant's remaining points for reversal are moot; consequently, we do not address them.

Reversed and dismissed.

ROBBINS, C.J., and ROAF, J., agree.

Judith N. MEADORS *v.* Thomas R. MEADORS

CA 96-1138 946 S.W.2d 724

Court of Appeals of Arkansas
Division III
Opinion delivered June 18, 1997

Davis & Cox, by: *Hal W. Davis*, for appellant.

Michael J. Medlock, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the dismissal of appellant's motion for contempt based on a finding that her claim was barred by the statute of limitations. For reversal, appellant contends that the trial court erred in applying the five-year statute of limitations applicable to written contracts to a provision in a property settlement agreement that was incorporated into a decree of divorce. Failing that, she contends that the five-year statute of limitations had not expired. We affirm.

The marriage of appellant, Judith Meadors, and appellee, Thomas Meadors, ended in divorce by a decree entered on August 4, 1989. The decree incorporated a property settlement agreement, dated August 2, 1989, which contained a provision stating that "[appellee] shall pay to the [appellant] the sum of $10,000 cash." On December 6, 1995, appellant filed a motion for contempt alleging that appellee had failed to pay her this sum of money. Appellee countered with a motion to dismiss, arguing that the provision in the agreement was subject to the five-year statute of limitations applicable to written contracts under Ark. Code Ann. § 16-56-111 (Supp. 1995). The chancellor held that the agreement was an independent contract that was governed by the five-year limitations period. By order dated June 24, 1996, the chancellor dismissed appellant's motion, thus giving rise to this appeal.

[redacted] In our law, two types of property settlement agreements are recognized. *Seaton v. Seaton*, 221 Ark. 778, 225 S.W.2d 954 (1953); *McGaugh v. McGaugh*, 19 Ark. App. 348, 721 S.W.2d 677 (1986). A distinction is made between independent contracts, which do not merge into the decree and are thus not subject to modification by a trial court, and those less formal agreements which do merge and become part of a decree of divorce. *See Shipley v. Shipley*, 305 Ark. 257, 807 S.W.2d 915 (1991); *Seaton v. Seaton, supra*; *Kennedy v. Kennedy*, 53 Ark. App. 22, 918 S.W.2d 197 (1996); *Dodson v. Dodson*, 37 Ark. App. 86, 825 S.W.2d 608 (1992); *Linehan v. Linehan*, 8 Ark. App. 177, 649 S.W.2d 837 (1983). In this appeal, appellant does not strenuously contest the chancellor's finding that the agreement in question was an independent contract. Indeed, the agreement contains language strikingly similar to that used in the agreement at issue in *Armstrong v. Armstrong*, 248 Ark. 835, 454 S.W.2d 660 (1970), where it was held that the agreement constituted a separate, independent contract that did not merge into the decree.

[redacted] It is appellant's argument, however, that the agreement was nonetheless incorporated into the decree of divorce and was subject to enforcement by the court, and thus should be considered a judgment. Appellant maintains that, as a judgment, the provision was subject to the ten-year statute of limitations found in

Ark. Code Ann. § 16-56-114 (1987). We reject appellant's argument.

Arkansas Code Annotated § 16-56-114 provides that:

> Actions on all judgments and decrees shall be commenced within ten (10) years after the cause of action shall accrue and not afterward.

In *Thomas v. McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967), the court discussed the formal requirements of a judgment. The court said that a judgment should state the amount that the defendant is required to pay and the date from which interest is to be computed. Although the court held that a judgment is to be tested by its substance and not form, it stated that a judgment must clearly specify the relief granted and must clearly show that it is the act of the law, pronounced and declared by the court upon determination and inquiry. It must be such a final determination as may be enforced by execution or other appropriate manner.

When we apply these principles to the case at bar, we do not believe that the court, by its decree, rendered judgment for the amount specified in the property settlement agreement. While the provision imposed an obligation upon appellee to pay a sum certain, there is no indication that the court rendered judgment for that amount. That relief was not clearly stated in the decree, as it contains no language denoting the rendition of judgment. As such, we do not think that the provision was capable of enforcement by execution without it being reduced to judgment. It must be remembered that the agreement was an independent contract, and while it was incorporated into the decree, it did not, under settled law, merge into the decree. We hold that the provision was subject to the five-year statute of limitations.[1]

Appellant further argues that, because the agreement did not specify when the payment was due, the statute of limitations did not begin to run until she became aware that appellee

[1] In *Davenport v. Pack*, 35 Ark. App. 40, 812 S.W.2d 487 (1991), we applied the five-year statute of limitations to a property settlement agreement. We did not, however, address the issue raised in this appeal, as the parties in that case did not question the applicability of that limitations period.

had repudiated the agreement. She contends that appellee repudiated the agreement in September of 1995 and that it was at that time that her cause of action accrued. We do not reach this issue because the chancellor was not apprised of it, and we do not consider issues raised for the first time on appeal. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993).

Affirmed.

ROBBINS, C.J., and JENNINGS, J., agree.

ST. EDWARD MERCY MEDICAL CENTER *v.* Patricia ELLISON

CA 96-1134 946 S.W.2d 726

Court of Appeals of Arkansas
Division IV
Opinion delivered June 18, 1997

Pryor, Barry, Smith, Karber & Alford, PLC, by: *Gregory T. Karber*, for appellant.

Karr & Hutchinson, by: *W. Asa Hutchinson*, for appellee.

ANDREE LAYTON ROAF, Judge. This is a wrongful discharge case. The appellant, St. Edward Mercy Medical Center (St. Edward), employed the appellee, Patricia Ellison, as a cardiac monitor technician. Ellison was terminated after a delay in alerting the nursing staff that a patient, whom she was monitoring, was in ventricular fibrillation which resulted in the patient's death. Ellison filed suit for wrongful discharge, and was awarded damages of $20,000 in a jury trial. During the trial, St. Edward's motions

for directed verdict were denied. St. Edward appeals from the denial of its motion for judgment notwithstanding the verdict or for a new trial, contending that Ellison was an at-will employee who could be discharged with or without cause. We agree that the trial court erred in denying the motion, and reverse.

Because we agree that St. Edward was entitled to judgment as a matter of law pursuant to the employment-at-will doctrine, we need only summarize the facts leading to Ellison's termination. Ellison was employed by St. Edward as a monitor technician assigned to the cardiac monitor room of the intensive-care unit (I.C.U.). She was discharged for incompetence after St. Edward determined that she had misread a patient's monitor and delayed reporting the problem to the I.C.U. nurses, resulting in the patient's death. Ellison contended that because of understaffing, she was required to watch more groupings of patient monitors at the time than she could safely handle, and more than the terms of her employment required. Thus, she contended that St. Edward breached its agreement with her, and she was fired without cause. She asserted that language contained in documents promulgated by St. Edward created an employment agreement with terms sufficient to constitute an exception to the employment-at-will doctrine, and that St. Edward could not terminate her without cause.

The three documents relied upon by Ellison are St. Edward's employee handbook, a "twelve-hour shift agreement," and a document entitled "Cardiac Monitoring System." Ellison testified that she considered the twelve-hour-shift agreement to be her contract with St. Edward, and that it bound her to perform at a competent level. The twelve-hour shift agreement contains provisions for holiday and vacation pay, life insurance, retirement, leave of absence, sick pay, jury duty, etc., and concludes by stating:

> *ACKNOWLEDGMENT* I have read all the information contained in this 12-hour shift proposal and I understand it. *In consideration of being placed on a 12-hour shift I know that continued status is dependent upon my compliance to the stated rules and regulations.* (Emphasis added.)

The document was signed by Ellison, the nursing-department head, and the director of personnel.

The Cardiac Monitoring System includes a description of the system and provides that:

> [e]ach technician should be responsible for no more than thirty-two patient monitors *or one station of four vistas* . . . . Because of the obligation of constant observation of the patients' monitors, *the technicians must always be replaced with an I.C.U. nurse in the event of staffing shortage in the monitor room.* (Emphasis added.)

Ellison was responsible for ten vistas at the time of the incident which led to her termination because another technician had taken a break and had not been replaced.

Finally, the employee handbook contains an express provision that "employees are employed at will and for an indefinite term"; states that the list of serious offenses for which an employee may be terminated is not considered all inclusive and is provided for informational purposes only; and further states that the employee handbook does not constitute a contract and does not confer any contractual rights on the employee. However, the handbook also describes St. Edward's "progressive disciplinary policy," which is the provision relied upon by Ellison. The policy states:

> [v]iolations of work rules, safety codes, and hospital policies are dealt with appropriately and in a uniform, consistent manner. Depending upon the seriousness of the offense, the progressive disciplinary process *may involve one or more of the following*: preliminary investigation, informal talk, oral warning, written counseling, written first warning, written second warning, suspension (3-5 days), and written final warning or termination. (Emphasis added.)

One of the "serious offenses for which an employee may be terminated" is "[i]mproper performance of duty including malpractice."

On appeal, St. Edward claims that it was entitled to a judgment as a matter of law and that its motion for judgment notwithstanding the verdict was erroneously denied. A directed-verdict motion is a condition precedent to moving for a judgment notwithstanding the verdict. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993); Ark. R. Civ. P. 50(e). Appellate

review of a denial of a motion for a directed verdict or judgment notwithstanding the verdict entails determining whether the non-movant's proof was so insubstantial as to require a jury verdict, if entered in his behalf, to be set aside. *Nicholson v. Simmons First Nat'l Corp.*, 312 Ark. 291, 849 S.W.2d 483 (1993). Arkansas courts have consistently upheld the general rule that a trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict of the jury and the moving party is entitled to judgment as a matter of law. *Schmidt v. Pearson, Evans and Chadwick*, 326 Ark. 499, 931 S.W.2d 774 (1996); *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996); See also, *Anslemo v. Tuck*, 325 Ark. 211, 924 S.W.2d 798 (1996); *Dr. Pepper Bottling Co. v. Frantz*, 311 Ark. 136, 842 S.W.2d 37 (1992); *Dedman v. Porch*, 293 Ark. 571, 739 S.W.2d 685 (1987). In considering sufficiency of the evidence on appeal, the court will only consider evidence favorable to the appellee together with all its reasonable inferences. *Dedman, supra.*

St. Edward argues specifically that Arkansas law dictates that contracts for employment are at-will contracts with very limited exceptions and that the present case does not present one of those exceptions. St. Edward submits that "at will" means that the contract may be terminated by either party, for any reason, or without a reason. Conversely, Ellison claims that the twelve-hour shift agreement, the employee handbook, and the cardiac monitoring system document constituted a contract which required St. Edward to have cause to terminate her.

Generally, the law of this state is that an employer or an employee may terminate an employment relationship at will. *Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991). Under the employment-at-will doctrine, an at-will employee may be discharged for good cause, no cause, or even a morally wrong cause. *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991). Although the employment-at-will doctrine has been modified in some respects, it continues to represent the law of this state. *Kimble v. Pulaski County Special Sch. Dist.*, 53 Ark. App. 234, 921 S.W.2d 611 (1996).

The Arkansas Supreme Court has repeatedly reaffirmed the employment-at-will doctrine and has recognized only limited exceptions to it,

> where there is an agreement that the employment is for a specified time, in which case firing may be only for cause, *or where an employer's employment manual contains an express provision stating that the employee will only be dismissed for cause and that provision is relied on by the employee.*

Mertyris v. P.A.M. Transp., Inc., 310 Ark. 132, 832 S.W.2d 823 (1992) (quoting *Crain Indus., supra*). (Emphasis added.) The court has further recognized a limited public-policy exception to the at-will doctrine and has held "that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state." *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 249, 743 S.W.2d 380, 385 (1988). However, only the "express provision" exception is at issue in this case.

After review of the documentation relied upon by Ellison, we conclude that Ellison's employment does not fall within the narrow exception to the employment-at-will doctrine recognized by our supreme court in a series of cases in which language contained in employee manuals and handbooks was at issue.

In *Gladden v. Arkansas Children's Hosp.*, 292 Ark. 130, 728 S.W.2d 501 (1987), the court upheld judgments in favor of two employers, where the employees contended that they could not be fired without cause because of provisions contained in employment regulations and an employer handbook. However, the court modified the employment-at-will doctrine, stating:

> We do . . . believe that a modification of the at will rule is appropriate in two respects: where an employee relies upon a personnel manual that contains an express provision against termination except for cause he may not be arbitrarily discharged in violation of such a provision. Moreover, we reject as outmoded and untenable the premise announced in *St. Louis Iron Mt. Ry. Co. v. Matthews*, 64 Ark. 398, 42 S.W. 902 (1897), that the at will rule applies even where the employment agreement contains a provision that the employee will not be discharged except for cause, unless it is for a definite term. With those two modifications we reaffirm the at will doctrine.

Id. at 136, 728 S.W.2d at 505. The court cautioned, however, that "an implied provision against the right to discharge is not enough." *Id.*

In *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 684 (1991), the court declined to hold that the following language in an employer's handbook created an enforceable promise to discharge only for cause: "[w]e believe in working and thinking and planning to provide a stable and growing business, to give such service to our customers that we may provide maximum job security for our employees." The court held that it did not rise to the level of an "express provision" as the *Gladden* ruling required.

Finally, in *Crain Indus.*, *supra*, the court affirmed a judgment for employees who had sued for wrongful discharge because their layoffs were not in accordance with a provision contained in their employee handbook. The jury found the following provision to be an express agreement:

> [I]n the event it should become necessary to reduce the number of employees in the workplace, employees will be laid off on a seniority basis.

Crain Indus., 305 Ark. at 568, 810 S.W.2d at 911.

In *Crain Indus.*, the supreme court stated that this handbook provision was a "model of clarity and definiteness" and that there was "no doubt as to its meaning," in holding that "when an employer makes definite statements about what its conduct will be, an employee has a contractual right to expect the employer to perform as promised." Although the employee handbook in *Crain Indus.* had been later changed to include a provision that the handbook was not a contract of employment and the employer could change it at any time, the court did not decide the effectiveness of this disclaimer provision, because there was no evidence that the employees had been notified of the change.

■ When we apply the holdings of *Gladden* and *Crain Indus.* to the evidence submitted by Ellison, we find that it falls short of the requirement that there be an "express provision stating that the employee will only be dismissed for cause." Although the

cardiac monitoring system document sets forth the duties of the monitor technicians with some degree of specificity, it clearly contains no language which can be construed as a promise that termination will be only for cause.

As to the employee handbook, we cannot construe the progressive disciplinary policy as a guarantee that an employee can only be terminated in accordance with the policy, or for a "serious offense," where the same handbook states clearly and unequivocally that the handbook is not a contract, does not confer contractual rights upon employees, and also expressly states that employees are employed at will. Moreover, although a guarantee could perhaps be implied from the existence of the policy, and from its terms, this would be contrary to the supreme court's directive in *Gladden*, that an implied provision against the right to discharge will not be sufficient to invoke the exception.

We also can find no express provision against termination without cause in the document primarily relied upon by Ellison, the twelve-hour-shift agreement. We do not agree with Ellison's contention that the document constitutes a "clear and unambiguous employment agreement" which incorporates by reference other hospital rules and regulations, including the cardiac monitoring system and the employee handbook. This agreement was signed by Ellison in 1986, while she was employed by St. Edward as a patient-service technician, some five years before St. Edward trained her in 1991 to work as a monitor technician. The agreement states that only employees with "good attendance records" will be selected to work a twelve-hour shift, and contains a number of rules which are specific to employees who work that shift, as opposed to an eight-hour shift. The language that Ellison relies upon clearly provides that continued status as a twelve-hour-shift employee is dependent upon compliance with the rules stated in the agreement, and we cannot find even an implied provision against the right to discharge in this language.

As none of the documents relied upon by Ellison contains an express provision that discharge will not be without cause, the trial court erred in denying St. Edward's motion for judgment notwithstanding the verdict.

Reversed and dismissed.

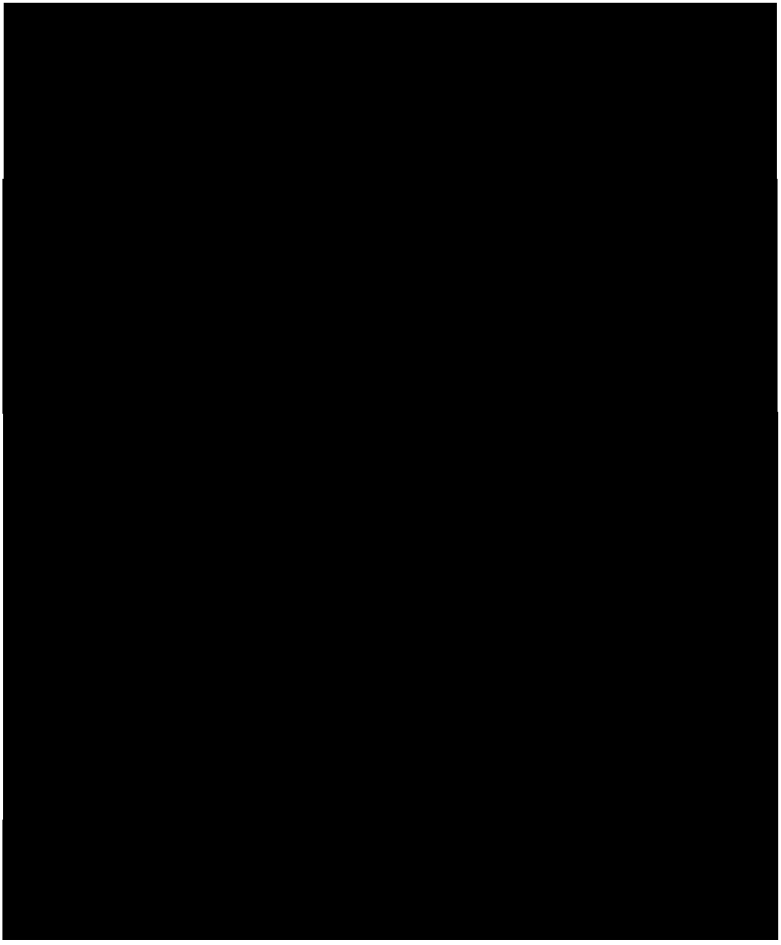
GRIFFEN and CRABTREE, JJ., agree.

Keith COX-HILSTROM *v.* STATE of Arkansas

CA CR 96-563 948 S.W.2d 409

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 25, 1997

[Petition for rehearing denied August 20, 1997.]



Davis & Cox, by: *James O. Cox*, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Keith Cox-Hilstrom appeals from a jury-trial conviction of theft of leased personal property and theft by deception, for which he was sentenced to concurrent terms of five years and three years, respectively, in the Arkansas Department of Correction. Appellant argues that the court erred in disallowing exculpatory testimony of a defense witness, in refusing appellant's proposed jury instructions on theft of leased personal property, and in failing to direct a verdict on the charge of theft by deception. We affirm in part and reverse and dismiss in part.

On November 10, 1993, appellant leased from Gary Anschutz Superior Car Wash and Quick Lube, a business in Fort Smith, Arkansas. After Anschutz terminated the lease, appellant vacated the premises on March 10, 1994. Anschutz subsequently discovered that tools and equipment were missing and filed a police report which resulted in the charge of theft of leased property.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995). Preservation of appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of trial errors. *Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994). Anschutz had an account with the *Southwest Times Record*, a Fort Smith newspaper. Appellant was charged with theft by deception of more than $200.00 for maintaining an account under Anschutz's account number at the newspaper. Appellant challenges the sufficiency of the evidence to support his conviction of theft by deception and contends the

State failed to prove that he knowingly obtained the property of another by deception. Anschutz testified that the account had a zero balance in November 1993 when appellant leased the business. Billing statements from the newspaper dated from November 1993 to March 1994 reflecting a balance due of $886.99 were introduced into evidence. Appellant's conviction is based on the charges made to the account from November 1993 to March 1994. In denying appellant's motion for directed verdict, the court stated that the November 1993 statement showing a previous balance of $70.25 and a $70.25 credit, leaving a zero balance, should have indicated to appellant that this was an existing account and that appellant, unless he sought to deceive, would have requested a new account when he took over the business rather than charging to Anschutz's account.

Appellant testified that he leased the business in November 1993 and advertised in the newspaper that the business was under new management. The November 1993 statement of the newspaper reflects the charge for the ad, identifying the ad as "now under new mgmt." Newspaper representatives said that they were aware that appellant was now running the business and that the newspaper's statements were addressed to "Superior Car Wash," were sent to the business address, and were received by appellant. There was no evidence that the newspaper submitted the statements to Anschutz or sought payment from Anschutz after November 1993. Curtis Haney, a salesman with the newspaper, sold ads to appellant. He testified that he thought the account belonged to appellant and that he was unaware that it was Anschutz's account.

Theft by deception occurs when a person "knowingly obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof." Ark. Code Ann. § 5-36-103(a)(2) (Repl. 1993). A person acts "knowingly" with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result. Ark. Code Ann. § 5-2-202(2) (Repl. 1993). Finally, "deception" means:

(i) Creating or reinforcing a false impression, including false impressions of fact, law, value, or intention or other state of mind that the actor does not believe to be true; or

(ii) Preventing another from acquiring information which would affect his judgment of a transaction; or

(iii) Failing to correct a false impression that the actor knows to be false and that he created or reinforced or that he knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

* * *

(v) Employing any other scheme to defraud.

Ark. Code Ann. § 5-36-101(3)(A) (Repl. 1993).

When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State and will affirm where there is substantial evidence to support the verdict. *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997). Evidence is sufficient to support a conviction if the trier of fact can reach a conclusion without having to resort to speculation or conjecture. *McGehee v. State*, 328 Ark. 404, 943 S.W.2d 585 (1997). Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or another. *Id.* A review of the record indicates that there is no evidence to support appellant's conviction of theft by deception. There is no evidence that appellant made a misleading or false representation to the newspaper. *Wiley v. State*, 268 Ark. 552, 594 S.W.2d 57 (Ark. App. 1980). The trial court's basis for overruling appellant's motion for directed verdict was the reflection of a previous balance on the November 1993 statement, which the court held should have alerted appellant that he was charging to an existing account and that he should have opened a new account. Appellant testified that he leased the entire business, and there was evidence from which the fact finder could infer that appellant reasonably believed that he also assumed the Superior Car Wash account with the newspaper. Although the lower court found that appellant charged on Anschutz's account, each of the statements is addressed to Superior Car Wash and Anschutz's name is not on the statements.

[redacted] There is insufficient evidence to support the conclusion that appellant "knowingly" sought to deceive the newspaper by creating a false impression or by failing to correct a false impression that he knew to be false. The only evidence that is unfavorable to appellant is that, admittedly, he failed to pay the account during the five-month period. However, there was testimony that the business declined during the winter months and that appellant's check for the February 1994 lease payment was returned for insufficient funds. Appellant testified that he did not pay the amount due because of financial constraints. We believe that the conviction for theft by deception is based on speculation and conjecture and must be reversed.

[redacted] Appellant also argues that the court erred in refusing to allow a defense witness, James Davis, to testify. Davis would have testified that he was with appellant's employee, Roni Ward, at Wal-Mart and that he saw Ward take cash from a money bag belonging to appellant's business to make purchases for her personal use. The State argues that appellant's argument should be rejected due to his failure to make a sufficient proffer. However, we hold counsel's offer of proof as to the witness's anticipated testimony to be sufficient. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996); Ark. R. Evid. 103(a)(2). The trial court ruled that the testimony was irrelevant and inadmissible because there was no evidence that Ward had stolen money from Anschutz. Appellant contends that, because Ward stole from him, it could be inferred that she was of such character that she would also steal from Anschutz. We believe that the trial court's ruling was correct. Evidence that someone other than the defendant may have committed the crime is inadmissible unless it points directly to the third party's guilt. *Echols, supra.* If it creates no more than an inference or conjecture as to the third party's guilt, it is inadmissible. *Echols, supra; Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996); *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993); *Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996). The testimony was that only Ward and appellant had keys to the leased premises and that she knew that items had been removed from the premises. However, there was no evidence presented linking Ward to the theft of Anschutz's property. We conclude that the

trial court did not abuse its discretion in excluding the testimony. *Zinger, supra.*

Appellant's next argument concerns the court's instruction to the jury on theft of leased personal property. The State and the appellant both agree that there is not a model instruction for theft of leased property. Appellant argues that the court erred in refusing his proposed jury instruction, which essentially repeats the entire text of Ark. Code Ann. § 5-36-115 (Repl. 1993), concerning theft of leased personal property. The trial court ruled that appellant's instruction had no application to the case or was covered in other instructions. Arkansas Code Annotated § 5-36-115(c) provides that it is prima facie evidence of intent to commit theft when the one who has leased the personal property of another fails to return the property to the owner after receiving notice from the owner that the lease has terminated. Appellant argues that Anschutz did not provide notice, that notice is required, and that the jury should have been instructed with § 5-36-115(c) as to the giving of notice and with subsection (f) which provides for waiver of notice. However, the owner's notice is not an element of the offense of theft of leased personal property. Subsection (c) merely provides a method by which the State may prove a prima facie case of intent to commit theft. The State was not restricted to the method set forth in subsection (c) to prove commission of the offense.

The court gave the following jury instruction:

> To sustain the charge of theft of leased personal property the State must prove beyond a reasonable doubt that [appellant] intentionally and fraudulently took or appropriated in any wrongful manner the property of Gary Anschutz, which was leased to [appellant].

The offense of theft of leased personal property is committed when a person shall "intentionally, fraudulently, or by false pretense take, carry, lead, drive away, destroy, sell, secrete, convert, or appropriate in any wrongful manner any personal property which is leased,. . .and thereby fraudulently obtains possession of that personal property." Ark. Code Ann. § 5-36-115(a) (Repl. 1993). In determining if the trial court erred in refusing an instruction in

a criminal case, the test is whether the omission infects the entire trial such that the resulting conviction violates due process. *Hardcastle v. State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988); *Conley v. State*, 270 Ark. 886, 607 S.W.2d 328 (1980). The burden of showing prejudice is much heavier when an instruction is omitted than when an erroneous instruction is given. *Evans v. State*, 287 Ark. 136, 697 S.W.2d 879 (1985). We find no error in the court's instruction.

Appellant also argues that the court erred in failing to instruct the jury as to an affirmative defense set forth in Ark. Code Ann. § 5-36-115(e) (Repl. 1993). We have stated that all of the factors listed in subsection (e) must be established in order to prove an affirmative defense. *Parks v. State*, 24 Ark. App. 139, 750 S.W.2d 65 (1988). Appellant did not provide evidence that his failure to return the property was lawful or that he, when demand was made, returned the property. There is no error in refusing to give an instruction where there is no evidence to support the giving of that instruction. *Id.*

Affirmed in part; reversed and dismissed in part.

ROBBINS, C.J., and JENNINGS and ROGERS, JJ., agree.

AREY and BIRD, JJ., dissent.

SAM BIRD, Judge, dissenting. While I agree with the decision of the majority to reverse and dismiss the charge of theft by deception, I respectfully disagree with the majority's opinion to not reverse and remand for a new trial on the remaining charge of theft of leased personal property with proper instructions to the jury to consider the affirmative defense to which the appellant is entitled.

Appellant was charged with theft of leased personal property as defined in Ark. Code Ann. § 5-36-115 (Repl. 1993). In my view, this statute is intended to deal with the evil of people who acquire possession of personal property, such as VCRs, TV sets, furniture, appliances, cars, etc., under short-term leases, with the intention to defraud the lessor. For example, section (a) of § 5-36-115 provides as follows:

> Any person is guilty of theft and subject to the punishments prescribed by § 5-36-103 who shall intentionally, fraudulently,

> or by false pretense take, carry, lead, drive away, destroy, sell, secrete, convert, or appropriate in any wrongful manner any personal property which is leased, rented, or entrusted to the person, or reports falsely of his wealth or mercantile credit and thereby fraudulently obtains possession of that personal property.

My view of the purpose of the statute is reenforced by the language of section (c) which provides:

> It shall be prima facie evidence of intent to commit theft when one who has leased or rented the personal property of another fails to return or make arrangements acceptable with the lessor to return the personal property to its owner within five (5) days, excluding Saturday, Sunday, or state or federal holidays, after proper notice following the expiration of the lease or rental agreement or presents identification to the lessor or renter thereof which is false, fictitious, or not current with respect to name, address, place of employment, or other appropriate items.

Section (d) of the statute provides that the "proper notice" referred to in section (c) "shall consist of a written demand addressed and mailed by certified or registered mail to the lessee at the address given at the time of making the lease or rental agreement."

In the case at bar, appellant, as lessee, entered into a written contract for a three-year lease of a carwash and lubrication business that carried with it, incidental to the business, certain items of personal property. The items of personal property were supposed to have been described in an exhibit that was supposed to have been attached to the contract. However, the lessor admitted that no inventory was taken and the exhibit was never attached to the contract. As a consequence, there was no way to determine what items of personalty were owned by the lessor and what items had been acquired by the lessee subsequent to his lease of the business. After appellant defaulted under the contract and removed much of the personal property from the leased premises, a question arose as to which items of personal property belonged to the lessor and which items had been acquired by the appellant subsequent to his acquisition of the lease. After a complaint by the lessor to the local police, the prosecuting attorney filed charges against appellant for theft of leased personal property under Ark. Code Ann.

§ 5-36-115. In my view, this factual scenario does not give rise to a prosecution under § 5-36-115.

However, assuming for the sake of argument that § 5-36-115 is applicable to the case at bar, it is clear from the language of the statute that to be guilty of the crime of theft of leased personal property, one must "intentionally, fraudulently, or by false pretense" obtain possession of the leased property, or fail to return it to the owner within five days after "proper notice" following expiration of the lease term. However, the court gave an instruction that merely required the jury to find that appellant "[i]ntentionally and fraudulently took or misappropriated in any wrongful manner the property of Gary Anschutz" in order to sustain the charge. I believe that this was error because there is no evidence in the record to support the court's instruction since appellant clearly did not obtain possession of Mr. Anschutz's carwash and lubrication business, or the personal property therein situated, fraudulently or by false pretense.

The majority holds that it was not erroneous for the trial court to refuse to give an instruction that informed the jury of the owner's obligation to provide notice to the lessee as set forth in § 5-36-115(c) because "the owner's notice is not an element of the offense of theft of leased personal property." The majority has apparently missed the point of appellant's requested instruction. Appellant's requested instruction was not offered for the purpose of informing the jury of the elements of the offense, but was offered to inform the jury about an affirmative defense that was afforded to him under the clear language of § 5-36-115(e), which provides as follows:

> (e) The following factors shall constitute an affirmative defense to prosecution for theft:
> (1) That the lessee accurately stated his name and address at the time of rental;
> (2) That the lessee's failure to return the item at the expiration date of the rental contract was lawful;
> (3) *That the lessee failed to receive the lessor's notice* personally unless notice was waived; and
> (4) That the lessee returned the personal property to the owner or lessor within forty-eight (48) hours of the commencement

> of prosecution, together with any charges for the overdue period and the value of damages to the personal property, if any. (Emphasis added.)

All of the elements necessary to justify an instruction as to this affirmative defense were present in this case. As to the first element, the State did not contend, nor is there any evidence that would support a contention, that appellant did not provide his correct name and address at the time he entered into the agreement to lease Anschutz's business. As to the second element, the only evidence in the record was that the lease agreement did not expire until November 9, 1996, long after appellant was charged. Thus, there is no evidence to support any claim that appellant did not return the items of personal property before the contract expired. As to the third element, it was clear that appellant did not personally receive a "proper notice" following expiration of the lease since it was admitted by Anschutz in his testimony that none was ever sent; and there was no evidence that notice was waived by appellant. As to the fourth element, the record reflects that all the missing property except a chair was returned to its owner on September 7, 1995, within forty-eight hours after the State commenced new charges against appellant by its Amended Information, filed September 5, 1995. The amended information constituted the commencement of a new charge since it increased the charge from a Class C to a Class B felony based upon new allegations that the value of the property allegedly stolen was more than $2,500. *Cf. United States v. Gengo*, 808 F.2d 1 (2d Cir. 1986); *Maytag v. Municipal Court, Santa Barbara*, 133 Cal. App. 3d 828, 184 Cal. Rptr. 365 (1982).

In my view, the record was sufficient to require the court to instruct the jury about the availability of the affirmative defense provided for in the statute, and its failure to do so was error calling for a reversal and remand for new trial on the charge of theft of leased personal property.

I am authorized to state that Judge AREY joins me in this dissenting opinion.

Stacey MOORE *v.* STATE of Arkansas

CA CR 96-865 947 S.W.2d 395

Court of Appeals of Arkansas
Divisions I & II
Opinion delivered June 25, 1997
[Petition for rehearing denied August 20, 1997.]

[redacted]

William M. Howard, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. On July 30, 1995, Robyn Ross Owens was found shot to death at the Elk's Club in Fordyce, Arkansas. Appellant, Stacey Moore, was subsequently charged with first-degree murder in connection with Owens's death. Moore was also charged with being a felon in possession of a firearm. Moore was found guilty by a Dallas County jury of the lesser included offense of second-degree murder and of felon in possession of a firearm and was sentenced to serve twenty-eight years in the Arkansas Department of Correction. On appeal, Moore argues two points for reversal: (1) the trial court erred in denying appellant's motion for directed verdict; and (2) the trial court erred in allowing the coroner to testify with regard to the bullet wound found on the victim. We find no error and affirm.

A motion for directed verdict is a challenge to the sufficiency of the evidence. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Cooper v. State*, 324 Ark. 135, 919 S.W.2d 205 (1996). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In determining the sufficiency of the evidence we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992). The fact that evidence is circumstantial does not render it insubstantial. *Payne v. State*, 21 Ark. App. 243, 731 S.W.2d 235 (1997).

In addition, intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances surrounding the crime. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996). The jury is allowed to draw upon its own common knowledge and experience to infer intent from the circumstances. *Tiller v. State*, 42 Ark. App. 64, 854 S.W.2d 730 (1993). Because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his acts. *Brown v. State*, 54 Ark. App. 44, 924 S.W.2d 251 (1996).

In the case at bar, the State offered testimony from thirteen witnesses. In particular, Ms. Jonell Jenkins, the victim's sister, testified that she had been with her sister all day on July 29, 1995, and during the early morning hours of July 30, 1995. They had just completed a two-week course to become certified nurse's assistants and were celebrating with two other friends, Melody and Stephanie Harris. Jenkins testified that after visiting their cousin, Chris Ross, at his house, they decided to go to the Elk's Lodge. At the Lodge, Jenkins testified that Robyn, Melody, Stephanie, and herself, got a table, sat down, and then danced. Jenkins stated that after Chris Ross, who was also at the Lodge at that time, got into an altercation with Patrick Crain, they decided to leave the Lodge.

Jenkins testified that as they were driving away, they changed their minds, and decided to go back to the Lodge to see their cousin, Ross. When they arrived back at the Lodge, Jenkins stated that appellant and another man named "Pop" were in front of the club arguing. According to Jenkins, Robyn got out of the car and went back into the Lodge. Jenkins testified that appellant was still outside with Pop arguing when she noticed that he had a gun. She stated that appellant started to shoot. She did not notice Robyn the first time appellant was shooting; however, she testified that the second time she saw appellant shooting, Robyn was walking back toward the car from the Lodge. Jenkins stated that at that particular time she saw Robyn fall to the ground and then saw appellant jumping the fence. She stated that she then ran over to Robyn and called others to help her.

Jenkins stated that during this time people were fighting and some more shooting had started around them. Jenkins testified that she, along with Chris Ross and Melody and Stephanie Harris, put her sister in the car and took her to the hospital. Jenkins also testified at trial that she did not remember anyone else shooting while appellant was shooting, which was at the time when she saw her sister fall on the ground. In addition to Jenkins's testimony, several other State witnesses testified that they saw appellant at the Elk Lodge when the incident occurred and saw him shooting a gun. The witnesses also testified that gunshots were coming from different directions and numerous people were fighting. One witness, Larry Buckley, testified that he was at the Lodge around two-thirty in the morning of July 30, 1995, and saw appellant shooting. Buckley also stated that he saw Ross at the Lodge with a gun. Patrick Strickland testified that he went to the Lodge with Ross on the evening of July 29, 1995. He stated that Ross had a .45 caliber gun and tried to shoot it in the air but the gun was jammed and would not shoot. Strickland testified that he thought Ross had gotten the gun unjammed but that he did not see him shoot it. Strickland also testified that he heard four or five shots but could not tell if these shots came from the same gun.

Chris Ross also testified at trial. Ross stated that he shot the gun in the air in an attempt to stop the fighting at the club. He claimed to only have shot the gun once. Ross further testified that he saw appellant shoot a gun first in the air and then in the crowd. Travis Bell, appellant's brother, testified that between 4:00 and 5:00 o'clock in the morning of July 30, 1995, appellant and his mother came by his house. Bell stated that appellant's mother asked him if he could take appellant to the bus station because she was "tired of fooling with him." Bell testified that he drove appellant to the bus station in Little Rock. Bell claimed that after driving appellant to the bus station he found a pistol under the passenger seat of his car. Bell stated that he had not seen this pistol prior to that time and thereafter turned it over to the police.

Rick McKelvey, an investigator with the State Police, testified that he was contacted on July 30, 1995, regarding a shooting in Fordyce. He conducted a crime-scene search and examined the victim's body at Dallas County Hospital. McKelvey stated

that, in the course of his investigation, he obtained a weapon from Bell. McKelvey identified the weapon as a nine-millimeter pistol. McKelvey also testified that while interrogating appellant, appellant stated that he was at the Elk's Lodge on the evening in question and that he was in possession of a small nine-millimeter pistol belonging to his cousin. McKelvey further stated that appellant told him he fired the gun once into the air. On cross-examination, when asked about the type of bullet which caused the victim's wound, McKelvey testified that it could not have been caused by a .45 bullet, and was smaller than a .357 or a .38 bullet. However, McKelvey could not identify the exact size bullet which caused the wound below that range, other than to state that a .45 could not have caused such a wound.

Charles Teppenpaw, the Dallas County Coroner, testified at trial regarding his examination of the victim. Teppenpaw, at the time of the trial, had been a coroner for approximately fifty years and had recently been appointed forensic medical examiner. Teppenpaw testified that appellant died of a gunshot wound which entered her back on the right side and exited the left chest. Teppenpaw stated that he concentrated his examination on the entrance and exit wounds and made a determination of what type of bullet may have caused the wound. Over appellant's objection, Teppenpaw testified as to the manner in which he made such determination. He stated that he carried sample bullets such as .22s, .38s, .45s, and nine-millimeters and matched those to the wound on the victim. Teppenpaw testified that he tried to match the .38, the .32, the .45, and the nine-millimeter bullet to the victim's wound. He stated that, of these bullets, the only one that he could identify to fit the victim's wound was the nine- millimeter bullet.

[redacted] Viewing the evidence in the light most favorable to the State, as we must, we hold that in the case at bar there was substantial evidence to support appellant's conviction. The State offered testimony which placed appellant at the scene of the crime shooting a gun in the direction of the victim. The victim was seen falling to the ground immediately after appellant fired his gun. A gun, whose size bullet fit the victim's wound, was recovered by appellant's brother after he had taken him to the bus sta-

tion. In addition, testimony regarding shots being fired by Ross, the victim's cousin, involved a .45 caliber gun to which both the investigating officer and the coroner testified could not have caused the victim's fatal wound. The State also presented sufficient evidence in this case from which the jury could infer that appellant's actions were done with the purpose of causing serious physical injury to another person which resulted in the death of Robyn Owens.

[redacted] Furthermore, reconciling conflicts in the testimony and weighing evidence are matters within the exclusive province of the jury, and the jury's conclusion on credibility is binding on this court. *Ashley v. State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987). Jurors are allowed to draw upon their common knowledge and experience in reaching a verdict from the facts directly proved. *Ashley*, *supra*. It has also been held that the action of fleeing from the scene of the crime is relevant to the issue of guilt. *Jones v. State*, 282 Ark. 56, 665 S.W.2d 876 (1984).

[redacted] Appellant's second argument on appeal involves the coroner's testimony. Specifically, appellant argues that it was error for the judge to allow the coroner to testify regarding his process of matching bullets to the victim's wound and stating as a result that a nine-millimeter bullet matched the victim's wound. The coroner was not qualified as an expert in this case. His testimony, therefore, falls under Rule 701 of the Arkansas Rules of Evidence. Rule 701 states that:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are
>
> (1) Rationally based on the perception of the witness; and
>
> (2) Helpful to a clear understanding of his testimony or the determination of a fact issue.

Ark. R. Evid. 701 (1997). A trial judge's decision to allow lay-opinion testimony under Rule 701 will not be reversed absent an abuse of discretion. *Bridges v. State*, 327 Ark. 392, 327 S.W.2d 392 (1997).

In *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990), the supreme court, citing Professor Weinstein, stated the following applicable principles with regard to Rule 701:

> Rule 701 "seeks to balance the need for relevant evidence against the danger of admitting unreliable testimony. It recognizes that necessity and expedience may dictate receiving opinion evidence, but that a factual account insofar as feasible may further the values of the adversary system. . . . 'The opinion rule today is not a rule against opinions but a rule conditionally favoring them.'". . .
> [I]n order to satisfy the first requirement of Rule 701, the testimony must initially pass the personal knowledge test of A.R.E. Rule 602. But, even if the witness does have the requisite personal knowledge, any inferences or opinions he expresses must thereafter pass the rational connection and "helpful" tests of Rule 701. "The rational connection test means only that the opinion or inference is one which a normal person would form on the basis of the observed facts. He may express the opinion or inference rather than the underlying observations if the expression would be 'helpful to a clear understanding of his testimony or the determination of a fact in issue.'" If, however, an opinion without the underlying facts would be misleading, then an objection may be properly sustained.

Carton, 303 Ark. at 571-72, 798 S.W.2d at 675 (quoting 3 WEINSTEIN'S EVIDENCE ¶ 701[02] at 701-13(1987)).

The court has also held that lay witnesses may be permitted to give their opinion as to the cause of death or other physical condition if the witness is qualified by experience and observation with regard to the subject matter. *Russell v. State*, 306 Ark. 436, 815 S.W.2d 929 (1991). In *Russell*, the court held that the opinion testimony of an emergency medical technician concerning the instrument which caused the victim's wounds was properly admitted pursuant to Rule 701. The medical technician testified that in his opinion the wounds were caused by a square-headed or Phillips head screwdriver. Appellant argued that because the medical technician lacked specialized training and expertise, he should not have been allowed to testify regarding the cause of the wounds. The court held that the testimony was based upon the technician's personal knowledge, having previously observed wounds made by screwdrivers, and based upon the

observation of the victim's wounds. In addition, the technician's opinion was helpful to the determination of a fact in issue, the cause of the victim's wounds. *Russell, supra.*

In *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996), the court held that the opinion testimony of a lay witness in accordance with Rule 701 was proper. The crime lab in *Moore* had been unable to identify or eliminate the shoe print found in the victim's bedroom as having been made by appellant's shoe due to the lack of sufficient individual markings, but noted that the shoe-sole pattern of the print was consistent with the pattern on appellant's shoe. The police investigator, during direct examination, however, testified that in his opinion the sole of appellant's athletic shoe matched the shoe print found on the center of the victim's bedroom floor. The court held that the trial court did not abuse its discretion in allowing the investigator's testimony because, even though the investigator was not an expert in that field, he had some experience in that area and he was clearly testifying that the patterns matched, which was not inconsistent with the crime lab report. *Moore, supra.*

In the case at bar, we cannot say that the trial court abused its discretion in allowing the coroner's lay-opinion testimony, subject to cross-examination. The situation is essentially analogous to that in *Russell* and, as in *Moore*, the coroner's testimony was not inconsistent with the testimony of Officer McKelvey, which had previously been admitted without objection.

Affirmed.

BIRD, ROGERS, and STROUD, JJ., agree.

NEAL and CRABTREE, JJ., dissent.

OLLY NEAL, Judge, dissenting. Because the majority has chosen to ignore the patent unfairness of convicting an accused person based on wholly unreliable and unsubstantiated opinion testimony, I must dissent. The inherent prejudice in this case is obvious. No witness saw appellant shoot the victim. No evidence was introduced tending to connect the weapon appellant admitted he fired into the air and the wound that caused the victim's death. There *was* evidence that other weapons were fired

around the time the victim was shot. Noticeably absent are ballistic evidence or other competent forensic evidence connecting the appellant and his gun to the crime.

Although the trial court based its admissibility ruling on the fact that the coroner was never qualified as an expert, he noted the coroner's fifty years of experience when he decided to allow him to testify. The supreme court has recognized that in some instances, the rational basis for qualifying a lay opinion as reliable is little different from the evidence requisite to showing that the witness is an expert in his field of knowledge. *See Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991), and *Gruzen v. State*, 276 Ark. 149, 634 S.W.2d 92 (1982). It follows that it is not acceptable to "gloss-over" the reliability requirement by using Ark. R. Evid. 701 to admit unreliable expert testimony as a lay opinion. *See Williams v. Southwestern Bell Tel. Co.*, 319 Ark 626, 893 S.W.2d 770 (1995).

As the majority writes, quoting from *Carton v. Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990), in addition to establishing the reliability of a lay opinion, the State must show that the opinion would be helpful to the trier of fact in understanding the witness's testimony. The lay witness must be qualified by experience and observation as to the subject matter. *Tallant v. State*, 42 Ark. App. 150, 865 S.W.2d 24 (1993). And the testimony must not be overly prejudicial. Ark. R. Evid. 403.

In *Felty v. State*, 306 Ark. 634, 816 S.W.2d 872 (1991), the supreme court noted two limitations on lay opinions: (1) the witness must have firsthand knowledge, and (2) the testimony must help resolve some issue in the case. If attempts are made to introduce meaningless assertions which amount to little more than "choosing up sides," exclusion is called for by the rule. *Felty* (citing Advisory Committee's Notes to Federal Rule 701). The rule was deciphered more clearly in *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991). There, where the issue was whether the trial court erred in refusing to admit the results of DNA testing where the reliability of the testing process had not been established, the court adopted the "relevancy standard." The relevancy approach requires that the trial court conduct a preliminary inquiry which

must focus on (1) the reliability of the novel process used to generate the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse or mislead the jury, and (3) the connection between the novel process evidence to be offered and the disputed factual issues in the particular case. *Id.* at 186. Although *Prater* involved the admissibility of *expert* testimony, its rule should be applied in the present case, because the standard would be essentially the same for establishing the reliability of the coroner's testimony if he were qualified as an expert. *See Gruzen, supra.*

Here, the coroner testified that he determined that the victim had been killed by a nine-millimeter bullet by a *forensically novel* process of placing several different-sized bullets in the fatal wound and eliminating all but one, based on the way the bullet fit the hole in the victim's body. It cannot be argued that this process has ever been recognized as an accurate means of determining the instrumentality of death, and it in no way relates to the commonly used method of ballistic examinations. The trial court cited only the coroner's fifty years' experience in determining the cause of death, and made no inquiry as to whether the coroner had the ability to properly explain the ramifications of his "findings" or whether he could relate them to the disputed factual issue of whether appellant fired the bullet that killed the decedent. Because there was no evidence that any of the shooters at the scene except appellant possessed a nine-millimeter, the obvious conclusion that would be drawn from the coroner's testimony in this particular case is that the appellant did, in fact, fire the fatal shot. The coroner's opinion amounted to "little more than choosing up sides," and therefore should have been excluded.

Some cases that further illustrate the error of the court's ruling are *Houston v. State*, 321 Ark. 598, 906 S.W.2d 286 (1995); *Young v. State*, 321 Ark. 225, 871 S.W.2d 373 (1994); *Palmer v. State*, 315 Ark. 696, 870 S.W.2d 385 (1994); and *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993). In all of these cases, the court dealt with the issue of whether the results of luminol testing, an unrecognized scientific test for the presence of blood, was admitted in error. The Supreme Court concluded in each that, because the procedure did not distinguish between human and other type blood, without additional test to confirm that the

blood found was human blood, admitting the results were *per se* misleading and overly prejudicial. In *Houston*, in particular, the supreme court noted that luminol testing can return a "false positive," and for that reason declared the results irrelevant without "additional factors that relate the evidence to the crime." In the present case, the exact calibers of the weapons present at the murder scene were never established, but there was testimony that in addition to the nine millimeter, a .38, a .357 and a .45 were fired. It is widely recognized among firearm experts that the .38, .357, .380 and the .9 millimeter are all in the same class of weapons and the cartridges are substantially the same in diameter. In fact, the .380 and the .9 millimeter are *exactly the same diameter.* Because the coroner's "ballistic testing" consisted only of inserting a bullet into the wound to determine the nature of the projectile that caused it, the similarity between bullets could just as easily result in a "false positive." Without further testing to confirm his results, the possibility that the jury could have been misled by the coroner's testimony is infinite. *See also Ferrell v. State, supra* (Arkansas Supreme Court recognized that difference between certain handgun barrel diameters are so slight that the difference can not be discerned by casual observation).

This case is somewhat different than *Russell v. State* 306 Ark. 436, 815 S.W.2d 929 (1991), upon which the majority relies for its decision. There, although, based upon his experience, an emergency medical technician was allowed to give his opinion that the victim's wounds were caused by a screwdriver, the opinion was a general one with less potential to mislead the jury. He was not allowed to speculate as to what type screwdriver caused the wound and there was eyewitness testimony that the appellant had in fact stabbed the victim with a screwdriver. In the case at bar, the coroner was qualified, to give his opinion that the decedent's wound was caused by a bullet, but he had no experience in ballistics that would provide an ample basis for his opinion that the bullet was of a particular caliber. Also, unlike the *Russell* case, there was no eyewitness testimony to corroborate the coroner's conclusion.

In summation, the trial court's decision to allow the coroner to give an opinion that the victim's wound was caused by a nine

millimeter bullet was erroneous because (1) the State failed to establish that the test procedure was reliable; (2) the testimony was overly prejudicial; (3) the coroner's testimony was misleading; and (4) there was no evidence tending to link the coroner's "findings" to appellant, and it was therefore irrelevant. *See also Middleton v. State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989) (officer's testimony fixing appellant's alcohol level at specific level based on physical test held inadmissable and manifestly prejudicial).

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

Mary Ann RECTOR *v.* Joseph Michael RECTOR

CA 96-634 947 S.W.2d 389

Court of Appeals of Arkansas
Divisions I & IV
Opinion delivered June 25, 1997

[redacted]

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[redacted]

[redacted]

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Pawlik & Associates, by: *Ella Maxwell Long*, for appellant.

Davis & Watson, P.A., by: *Jeff H. Watson*, for appellee.

SAM BIRD, Judge. Mary Rector brings this appeal from the Chancery Court of Benton County, which granted permanent custody of her son, Kevin, to Kevin's father, Joseph Michael "Mike" Rector. On November 16, 1995, Mr. Rector, appellee, filed a complaint in chancery court, alleging he was entitled to a divorce and requesting custody of Kevin. Ms. Rector answered and also petitioned the court for full custody of Kevin.

A temporary hearing was held November 27 to determine who should be awarded temporary custody of Kevin while the divorce was pending. The chancellor noted that, as with many cases, the parents in this case were not perfect. The chancellor was disturbed that Ms. Rector had allegedly threatened to burn down the house, that Ms. Rector was not able to control her anger in front of Kevin, and that she did not communicate well with Kevin or her other children. In addition, the court noted that Ms. Rector has taken a lot of anti-depressants for her inability to control her stress.

The chancellor was concerned about Mr. Rector's admitted use of marijuana, that he had taken Kevin out of school during the time Kevin was in the middle of a chess tournament, that Mr. Rector does not seem to think that education is important, that

Mr. Rector did not yet have a stable location he could call home, and that Mr. Rector's work takes him out of town often.

Ms. Rector was awarded temporary custody because the chancellor found that she could meet the needs of the child and because her work schedule would allow Kevin to have a more stable environment.

A hearing was held on February 5, 1996, to determine whether a divorce should be granted, and if so, who should be awarded full custody of Kevin. Again, Mr. Rector admitted to using illegal drugs and Ms. Rector admitted to using a large amount of prescription drugs. Joseph Michael Rector, the parties' eldest son, testified that Ms. Rector had a number of mood swings. Both parents admitted to disciplining Kevin with a belt, and testimony was presented that Ms. Rector also used a wire fly swatter. Kevin testified that he wanted to live with his father because his dad "takes me out camping and everything, and Mom just watches TV and tells me to go to school and stuff."

Nicki McDonald, Ms. Rector's adult daughter from another marriage, also testified. Ms. McDonald stated that Mr. Rector had sexually abused her when she was a child. Appellee objected, stating that the evidence was irrelevant. After questioning Ms. McDonald, the court sustained the objection, stating that a complete investigation into these allegations had not been made and that a link between the incident that happened ten years ago and what was being decided in the hearing was missing.

The chancellor granted Mr. Rector a divorce and permanent custody of Kevin, subject to visitation rights of Ms. Rector. In his oral findings, the chancellor stated that he was concerned about the use and storage of illegal drugs and prescription drugs. However, the chancellor felt that an illegal drug problem could be handled by ordering Mr. Rector to take drug tests, ordering examinations of the home and ordering that the child be removed from an environment where illegal drugs are used. However, these options were not available in monitoring Ms. Rector's use of prescription drugs. He found that Ms. Rector was taking a large amount of anxiety drugs because of her mood swings, and found that Kevin needed a stable environment and needed to be able to

know what to expect from each parent. The chancellor also noted that Mr. Rector tended to spend more time in activities with Kevin.

This court reviews chancery decisions de novo and reverses only if it finds that the chancellor's findings are clearly against the preponderance of the evidence. *Fitzpatrick v. Fitzpatrick*, 29 Ark. App. 38, 776 S.W.2d 836 (1989). In a custody hearing, the court considers what is in the best interest of the child. Ark. Code Ann. § 9-13-101 (Repl. 1993). Factors a court may consider in determining what is in the best interest of the child include the psychological relationship between the parents and the child, the need for stability and continuity in the child's relationship with parents and siblings, the past conduct of the parents toward the child, and the reasonable preference of a child. *Anderson v. Anderson*, 43 Ark. App. 194, 863 S.W.2d 325 (1993). In child custody cases, the chancellor has a heavy burden of evaluating the witnesses, their testimony, and determining what is in the child's best interest. *Fitzpatrick*, 29 Ark. App. at 40, 776 S.W.2d at 837. In *Fitzpatrick*, this court held, "We have often stated that we know of no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as great a weight as those involving child custody." *Id.* (citing *Calhoun v. Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981)).

Appellant argues on appeal that the chancellor abused his discretion in determining that it was in the best interest of the minor child to be placed in the permanent custody of appellee because the chancellor's decision was clearly against the preponderance of the evidence. For this claim, the appellant relies on three arguments. We affirm.

First, appellant argues the court erred when it ruled that the testimony by Nicki McDonald that Mr. Rector had sexually abused her was irrelevant. She argues that the testimony is a reflection on Mr. Rector's morality and that morality must be considered in determining what is in the best interest of the child. We agree that morality is a factor to be considered in determining a child-custody case; however, we also agree with the chancellor that neither a proper link had been made to connect the allegation

to the case at hand nor had a proper investigation been made into the allegation.

Nicki McDonald testified that Mr. Rector sexually abused her when she was in the ninth or tenth grade. She testified that he would come into her bedroom and "he touched me and that was it." However, she never talked to anyone about the incident. She stated that she confronted Mr. Rector and he did not touch her again. Appellee objected to the testimony based on relevance. The court then questioned Ms. McDonald and ruled,

> I think this is an issue that needs to be resolved. It's not totally collateral to this, but I think there needs to be some tie-in to something that happened over ten years ago and what is happening today. If he has exhibited these propensities of abuse toward other children or something, the male children, I need to know about that. We are dealing with a male child here. I am not putting down the allegations Mrs. McDonald is making here today, but I just don't think that this is the platform for doing it.

The court obviously gave little weight to the testimony of Ms. McDonald about her sexual-abuse allegations against Mr. Rector because no investigation had been made into the allegation, because the alleged incidents had gone unreported to anyone by Ms. McDonald for ten years, and because the custody hearing concerned a twelve-year-old boy and not a high-school girl. No evidence was presented that Mr. Rector had ever sexually abused his son and he steadfastly denied that he had ever touched Ms. McDonald inappropriately. Where testimony conflicts, the issue of credibility is a matter in which this court defers to the chancellor. *Fitzpatrick, supra.*

Ark. R. Evid. 401 defines relevant evidence as evidence that has a tendency to make the existence of any fact more probable or less probable than it would be without the evidence. This court will not reverse a chancellor's ruling on relevancy unless it finds an abuse of the trial court's discretion. *James v. James*, 29 Ark. App. 226, 780 S.W.2d 346 (1989). In child-custody cases, the chancellor's personal observation of the mother and father and their respective personalities is vital and of inestimable value. *Fitzpatrick, supra.*

For her second argument, appellant contends that the chancellor's findings that the appellant's use of prescription drugs was abusive is arbitrary and groundless. The appellant cites no authority for this argument but argues that this finding was not supported by substantial evidence.

The chancellor did not specifically find that appellant was abusing drugs, but he did express that he was "concerned about the number of prescription drugs that are passing through the hands of the defendant." Evidence was introduced that showed appellant was getting prescriptions filled about every month. She testified that she was taking, or has taken in about a year, Valium, which she characterized as an antianxiety drug taken to help her sleep; Phentermine and Pondimine to help her lose weight; Darvocet, for chronic headaches; Polyhistine-D for sinus; Cephalexin, which is an antibiotic; and Paxil, as an antidepressant. She also testified that she had taken Fiorinal during the past year for pneumonia. Further, she stated that although she gets refills of Valium of about 100 every other month, she does not take all of them. Also, she testified that she receives refills of Darvocet in quantities of about forty every other month but does not take all of them either.

[redacted] The chancellor found that she was taking some of these drugs for mood swings, and the chancellor held that Kevin needed stability. The chancellor stated, "I believe the child needs to know what to expect from his parents and I believe it needs to be stable and needs to be consistent in that response." Based on the number of drugs appellant takes or has taken recently and the number or refills she receives, the chancellor did not abuse his discretion in considering appellant's prescription drug use as a factor in determining what was in the best interest for Kevin.

For her third argument, the appellant contends that the chancellor should not have considered drug-test results of the appellee because the tests were not admitted into evidence. The appellant states that the chancellor further erred by discounting appellee's illegal drug use.

During the hearing, Mr. Rector testified that he had submitted to drug tests monthly since the temporary hearing so that he

"could convince the judge that I am serious when I say I am not going to be using it." However, when appellee's counsel sought to have the documents containing the results of the drug tests marked as exhibits, appellant's counsel objected to their introduction on grounds that they were "inadmissible." The court did not rule on the objection but the documents containing the results of the drug tests were not introduced into evidence. The judge later commented that he was impressed by the drug tests.

The dissenting opinion suggests that the drug-test results were not introduced because of failure on the part of appellee to produce them, and that such failure gives rise to a presumption that the evidence, if produced, would be unfavorable to appellant. Exactly the opposite is true. Appellee had the test results present in court and was preparing to have them marked as exhibits as a prerequisite to their introduction when appellant objected because the person who conducted the tests was not present to authenticate them. Appellant obviously knew what the test results would show and did not want the court to consider them. It would be unreasonable to infer that the drug-test results were unfavorable to appellee where it was appellee who revealed that he had taken the tests, where he took the tests to try to persuade the judge that he was no longer using marijuana, and where appellee was attempting to offer the test results into evidence until they were objected to by the appellant.

The judge did not comment that he was impressed with the *results* of the drug tests. Instead, he said that he was impressed with the tests, obviously meaning that he was impressed that appellee had gone to the trouble and expense of having the tests performed. It was not impermissible for the court to consider such evidence. Clearly it bears upon the credibility of appellee's testimony that he had stopped using marijuana.

The court did not rely on the drug tests in determining custody and what would be in the best interest of the child. In the court's order, the chancellor stated that he might take Mr. Rector "up on these drug tests. If, in fact, it comes to . . . my attention that there is a — I guess if I'm convinced that there may be a

violation of this trust that I have in you on the consumption of drugs, I reserve the right to order you to take a drug test."

Further, the trial court did not discount appellee's illegal drug usage. To the contrary, the judge found that he could monitor and had options to deal with any allegations of illegal drug use by Mr. Rector, but it would be more difficult to monitor or take action on the allegation of abuse of prescription drugs. The court held,

> I certainly do not encourage the use of illegal drugs. I don't encourage the abuse of prescription drugs. I am concerned about the number of prescription drugs that are passing through the hands of the Defendant. I am concerned about the security of those drugs just as much as I am concerned about the security of illegal drugs. There is a way the illegal drugs can be modified [sic] by this Court, because I can order drug tests, I can order protective services, I can order examination of the home, and with illegal drugs, I can remove the child from that environment. Where it is [an] abuse of legal drugs, I don't have those options.

[redacted] We do not find that the chancellor's decision to place Kevin in the custody of his father was clearly against the preponderance of the evidence, and we affirm.

Affirmed.

JENNINGS, STROUD, NEAL, and CRABTREE, JJ., agree.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. This is an appeal from a decree awarding custody of the parties' ten-year-old son to his father. I register this dissent mainly because the majority has committed a most grievous error in judgment by affirming the chancellor's ruling that evidence that the father sexually abused his stepdaughter is not relevant to a determination of whether he is a fit and proper person to have custody of the child.

The testimony deemed irrelevant by the chancellor and this court is that of Nicki McDonald. Ms. McDonald is appellant's twenty-six-year-old daughter from a former marriage, who had lived in the household with appellee since she was a small child, as the parties married when she was a year old. She said that, when

she was in the ninth or tenth grade, appellee came into her bedroom several times a week and touched her inappropriately. The abuse stopped after a confrontation, and she said that appellee admonished her not to tell anyone and convinced her that no one would believe her. Therefore, she kept the abuse a secret.

"Relevant evidence" means evidence having *any* tendency to make the existence of a 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. A fact that is of consequence in this case was whether appellee was a fit and proper person to have custody of the child. We have recognized that evidence bearing on a parent's moral character is relevant in deciding the issue of custody. *Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996); *James v. James*, 29 Ark. App. 226, 780 S.W.2d 346 (1989). It requires no stretch of the imagination to realize that evidence of sexual abuse of a child speaks volumes about that person's moral character.

In *James v. James*, 29 Ark. App. 226, 780 S.W.2d 346 (1989), we reversed a chancellor's ruling excluding evidence on grounds of relevancy that a prospective custodial parent had fraudulently embezzled funds from his deceased father's estate. We held that this behavior was indicative of the parent's moral character and was thus relevant to the issue of parental custody and the issue of the best interest of the child.

More recently, in *Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996), we affirmed a chancellor's ruling permitting evidence of crimes committed by third persons who were brought into the presence of the child by a prospective custodial parent. The offenses included possession of a controlled substance, harassment, and possession of a controlled substance with intent to deliver. We harkened back to our decision in *James v. James, supra*, and held that, since evidence of a parent's moral character is relevant in a custody proceeding, the evidence in question was relevant as a reflection on the parent's "morality in allowing persons of questionable reputation and character to be around the child."

I submit that the behavior evidenced in this case is far more serious than that of fraud or embezzlement. And, if evidence that

a parent's acquaintances have committed crimes is considered a poor reflection on that parent's moral character, then there is no sound reason to conclude that the evidence in this case is irrelevant. Aside from the moral implications of the evidence discussed in *James v. James* and *Stone v. Steed*, evidence of a parent's conduct and activities is routinely admitted in custody cases as a means for chancellors to acquaint themselves with the parties in order to decide the placement of custody. Church activities, or the lack thereof, criminal records, drinking habits, drug usage, adulterous affairs, the use of foul language, etc., are all considered relevant topics in a custody case, as having a tendency to show the kind of person a parent is. No reasonable person, even one unschooled in the law, would argue that evidence of sexual abuse is not relevant. Nevertheless, the majority stubbornly refuses to count this evidence among that which is generally considered relevant in determining the best interest of the child.

To affirm, the majority accepts the chancellor's reasoning that the evidence was not relevant because the abuse involved a young girl, whereas the child in question is a young boy. That distinction misses the point entirely. The evidence was not offered to show that the child was necessarily in danger of being abused. It was offered as evidence bearing on the issue of appellee's moral character and his fitness to have custody of the child. It cannot be said that this evidence was not probative of appellee's basic moral fiber and character. It would be ludicrous to conclude otherwise.

The majority further holds that the evidence was not relevant because there had been no "proper investigation" of the allegation. I suppose this means that evidence of this kind is not considered relevant unless it has been reported to the proper authorities and investigated by them. In other words, acts that have remained clothed in secrecy are not relevant. To plainly state the majority's holding is but to expose the fallacy of its reasoning.

The issue here is one of simple relevancy. The chancellor unequivocally ruled that he did not consider this evidence relevant to any issue before him; he thus did more than attach little weight to the evidence as the majority obliquely suggests. Significantly,

the chancellor did not find that the testimony was not worthy of belief. Yet to affirm this ruling, the majority has erected artificial barriers for the admission of this evidence. Such a result represents a perversion of the definition of relevant evidence and a blatant disregard of our case law holding that evidence of a parent's moral character is relevant in a custody case. This decision is thus as offensive as it is wrong.

Issues that touch upon the welfare of children should merit particular consideration on appellate review. As I indicated in my dissenting opinion in *Jones v. Jones*, 51 Ark. App. 24, 907 S.W.2d 745 (1995), rev'd on review, 326 Ark. 481, 931 S.W.2d 767 (1996), we who sit on this court should not hesitate to reverse in the face of manifest error. When a chancellor refuses to consider evidence that is relevant to the vital issue of a parent's character, his values, and his sense of morality, it is our responsibility to take corrective action to disabuse the chancellor of his mistake in judgment. The chancellor in this case clearly abused his discretion in failing to consider this evidence as relevant. His ruling should not have the approbation of this court.

While I would reverse and remand on this issue alone without discussing the other arguments on appeal, this court's affirmance compels me to comment on the remaining issues raised. I also find fault with the chancellor's comparison of appellant's use of prescription medication to appellee's use of an illegal substance. Persons who take medications prescribed by their doctors do so for reasons of health, while persons who use illegal, controlled substances do so for recreational purposes. Obviously, there is a vast difference between the two.

And in this case, the medications prescribed for appellant were for the treatment of severe and frequent migraine headaches, which appellee did not dispute, and anxiety associated with her monthly menstrual cycle, as well as stress brought about by the deterioration of the parties' relationship. These medications were prescribed under the direction and control of a physician in quantities deemed necessary by him for the treatment of those conditions. And, the chancellor did not find that she abused any of these medications. Appellee, on the other hand, admitted that he

had smoked marijuana for twenty years. Introduced into evidence was a book of appellee's called *The Marijuana Growers Guide*, which suggests that appellee did more than smoke this illegal substance. There was evidence that appellee's use of this substance influenced the parties' elder son, who also smoked marijuana and who had even stolen appellee's marijuana from the shed where appellee kept it hidden. The young boy in question also testified that he had been around his father "every now and then when he acted kind of funny, acted drunk." Therefore, I question the chancellor's ruling holding appellant blameworthy for the use of prescribed medications, while downplaying appellee's daily use of marijuana. The court reasoned that he could not control appellant's behavior, but that he could control appellee's usage of drugs. In the end, however, the chancellor did nothing to check appellee's use of marijuana, since drug testing was not made part of the decree. The decree provided only that the court reserved the right to order drug testing in the future.

I also cannot disagree with appellant's argument that the chancellor considered evidence that was not introduced. It is clear that the chancellor was impressed with appellee's testimony that he had been tested for drugs, as if the results were negative. However, the results of those tests were not admitted into evidence. It goes without saying that a court is not to consider evidence outside of the record. *See Sanders v. Putman*, 315 Ark. 251, 866 S.W.2d 827 (1993). Moreover, if the results were favorable to appellee, I wonder why no effort at all was made to lay a foundation for their admission? The failure to produce evidence within the party's control raises the presumption that, if produced, it would operate against him, and every intendment will be in favor of the opposite party. *Arkansas Hwy. Comm'n. v. Phillips*, 252 Ark. 206, 478 S.W.2d 27 (1972); *Rutherford v. Casey*, 190 Ark. 79, 77 S.W.2d 58 (1934).

Although we lend great deference to a chancellor's judgment in custody cases, and for good reason, that does not mean that we must affirm when the record is fraught with errors so fundamental as to constitute an abuse of discretion.

I respectfully dissent.

SOUTHWESTERN BELL TELEPHONE COMPANY, et al.
v. ARKANSAS PUBLIC SERVICE COMMISSION, et al.

CA 95-1176 946 S.W.2d 730

Court of Appeals of Arkansas
Special Division
Opinion delivered June 25, 1997

Ann E. Meuleman and *Garry S. Wann*; and *Ivester, Skinner & Camp, P.A.*, by: *H. Edward Skinner*, for appellant Southwestern Bell Telephone Company.

Arthur H. Stuenkel, for appellee Arkansas Public Service Commission.

Wright, Lindsey & Jennings, by: *J. Mark Davis*; *Cuffman & Phillips*, by: *Stephen K. Cuffman*; and *Shults, Ray & Kurrus*, by: *H. Baker Kurrus*, for appellees AT&T Communications of the Southwest, Inc.; MCI Telecommunications Corp.; and LDDS of Arkansas, Inc.

JUDITH ROGERS, Judge. Appellants herein are twenty-eight local exchange carriers (LECs), the largest such carrier being Southwestern Bell Telephone Company (SWBT). This appeal concerns the Carrier Common Line (CCL) charges that the LECs assess the interexchange carriers (IXCs) for the IXCs' use of the LECs' facilities. The IXCs use the LECs' local loop networks in the origination and termination of long-distance toll calls and are charged intrastate access charges by the LECs. These charges are designed to recover a reasonable share of LECs' local loop network

costs and are treated by the IXCs as part of their cost of service, which they include in their toll rates. To determine the amount of CCL charges, the CCL revenue requirements are calculated annually on the basis of a formula, hereinafter referred to as the algorithm, which quantifies each LEC's operating expense, current depreciated assets, and return on the LEC's invested capital that is associated with access service to the IXCs. A 12% rate of return is used in the algorithm.

The Arkansas InterLATA Carrier Common Line Pool (AICCLP) was established by the Arkansas Public Service Commission (Commission) to administer the CCL revenue requirement and resulting charges. Annually, the AICCLP files tariffs with the Commission setting forth the LECs' revenue requirements for the succeeding calendar year. On November 30, 1994, SWBT as administrator of the AICCLP filed revised tariffs with the Commission setting forth the 1995 preliminary revenue requirements (and the proposed tariffs) for each LEC member of the AICCLP. Three IXCs, AT&T Communications of the Southwest, Inc., MCI Telecommunications Corporation, and LDDS of Arkansas, Inc., responded that the 12% rate of return used in the algorithm was excessive and moved to suspend the effective date of the tariff revisions pursuant to Ark. Code Ann. § 23-4-407 (1987) in order to permit an investigation and public hearing. Order No. 27 granted the IXCs' motion, suspended the tariffs pursuant to Section 23-4-407, ordered a public hearing on the proposed tariff revisions, and ordered the AICCLP, the LECs, and the other interested parties supporting the proposed tariffs to file their testimony first. In separate motions for reconsideration of Order No. 27, the General Staff of the Arkansas Public Service Commission (Staff), the LECs, and SWBT argued that the IXCs have the burden of proof in this proceeding and that they should be ordered to present their testimony first. Order No. 30 granted their petition for reconsideration. Order No. 31 held that the burden of proof that the AICCLP's tariffs are just and reasonable and in the public interest remains on the proponents of the tariff filing but adjusted the procedural schedule to require the IXCs to file testimony first in order to facilitate the development of the issues.

After testimony had been filed in the proceeding and the public hearing concluded, the Administrative Law Judge (ALJ) stated her findings in Order No. 32. She concluded that the rate of return used in the algorithm should be reduced to appropriately reflect the current cost of capital and that, based upon the record, there was substantial evidence that the AICCLP revenue rate of return should be reduced to 9.2%. The Commission in Order No. 33 adopted without modification Order No. 32. Order No. 34 denied appellants' request to stay the procedural schedule for the filing of the revised tariffs, and Order No. 36 approved the proposed tariffs utilizing the 9.2% rate of return authorized by Order No. 33. Order No. 37 denied appellants' petition for rehearing of Orders No. 33, 34, and 36. On appeal, appellants argue five points for reversal.

This court's review of appeals from the Commission is limited by the provisions of Ark. Code Ann. § 23-2-423(c)(3) and (4) (Supp. 1995), which provide:

> (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.

See Bryant v. Arkansas Pub. Serv. Comm'n, 54 Ark. App. 157, 924 S.W.2d 472 (1996). The Commission has broad discretion in exercising its regulatory authority, and courts may not pass upon the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion. *Bryant v. Arkansas Pub. Serv. Comm'n*, 55 Ark. App. 125, 931 S.W.2d 795 (1996). "This Court has often said that, if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then this court must affirm the Commission's action." *Id.* at 135.

Appellants' first point concerns their contention that the Commission failed to regularly pursue its authority by engaging in single-issue ratemaking. Appellants state that the algorithm is composed of numerous separate components or allocation factors, that all components are interdependent on each other, and that a change in one component may necessitate a change in another component. Unlike a traditional rate case in which the relevant ratemaking factors consist solely of various items associated with rate base, test-year revenues, test-year expenses, and rate of return, appellants argue that the relevant ratemaking factors in the instant case also include the various components of the algorithm as well as other non-algorithm components such as "IXC credits" that the Commission should have considered before reducing the CCL rate of return. Appellants conclude that, by considering the 12% rate-of-return component of the algorithm in isolation, the Commission engaged in single-issue ratemaking.

The Commission addressed appellants' single-issue ratemaking argument in Order No. 37:

> The Commission has the statutory authority and jurisdiction to create the AICCLP and to prescribe its rates. Historically, the annual revenue requirement of the AICCLP has been considered on a stand alone basis which has resulted in increases in access rates to recover increases in non-traffic sensitive (NTS) costs recovered through the AICCLP. As Staff points out in its Response, the Commission also allows "LECs to increase the traffic sensitive portion of their access rates through parity filings in Docket 86-160-U" and such "rate increases to the LECs were allowed on a stand alone basis, without regard to the revenue requirements of the respective LECs." However, it is apparent from the LECs' Petitions that their position is that "single issue ratemaking" becomes unlawful when it results in a decrease in rates. AT&T, MCI & LDDS point out that "the LECs' unified theory of ratemaking, if carried to its logical extreme, results in the conclusion that the Arkansas Intrastate Carrier Common Line Pool, and the tariffs establishing CCL revenues and the monthly CCL rate to be charged by LECs, are themselves the product of "single issue ratemaking". Consequently, LECs must also conclude that the AICCLP and its monthly CCL rate are unlawful."

The term single-issue ratemaking was first used by appellants in their petition for rehearing of Order No. 33. They stated that single-issue ratemaking occurs "when the Commission has failed to consider *all* relevant ratemaking factors in setting a utility's rates." No Arkansas statute or Arkansas case discusses single-issue ratemaking. Single-issue ratemaking is discussed in *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill.2d 111, 651 N.E.2d 1089 (1995); *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 146 Ill.2d 175, 585 N.E.2d 1032 (1991); *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission of Missouri*, 585 S.W.2d 41 (Mo. 1979); and *Pennsylvania Indus. Energy Coalition v. Pennsylvania Pub. Util. Comm'n*, 653 A.2d 1336, 1350 (Pa. Commw. Ct. 1995), *aff'd*, 670 A.2d 1152 (Pa. 1996). Our review of these cases, however, does not lead us to conclude that "prohibited single-issue ratemaking" occurred in this situation.

Unfortunately, the Commission's orders that established the AICCLP and the CCL charges prior to SWBT's filing of the AICCLP's November 1994 tariff have not been included in the record despite the fact that appellants clearly recognized that these orders were necessary to this court's understanding of the facts of this appeal. In this court's letter order of February 21, 1996, we denied appellants' motion to file a brief with these orders appended; however, we did so without prejudice to appellants' filing a motion to supplement the record. No such motion was ever filed. Therefore, this court is unable to determine whether the various components of the AICCLP have been determined in the past on a single-issue basis and we must defer to the Commission's discretion in this regard.

Furthermore, we disagree with appellants' allegation that the rate-of-return component of the algorithm was considered by the Commission in isolation. It was appellants' burden to prove that their November 1994 tariffs were just and reasonable and in the public interest.[1] They were allowed to file exhibits and

[1] Orders No. 27 and 31 of this docket held that the burden of proof was on appellants to show that the proposed November 1994 tariffs were just and reasonable. Appellants have not appealed these orders.

testimony in this regard, and a public hearing was also held in which witnesses testified regarding their prefiled testimony and the parties were allowed to cross-examine the witnesses. Appellants have not directed this court to any of the Commission's rulings showing that they were limited in any manner from producing evidence in support of the proposed tariffs, nor did they produce any evidence of the other relevant factors that they contend the Commission should have considered. It is apparent, however, that other factors were in issue as evidenced by MCI's challenge to the inter/intra allocation factors used in the algorithm. Orders No. 32 and 33 also refute appellants' contention that other components that impact appellants' costs for CCL service such as Commission-ordered credits and universal service were not considered by the Commission. In sum, appellants have failed to show that the Commission engaged in single-issue ratemaking.

The appellants further argue that the Commission failed to pursue its authority regularly by not first determining whether the appellants were earning more than a reasonable rate of return before ordering a reduction in their CCL revenue requirements. The Commission adequately dealt with this argument in Order No. 37:

> All twenty-three (23) LECs were provided notice of the suspension of the CCL tariff and the issue of the CCL revenue requirement which resulted in the suspension of the tariff on December 30, 1994. All the LECs were given an opportunity to be heard, but not a single LEC produced any evidence that a reduction of the AICCLP rate of return would result in that LEC's failure to earn its allowed rate of return. Substantial evidence requires more than a generic assertion that one of the LECs might at some future time not earn its allowed rate of return.

The burden was on appellants at the hearing to justify the revised tariffs included in the AICCLP's November 1994 filing and to show that without such rates they would be unable to earn their allowed rate of return. *General Tel. Co. of the SW v. Arkansas 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). This in part stems from the fact that appellants had possession of all pertinent records. *Accord City of El Dorado v. Arkansas Pub. Serv. Comm'n*,

235 Ark. 812, 362 S.W.2d 680 (1962). The appellants have not cited us to any evidence that was before the Commission that demonstrates they will be unable to earn a reasonable rate of return as a result of the Commission's decision to reduce the rate-of-return component of the CCL formula. The appellants' conclusion that they have no reasonable prospect of achieving their allowed rate of return unless they are allowed to increase their rates by a corresponding amount for another service is supposition and not evidence. In fact, the testimony is disputed as to whether appellants will even suffer any revenue loss as a result of the rate-of-return reduction.

Ratemaking is a legislative, not a judicial, function, and every rate order may be superseded by another, not only when conditions change, but also when the administrative understanding of the same conditions changes. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980). This court has repeatedly held that the Public Service Commission has wide discretion in choosing its approach to rate regulation, and the appellate court does not advise the Commission concerning how to make its findings or exercise its discretion. *Bryant v. Arkansas Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995). The appellate court is generally not concerned with the method used by the Commission in calculating rates as long as the Commission's action is based on substantial evidence and the total effect of the rate order is not unjust, unreasonable, unlawful, or discriminatory. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997). Here, substantial evidence existed to support the Commission's reduction in the AICCLP's rate of return, and appellants have not come forward with any evidence to show the reduction is unjust, unreasonable, unlawful, or discriminatory.

For their second point, appellants contend that the Commission denied appellants due process of law by refusing to implement a mechanism for concurrent rate relief. They contend that, because the Commission failed to evaluate the appellants' needs for rate relief to recover the revenues lost as a result of the reduction of the rate of return, the Commission in effect took their property without due process of law and that nowhere is the

Commission given taking authority. We do not address this argument because it was not made in appellants' petition for rehearing. Arkansas Code Annotated § 23-2-423(c)(2) (Supp. 1995), states that an objection to an order of the Public Service Commission may not be considered by the Court of Appeals unless the objection has been urged before the Commission in the application for rehearing. *See Bryant v. Arkansas Pub. Serv. Comm'n,* 57 Ark. App. at 85. In regard to appellants' argument that the Commission denied appellants due process by not evaluating appellants' need for rate relief to recover lost revenues resulting from the reduction in the AICCLP's rate of return, we note that appellants failed to produce any evidence before the Commission that they will lose revenue.

A full and fair hearing is a fundamental requirement of due process in the determination of the reasonableness of utility rates, and in order to meet due process requirements, a hearing must afford a utility the right to reasonably know the charges and the right to meet such charges by competent evidence. *Arkansas Pub. Serv. Comm'n v. Continental Tel. Co. of Ark.*, 262 Ark. 821, 561 S.W.2d 645 (1978). The opportunity to submit evidence to rebut charges or adverse claims and testimony is an essential requirement of a full and fair hearing of the due process clause of the Constitution. *Id.* Here, the evidence supports the Commission's finding that the appellants were advised of the issues before the Commission and were given the opportunity to present evidence to the Commission in support of all the components of the proposed tariffs, including the existing rate-of-return factor. The Commission correctly observed in Order No. 37 that "[t]he failure of a party to produce evidence on an issue is not a denial of due process." Where the appellants are afforded every opportunity to participate in a proceeding below, the simple fact that the outcome is not as appellants would have wished is not tantamount to a denial of due process. *See Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n,* 35 Ark. App. 47, 813 S.W.2d 263 (1991).

Appellants for their third point argue that the Commission exceeded its jurisdiction as set forth by Ark. Code Ann. § 23-2-301 (1987) in treating the AICCLP as a stand-alone "utility busi-

ness" and by prescribing a service-specific rate of return for CCL service. That section provides "[t]he Commission is vested with the power and jurisdiction, and it is made its duty, to supervise and regulate every public utility defined in § 23-1-101. . . ." Appellants contend that, because the AICCLP has no separate legal status except for purposes of its administrative functions of filing tariffs and billing and collecting CCL revenues, it is not a public utility as defined in Section 23-1-101 and as such, it cannot lawfully have its rates prescribed by the Commission. Appellants acknowledge that the AICCLP algorithm requires the use of a target rate of return but contend that the Commission has never prescribed a separate rate of return for CCL service in a contested proceeding. They insist that the rate of return used in the AICCLP is simply an agreed-upon return by the parties, and the approval of these joint agreements by the Commission does not constitute a legal prescription of a service-specific rate of return for CCL service.

The Commission responded to this argument in Order No. 37:

> The Commission has the statutory authority and jurisdiction to create the AICCLP and to prescribe its rates. Historically, the annual revenue requirement of the AICCLP has been considered on a stand alone basis which has resulted in increases in access rates to recover increases in non-traffic sensitive (NTS) costs recovered through the AICCLP. As Staff points out in its Response, the Commission also allows "LECs to increase the traffic sensitive portion of their access rates through parity filings in Docket 86-160-U" and such "rate increases to the LECs were allowed on a stand alone basis, without regard to the revenue requirements of the respective LECs."

Section 23-2-301 authorizes the Commission to supervise and regulate every public utility defined in Section 23-1-101 and "to do all things, whether specifically designated in this act, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty." *See Bryant v. Arkansas Public Service Commission*, 46 Ark. App. 88, 94-95, 877 S.W.2d 594 (1994). The Commission was created to act for the General Assembly, and it has the same powers that that body

would have when acting within the powers conferred upon it by legislative act. *Id.* at 95.

[redacted] The AICCLP has acted as a stand-alone unit in recouping the appellants' CCL costs since 1986. In relation to their CCL revenue requirements, the appellants do not act independently but through the AICCLP's filing of annual proposed rates, which is the subject matter of this docket. This court does not have for its review the prior Commission orders concerning the "agreed-upon" 12% rate of return. Assuming, however, that this rate did result from the parties' agreement, it does not change the fact that rates are still required to be approved by Commission order. *See* Ark. Code Ann. § 23-2-304 (Supp. 1995). Moreover, this court has previously held that the Commission's statutory authority is clearly broad enough to allow the Commission to *consider* stipulations entered into by some of the parties to a proceeding in approaching rate regulation. *See Bryant v. Arkansas Public Service Commission*, 46 Ark. App. at 98 (emphasis in original). The Commission must, however, make an independent finding supported by substantial evidence that the stipulation resolved the issues in dispute in a way which was fair, just, and reasonable, and in the public interest. *Id.*

Appellants' point number four is analogous to their argument of Point One. They contend that the Commission acted arbitrarily and capriciously and abused its discretion by failing to adequately address the implications of Order No. 33 on universal service and by failing to enumerate and identify explicit support mechanisms. We disagree. The ALJ discussed universal service in Order No. 32, which was adopted by the Commission in Order No. 33:

> The Commission continues to support the objective of universal service. However, universal service goals can be maintained through explicit support mechanisms instead of nonspecific pooling support mechanisms. It does not have to be supported by inflated intrastate toll rates which are not beneficial to the public in a rural state where toll calls are an essential means of daily communications for many residents. Furthermore, reducing CCL charges furthers the Commission's goal of reducing the disparity between interstate toll rates and intrastate toll rates.

To set aside the Commission's action as arbitrary and capricious, the appellant must prove the action was a willful and unreasoning action made without consideration and with a disregard of the facts and circumstances of the case. *Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996). Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis and something more than mere error is necessary to meet the test. *Id.* The ALJ recognized the objectives of the universal fund, but she also recognized the rapid changes in the telecommunications industry. The General Assembly also recognized these changes when it passed Act 238 of 1993, codified at Ark. Code Ann. § 23-2-304(b). The emergency clause to that act states:

> It is hereby found and determined by the General Assembly that because of competitive and technological changes relating to telecommunications services, it is essential that the Arkansas Public Service Commission be authorized to deviate from the rate/base rate of return method of regulation in establishing rates and charges for such services; that it is in the best interest of the public that this authority be granted at the earliest possible date to enable the commission to more equitably establish a system of rates and charges for telecommunications services and that this act is designed to grant such authority and should be given effect immediately.

For their final point, appellants argue that the Commission's failure to consider the IXCs' credits in setting the 9.2% rate of return was arbitrary and capricious. Appellants claim that these credits reduce the total AICCLP revenue requirement allocated to the IXCs by $5.2 million annually, thereby reducing the effective rate of return paid by the IXCs from 12% to 6.45%. The appellants argue that using a 9.2% rate of return without making any adjustment to these credits will produce an earned rate of return significantly below SWBT's current 6.45% rate of return and violates the prohibition against confiscatory ratemaking.

We are hampered in discussing these credits because none of the Commission's orders granting the IXCs such credits are included in the record. It is apparent from the testimony, however, that the IXCs' credits appellants discuss were issued in

other dockets and used as offsets against the IXCs' AICCLP payments. Both AT&T witness Arthur Lerma and SWB witness Paul Waits testified that the IXC credits are not part of the algorithm used to develop the AICCLP revenue requirement. Waits testified:

> The majority of them came out of a docket where the Commission wanted to reduce intraLATA toll rates. It might have been from a Southwestern Bell case. I can't recall for sure. But when we settled it, the interexchange carriers intervened and said we want some access charge reductions as part of this deal.

Lerma testified that a "good number" of the IXC credits were the result of overearnings investigations, that the remainder are a combination of credits from SWB and other ordered credits related to changes in the toll pool, and that the credits are separate from the AICCLP revenue requirement. The ALJ discussed these credits in Order No. 32:

> The LECs raised two points regarding any reduction in the AICCLP rate of return. First, the LECs allege that credits flowed through the AICCLP should be reduced or eliminated if the rate of return is reduced. The credits addressed by the LECs are the result of findings by the Commission in a number of other dockets. Some credits are the result of company specific earnings reviews and other credits are the product of generic toll reductions. Other than a desire not to have the AICCLP revenue requirement reduced, the LECs have presented no evidence that any orders establishing the credits should be modified or overturned. Nor have the LECs presented any evidence that these credits which were the result of findings and orders in other dockets are within the scope of this proceeding and subject to consideration herein.

The Commission adopted Order No. 32 and concluded that it was not appropriate to consider these credits in setting the 9.2% rate of return. From the limited information we have before us concerning these credits, we cannot conclude that the Commission acted arbitrarily and capriciously.

[redacted] In Order No. 32, the ALJ reviewed the testimony that supported the reduction in the rate-of-return component, and it would unduly lengthen this opinion to repeat the testimony here.

Suffice it to say that substantial evidence existed in the record to support the Commission's finding that the 12% rate of return should be reduced to 9.2%. The orders of the Commission are therefore affirmed.

Affirmed.

JENNINGS, STROUD, CRABTREE, MEADS, and ROAF, JJ., agree.

Randy WIRTH and Mary Wirth *v.* REYNOLDS METALS COMPANY

CA 96-1161 947 S.W.2d 401

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 25, 1997

Walters, Hamby & Verkamp, by: *Michael Hamby*, for appellants.

Warner, Smith & Harris, PLC, by: *Douglas O. Smith, Jr.*, and *Gerald L. DeLung*, for appellee Reynolds Metals Company.

JUDITH ROGERS, Judge. This is an appeal from an order of summary judgment entered upon a finding that appellants, Randy and Mary Wirth, had failed to offer proof of proximate causation to support their claim of negligence[1] against appellee, Reynolds Metal Company. Although appellants contend that the trial court erred in its decision, we affirm.

In May of 1994, appellants drilled a water well to service a new home they were in the process of building in rural Sebastian County. Appellants and their four children moved into the home on December 31, 1994. The family consumed an average of 12,000 gallons of water a month, and the well produced eight gallons of water a minute, which was sufficient to meet their needs. After using the well for four months, appellants experienced problems with the well in terms of pressure and the quantity of

[1] We certified this case to the supreme court as one presenting a question in the law of torts. Ark. Sup. Ct R. 1-2(a)(15). However, the court returned the case to us for decision.

water it produced. In July of 1995, production of the well decreased to half a gallon a minute. In October, appellants abandoned use of the well and drilled another well one hundred feet away.

Appellants filed this suit against appellee for damages connected with the failure of the first well. In their complaint, they alleged that appellee had drilled a gas well on adjacent property at a distance of 800 feet from their water well. They claimed that the damage caused to the water well was the proximate result of appellee's drilling and operation of the gas well. Appellants prayed for damages in the amount of $10,000. Appellants subsequently amended their complaint to assert a claim of negligence against appellee. Specifically, in terms of proximate causation, appellants alleged that "the slurry or cement used by the [appellee] in casing their [sic] well leaked into the natural aquifer which served as a channel through which [appellants'] water supply flowed."

Appellee moved for summary judgment on the issue of proximate causation. Submitted with the motion were the depositions of appellant, Randy Wirth, and T.H. Musgrove, appellants' expert who had drilled appellants' water wells, as well as the affidavit of Darwin Hale, the tool pusher who worked on the crew that drilled appellee's gas well. In opposition to the motion, appellants relied on the same depositions and added the affidavit of a neighbor, Omar Gibson.

In his deposition, Wirth asserted that the problems with his well began two weeks after appellee drilled its well. He said that he did not have any information and did not know that there was anything inappropriate done in the drilling of the gas well, but that it was his "personal belief that this casing and cementing is what caused my problem."

Mr. Musgrove related that there was no continuous aquifer in the area and that he had dug appellants' well in a fault where water tends to collect. He had not examined the gas well or appellee's log books, and he did not know the distance between the two wells or the differences in elevation. He could not say that appel-

lee's gas well had any effect on appellants' water well. He said that the only scenario for appellee's well to have caused the problem would be if cement had been lost during the drilling of the gas well. He stated that "[i]f they lost cement, it could possibly have bothered the well." He said, however, that he had not checked to see if any cement had been lost, but he opined that the man who cemented the gas well would know.

Darwin Hale stated in his affidavit that no water had been encountered during the drilling of appellee's well and that no cement had been lost. As based on his experience and knowledge, he averred that the drilling of the gas well did not and could not have had any effect on the water well.

In his affidavit, Mr. Gibson stated that he had lived in "close proximity" to appellants' property for three years. He said that his well had run dry from time to time and that its production had decreased substantially since the drilling of appellee's gas well.

On this record, the trial court granted appellee's motion for summary judgment. The court took note of Mr. Musgrove's testimony that the drilling of the gas well would not have caused the decreased water capacity of appellants' well in the absence of a loss of cement during drilling, and the testimony of Mr. Hale who stated that no cement had been lost. The court thus found that appellants had failed to offer proof in support of their claim of a causal relationship between the drilling of the gas well and the damage to their water well.

In this appeal, appellants have discarded the theory of causation with respect to the loss of cement. It is their argument that summary judgment was not appropriate because of the circumstantial evidence contained in the record, which consists of proof indicating that their well and Mr. Gibson's well developed problems two weeks after the drilling of appellee's gas well. Applying the familiar principles of summary judgment to the evidence adduced in this case, we find no merit in this argument.

Summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that

there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Johnson v. Harrywell, Inc.*, 47 Ark. App. 61, 885 S.W.2d 25 (1994). All proof submitted must be considered in the light most favorable to the nonmoving party, and any doubts or inferences must be resolved against the moving party. *Wozniak v. Colonial Ins. Co.*, 46 Ark. App. 331, 885 S.W.2d 902 (1994). Rule 56(e) of the Arkansas Rules of Civil Procedure provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The supreme court has interpreted Rule 56(e) many times and has summarized its requirements by stating that once the moving party makes a prima facie showing of entitlement, the opposing party must meet proof with proof by showing a genuine issue of material fact. *Dillard v. Resolution Trust Co.*, 308 Ark. 357, 824 S.W.2d 387 (1992). When a prima facie showing is made, the adverse party may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Norris v. Bakker*, 320 Ark. 629, 899 S.W.2d 70 (1995); *Carmichael v. Nationwide Life Ins. Co.*, 305 Ark. 549, 810 S.W.2d 39 (1991). An affidavit stating only conclusions is not sufficient to show the existence of a genuine issue of material fact. *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994).

Here, the appellants alleged that the damage to their well was caused by the negligence of appellee attributable to the loss of cement when the gas well was drilled. Appellee refuted that allegation and thus made a prima facie showing of entitlement to summary judgment. *See Knowlton v. Ward*, 318 Ark. 867, 889 S.W.2d 721 (1994); *Hensley v. White River Medical Center*, 28 Ark. App. 27, 770 S.W.2d 190 (1989). It then fell to appellants to dis-

card the shielding cloak of formal allegations and meet proof with proof to show a genuine issue of material fact. *Cash v. Lim*, 322 Ark. 359, 908 S.W.2d 655 (1995); *Cummings, Inc. v. Check Inn*, 271 Ark. 596, 609 S.W.2d 66 (1980); *J.M. Products, Inc. v. Ark. Capital Corp.*, 51 Ark. App. 85, 910 S.W.2d 702 (1995). This they failed to do. Although there was proof that the well developed problems shortly after the drilling of the gas well, the wells were located at a distance of over two football fields apart, and appellants offered no specific evidence demonstrating how the drilling of the gas well might possibly have caused the damage to their well. Appellants' claim is thus based on mere allegations and conclusions, which are not sufficient to overcome appellee's prima facie showing of entitlement to judgment as a matter of law.

To accept appellants' 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). The failure of *post hoc ergo propter hoc* reasoning to prove proximate causation was ably set forth by the Supreme Court of Mississippi in *Western Geophys. Co. of America v. Martin*, 174 So. 2d 706 (Miss. 1965). Like the instant case, *Martin* involved a damaged water well. Martin, the well owner, asserted that Western's negligent conduct damaged his well. The issue on appeal was whether the trial court erred in denying Western's motion for a directed verdict. The court described Western's conduct and its relation in time and place to Mr. Martin's water well as follows:

> The Western Geophysical Company of America, hereinafter called Western, is engaged in seismograph work, the main purpose of which is to locate subsurface formations capable of producing oil. This work involved the detonating of small charges of dynamite in relatively shallow holes, thereby sending out energy waves which in turn bounced off the lower formations and traveled back to the surface where they were detected and recorded by extremely sensitive instruments.

> Appellee charged that on May 6, 1963, around three o'clock in the afternoon, the appellant detonated a charge of dynamite close to the appellee's property and a water well of the appellee, so that the appellee's water well, which had been operating properly, ceased to do so and began to pump sand, which ruined the pump. More specifically, the appellee charged Western's wrongful act was "the firing of dynamite in the water stream that your plaintiff's water well was in and the firing of dynamite or other explosives too close to the plaintiff's house and water well." Appellee further charged that the vibration damaged the strainer, causing the pump to pump sand and rusty water, and that the sand burned up the pump. The appellee contended that the explosion was the proximate cause of the loss of his well and that he sustained actual and punitive damages in the sum of $2,500.

Martin, 174 So. 2d at 707-08.

The court then summarized a great deal of testimony offered by Western to the effect that its conduct in setting off the dynamite charge did not damage Mr. Martin's water well. Thereafter, the court noted:

> In the case at bar, there is not any specific, competent testimony as to how and in what manner the well was damaged by the appellant's detonation. In fact, there is no testimony on this point except by the appellee [Martin] himself, who admitted that he did not know what damage was caused; that he just assumed damage was caused.

Martin, 174 So. 2d at 713.

In concluding that the trial court should have granted Western's motion for a directed verdict, the court relied on its previous decisions in *Humble Oil and Refining Co. v. Pittman*, 49 So. 2d 408 (Miss. 1950), and *Kramer Service, Inc. v. Wilkins*, 186 So. 625 (Miss. 1939), and observed:

> The language of the court in the Pittman case deserves our attention. In that case it was said:

> Against this expert testimony there is left only the circumstance that soon after the charges were fired some disturbance of the well appeared. This may of course have had a causal connection with the explosions. There is plausible ground for lay witnesses so to suspect. Yet verdicts may not rest upon suspicion or conjecture. In its last analysis the circumstantial evidence adduced to support the verdict is the theory post hoc ergo propter hoc. This basis has never of itself been held substantial enough upon which to erect proximate causation. (Citing Kramer Service Co. v. Wilkins, 184 Miss. 483, 186 So. 625, 627 (1939).)

The Pittman case relied upon the Wilkins case, in which the court, speaking through Justice Griffith, said:

> There is one heresy in the judicial forum which appears to be Hydra-headed, and although cut off again and again, has the characteristic of an endless removal. That heresy is that proof that a past event possibly happened, or that a certain result was possibly caused by a past event, is sufficient in probative force to take the question to a jury. Such was never the law in this state, and we are in accord with almost all of the other common-law states. . . . "Post hoc ergo propter hoc" is not sound as evidence or argument. Nor is it sufficient for a plaintiff seeking recovery for alleged negligence by an employer towards an employee to show a possibility that the injury complained of was caused by negligence. Possibilities will not sustain a verdict. It must have a better foundation.
>
> This terse and expressive language had no such limited application as that it governed only in employer and employee cases, but is to be paraphrased as follows: It is not enough that negligence of one person and injury to another coexisted, but the injury must have been caused by the negligence. Post hoc ergo propter hoc is not sound as evidence or argument. Nor is it sufficient for a plaintiff, seeking recovery for alleged negligence by another toward the plaintiff, to show a possibility that the injury complained of was caused by negligence. Possibilities will not sustain a verdict.

> It must have a better foundation. (184 Miss. at 496, 497, 186 So. at 627.)

Martin, 174 So. 2d at 714-15.

[redacted] We find the Mississippi Court's analysis in *Martin* and the precedents upon which *Martin* relies to be persuasive.

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). Appellants presented no evidence upon which fair-minded people could have concluded without speculation that the drilling of the gas well had any effect on their water well. Proximate causation cannot be based on mere coincidence. Therefore, we cannot say that the trial court erred in granting appellee's motion for summary judgment. *See, e.g., Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995) (summary judgment affirmed where plaintiff failed to offer proof that the defendant's feed caused the death of plaintiff's ostriches); *Continental Geophys. v. Adair*, 243 Ark. 589, 420 S.W.2d 836 (1967) (holding that motion for a directed verdict should have been granted when no evidence was presented to show that the defendant's seismographic detonations caused the damage to plaintiffs' water wells).

Affirmed.

PITTMAN, GRIFFEN, and MEADS, JJ., agree.

STROUD and CRABTREE, JJ., dissent.

JOHN F. STROUD, JR., Judge, dissenting. I respectfully dissent from the majority's opinion. In my view, the majority opinion erroneously concludes that proximate causation is not a

genuine issue of material fact in this case, and it fails to address the factors that should guide analysis of proximate causation in cases like this one.

Three Arkansas Supreme Court decisions should govern our review of the circuit court's determination that appellants failed to present any genuine issue as to whether the appellee's drilling of its gas well was the proximate cause of the reduction in the amount of water that their first well produced. When considered together, these three cases set forth the sort of circumstantial evidence that a court should consider when determining whether the drilling of an oil or gas well damaged a neighboring water well.

The first of these three cases is *Western Geophysical Co. v. Mason*, 240 Ark. 767, 402 S.W.2d 657 (1966). In *Mason*, the supreme court affirmed a jury's verdict that the Western Geophysical Company had damaged Mason's water well in the course of conducting seismographic exploration for oil by exploding dynamite in holes fifty to seventy-five feet deep near Mason's property. After Western Geophysical Company's detonation of the dynamite, the water in Mason's well "turned red and muddy, and was unfit for use, allegedly as the result of the shots." *Mason*, 240 Ark. at 768, 402 S.W.2d at 658. With regard to Mason's proof that Western Geophysical Company's conduct was the proximate cause of the damage to his water well, the supreme court set forth the following summary of the circumstantial evidence that proved proximate causation:

> Rather than attempting to set out in full all relevant testimony, we deem it sufficient to point out: appellees testified their well was damaged in 1961 by similar explosions; that they so informed appellant [Western Geophysical Company], and that they warned appellant the explosions were too close to their well. Likewise, there is undisputed evidence in the record that the well was damaged shortly after the explosions occurred, and no other explanation for the damage was shown or even suggested. We are not unmindful of the expert testimony presented by appellant to the effect that vibrations set in motion by the explosions could not have affected the well because of the small size of the shots

> and the distance from the well. However, in our opinion, a jury question was presented by all the testimony.

Mason, 240 Ark. at 769-70, 402 S.W. 2d at 658. Nowhere in its recitation of the circumstantial evidence bearing on the proximate cause issue did the supreme court state the distance between Mason's water well and the Western Geophysical Company's subterranean dynamite explosions. Moreover, the supreme court did not state the time that passed between Western Geophysical Company's dynamite explosions and the appearance of mud and red coloration in the water in Mason's water well.

The second supreme court decision pertinent to our review of this case is *O'Brien v. Primm*, 243 Ark. 186, 419 S.W.2d 323 (1967). In that case, the Arkansas Supreme Court affirmed the circuit court's denial of appellant O'Brien's motion for directed verdict. Appellant O'Brien owned an oil well that was 2,326 feet deep and was located 550 feet from appellee Primm's water well, which was approximately 30 feet deep. With regard to O'Brien's conduct and its relation in time to damage to the water in Primm's water well, the supreme court noted:

> In April 1964, appellants did what is known as a sand fract job on the oil well, and within a week or so following this operation, a change was noted in the quality of the water in appellees' water well, and the quality of the water rapidly deteriorated until it soon became unfit for human consumption.

O'Brien, 243 Ark. at 188, 419 S.W. 2d at 324.[1] The supreme court noted further that O'Brien's sandfract operation consisted of pouring cement down the casing of the gas well's shaft, then pouring acid into the well shaft and forcing sand, blended with oil, down through the well shaft under 3,500 pounds of pressure per square inch. Moreover, the supreme court noted that, in per-

[1] "Sandfracting" is defined as "[a]n operation designed to loosen or break up tight [sedimentary rock] formations which contain oil or gas, thus causing such formations to have more permeability and greater production." Howard R. Williams and Charles J. Meyers, *Oil and Gas Terms* 880 (7th ed. 1987).

forming this sandfract operation, appellant O'Brien made use of an old airplane engine, without a muffler, that generated vibrations of great intensity. The supreme court summarized appellee Primm's proof that appellant O'Brien's sandfracting job on his oil well was the proximate cause of damage to his water well as follows:

> Appellants' oil well, only 550 feet from appellees' water well, contained an undetermined amount of acid. It was the only known source of acid anywhere near the appellees' well. This acid was forced out into the earth under tremendous pressure along with, or ahead of, an undetermined amount or volume of fracting material. There is evidence of tremendous vibrations in connection with this operation and some evidence that the ground under the appellees' house vibrated. So giving to the appellees' evidence its highest probative value, and taking into account all reasonable inferences that may be deduced from it, the jury could have reasonably concluded that the high acid content of the water in appellees' well, which had suddenly gone bad following the sand fract operation, was forced into appellees' well along with other impurities, from the only known and nearest source, appellants' oil well.

O'Brien, 243 Ark. at 195, 419 S.W. 2d at 328.

The third Arkansas Supreme Court decision that should be considered in our review is *Continental Geophysical Co. v. Adair*, 243 Ark. 589, 420 S.W.2d 836 (1967). In that case, the supreme court reversed the trial court's denial of Continental Geophysical Company's motion for directed verdict. *Adair*, like *Mason*, involved an appellant that conducted seismographic exploration for oil by detonating dynamite in holes that had been drilled into the earth. Adair and the other four appellees were homeowners who lived in the vicinity of Continental Geophysical Company's dynamite blasts. Each appellee had a water well on his property that had gone dry in the spring or summer of 1964. With regard to the precise nature of Continental Geophysical Company's conduct and its spacial and temporal relation to the appellees' damaged water wells, the supreme court noted:

> The record facts show that sometime prior to March 13, 1964, appellant [Continental Geophysical Company] drilled ten holes in the vicinity of the Sugar Grove and Dry Creek areas of south Logan County, at a depth of 100 feet . . . . In each of seven of these holes appellant placed 200 pounds of dynamite, which took up 40 feet of the hole. The remaining 60 feet was filled with gravel. The charges packed in the holes were set off by appellant on March 13, 14, and 15, 1964. The closest test hole to any of appellees' wells was 1,600 feet; the farthest was 6,300 feet. It was also undisputed that in 1963 Logan County was declared a drouth area. . . .

Adair, 243 Ark. at 590, 420 S.W. 2d at 836. The supreme court also noted the testimony of Continental Geophysical Company's expert witness, who apparently was a geologist. This expert witness testified that all of the wells in the town of Sugar Grove drew water from an underground saturated mass and that this body of water did not flow in streams but moved as a body en masse. This expert witness testified further that there were no underground streams in the area. The supreme court held that the circuit court erred in denying Continental Geophysical Company's motion for directed verdict because there was no evidence that showed Continental Geophysical Company's dynamite blasts were "a cause which, in a natural and continuous sequence, produced the damages to the [appellees'] wells and without which the damages would not have occurred." *Adair*, 243 Ark. at 593. In reaching this conclusion, the supreme court specifically noted the distance from Continental Geophysical Company's dynamite blast holes and the appellees' water wells and the lag in time, from the middle of March 1964 to the spring or summer of 1964, as proof that Continental Geophysical Company's dynamite blasts did not cause the appellees' water wells to dry up.

Study of *Mason*, *O'Brien*, and *Adair* establishes that when considering whether seismographic exploration for or operation of an oil well was the proximate cause of damage to neighboring water wells, the Arkansas Supreme Court considers proof of the following factors, which can be circumstantial evidence of causa-

tion: (1) the nature of the oil well operator's activity; (2) the distance between the oil well and the water wells; (3) the proximity in time between the oil well operator's activities and the first appearance of damage to the water well; (4) the presence of (and nature of) contaminants in the water well; (5) the drought conditions in the locality; (6) the period of time that the water well had previously been in operation; (7) the difference between the rate of the water well's production before and after the oil well operator's conduct; (8) the manner in which subterranean water in the locality flows; and (9) the possibility that there is some other cause, other than the conduct of the oil well operator, for the damage to the water wells. Because this case was decided below in appellee's favor on a motion for summary judgment, this court should consider the proof bearing on these factors in the light most favorable to appellants, who were the nonmoving parties, and any doubts or inferences must be resolved against appellee. *See Cash v. Lim*, 322 Ark. 359, 361, 908 S.W.2d 655 (1995).

Application of the factors, noted above, to the circumstantial evidence set forth in the depositions and affidavits before the circuit court does not yield a conclusive result. The appellee did establish a prima facie case for summary judgment by introducing proof that the water that fed appellants' well flowed through strata of rock and that when its gas well was drilled the well shaft did not strike water. The appellee's prima facie case is buttressed by the confined nature of its activity — the drilling of a gas well — when compared to the blasting of the earth and intense vibration of the earth done by the defendants in *Mason*, *O'Brien*, and *Adair*. Neither party produced proof pertaining to the possibility of drought in the locality during the spring and summer of 1995. Neither party produced proof of any contaminants present in appellants' well water, prior to its purification, after the well's production dropped from eight gallons of water a minute to about half a gallon a minute.

Although appellee established a prima facie case to the entitlement of summary judgment in its favor, appellants placed before the circuit court proof that, if viewed in the light most favorable to

them, would establish a genuine issue as to whether appellee's conduct was the proximate cause of damage to their water well. Appellants proved that appellee's gas well was approximately 800 feet from their water well, which is comparable to the 550 feet between the water well and the sandfracted oil well in *O'Brien*. Moreover, appellant Randy Wirth introduced proof that approximately two weeks after March 26, 1995, he first noticed that there was low pressure in his water well and he also proved that the appellee began to drill its gas well in March of 1995. This approximate two-week period is comparable to the "week or so" in *O'Brien* that passed between the sand fract operation and the change in the water in Mr. Primm's well. In addition, Wirth proved that there was a significant reduction in the amount of water produced by his well after the appellee began drilling its gas well and this low production of water remained constant. Moreover, Wirth proved that in the six-month period prior to March 1995, when the appellee began to drill its gas well, his water well consistently produced enough water for his family's use. Moreover, appellee did not introduce proof that there was some other cause, other than its drilling of the gas well, for the damage to appellants' water well. This "no other explanation for the damage" factor was noted by the supreme court in *Mason* as a matter that presented an issue for the jury to determine. *Mason*, 240 Ark. at 770.

Based upon my analysis of the *Mason*, *O'Brien*, and *Adair* cases and based upon my review of all of the proof presented to the circuit court in the light most favorable to appellants, as the nonmoving parties, and because this court should resolve any doubts or inferences against appellee, as the moving party, I conclude that the circuit court erred in granting appellee's motion for summary judgment. When I apply the appropriate standard of review to the proof in this case, I conclude that appellants did present a genuine issue of fact regarding whether appellee's drilling of its gas well was the proximate cause of damage to their water well. I would reverse the granting of the summary judgment and remand this case for a trial on the merits.

CRABTREE, J., joins in this dissent.

Bucky TILLMAN *v.* BALDWIN & SHELL CONSTRUCTION

CA 96-1387 948 S.W.2d 118

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered July 2, 1997

[Petition for rehearing denied August 20, 1997.]

[redacted]

Tolley & Brooks, P.A., by: *Jay N. Tolley*, for appellant.

Bassett Law Firm, by: *William Robert Still, Jr.* and *Scott E. Wray*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this workers' compensation case, whose job required heavy lifting, alleged that he developed hemorrhoids as a gradual-onset injury. The administrative law judge denied benefits after concluding that appellant's hemorrhoids were not a compensable gradual-onset injury under the new Act. The Commission adopted the administrative law judge's opinion as its own, and this appeal followed.

For reversal, appellant contends that the Commission erred in ruling that hemorrhoids are not a compensable injury under Ark. Code Ann. § 11-9-102(5)(A)(ii) (Repl. 1996). In addition, he asserts that there is substantial evidence to show that he sustained a compensable injury, and urges us to hold that the record supports a finding of compensability. We find no error, and we affirm.

Appellant's first argument focuses on a distinction between accidental injuries (as defined in Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 1996)) and gradual onset injuries (as defined in Ark. Code Ann. § 11-9-102(5)(A)(ii) (Repl. 1996)): accidental injuries are those that are both caused by a specific incident *and* identifiable by time and place of occurrence; gradual onset injuries are those that either are not caused by a specific incident *or* are not identifiable by time and place of occurrence if the injury is (a) caused by rapid repetitive motion, (b) a back injury, or (c) hearing loss. On the basis of this "and/or" distinction, appellant posits that there exists a third type of compensable injury, *i.e.*, a non-back, non-hearing loss, non-repetitive motion injury that is not

caused by a specific incident but that is otherwise identifiable by time and place of occurrence.

In essence, appellant argues that the distinction between subsection (i) and subsection (ii) regarding the requirement that an injury be identifiable by time and place of occurrence renders the statute ambiguous, and asks us to construe it so as to expand its meaning. We note that, even if we agreed that the statute was ambiguous, we would be required to subject it to strict construction pursuant to Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). In any event, we see no ambiguity in the statutory language. The only injuries that have been defined as compensable by the legislature are: accidental injuries, gradual injuries of the three specified types, mental illness, cardiovascular disease, and hernias. *See generally* Ark. Code Ann. § 11-9-102(5) (Repl. 1996). Appellant has demonstrated that there may be a category of injury which has not been included in the statutory definition of compensability and, in effect, asks us to treat this as a legislative oversight. However, the legislature has expressly declared that:

> [T]he extent to which any physical condition, injury or disease should be excluded from or added to coverage . . . shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

Ark. Code Ann. § 11-9-1001 (Repl. 1996). In light of this declaration, and in the absence of any assertion that the injury resulted from rapid repetitive motion, we hold that the Commission correctly found that appellant's hemorrhoids did not constitute a compensable injury under Ark. Code Ann. § 11-9-102(5)(A)(ii) (Repl. 1996).[1]

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[1] The dissent argues that the Commission's findings of fact are inadequate. We agree that the Commission is required to make findings of fact sufficient to justify the denial of benefits. *Shelton v. Freeland Pulpwood*, 53 Ark. App. 16, 918 S.W.2d 206 (1996). However, the Commission did so in the case at bar. Appellant never contended, either before the Commission or on appeal to this court, that his injury came within any of the three categories of compensable gradual-onset injuries established by Ark. Code Ann. § 11-9-102(5)(A)(ii). After reciting the categories of injury compensable under subsection

Finally, appellant asks us to review the record and hold that the evidence supports a finding that he suffered a compensable injury. In light of our holding that the injury appellant assertedly sustained was not compensable, we need not address this issue. We note, however, that even had we agreed with appellant's initial argument, we would lack the authority to make findings of facts and remand for an award of benefits. Our review is governed by Ark. Code Ann. § 11-9-711(b)(4) (Repl. 1996), which states that:

> The court shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award, upon any of the following grounds, and no other:
>
> (A) That the commission acted without or in excess of its powers;
>
> (B) That the order or award was procured by fraud;
>
> (C) That the facts found by the commission do not support the order or award;
>
> (D) That the order or award was not supported by substantial evidence of record.

Affirmed.

ROBBINS, C.J., and AREY, GRIFFEN, and ROAF, JJ., agree.

MEADS, J., dissents.

MARGARET MEADS, Judge, dissenting. I cannot agree with the majority in this case, because I believe the findings of the Administrative Law Judge (ALJ), which were affirmed and adopted by the Commission, are not sufficient. I would reverse and remand for additional findings to be made, so that appellant will know the reason why his claim was denied. I would not reach the issue of statutory interpretation, as the majority has done.

(ii), the Commission denied relief, explaining that the Act set forth only three types of gradual-onset injuries, and the claimant's hemorrhoids did not fall within any of those categories. Although the Commission's findings were brief, they were sufficient to allow us to determine whether the Commission resolved the issues before it in conformity with the law, and that is all that is required. *See Shelton v. Freeland Pulpwood, supra.*

A claimant is entitled to know the factual findings upon which his claim is denied. *Wright vs. American Transp.*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). When the Commission denies compensation, it is required to make findings sufficient to justify that denial. *Id.* The Commission must find as facts the basic component elements on which its conclusion is based. *Cagle Fabricating & Steel, Inc. v. Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992). While the Commission may specifically adopt the findings of fact made by the ALJ, it is necessary under such circumstances that the ALJ have made sufficient findings. *Lowe v. Car Care Marketing,* 53 Ark. App. 100, 919 S.W.2d 520 (1996).

In the present case, the ALJ's opinion includes a section entitled "Findings & Conclusions" which simply states:

> 1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
>
> 2. On all pertinent dates the relationship of employee-employer existed between the parties.
>
> 3. The claimant has failed to prove that he sustained a compensable injury as defined by Ark. Code Ann. § 11-9-102(5)(A)(ii)(a), (b), and (c).
>
> 4. This claim should be denied in its entirety.

None of these "findings" give any indication of the basis on which appellant's claim was denied. Did the Commission determine that this claimant's injury is not compensable because his physician could not state within a reasonable degree of medical certainty that the injury was work-related? Or did the Commission determine that hemorrhoids are never compensable under Act 796 of 1993? Or was the claim denied for some other reason?

Appellant has asked that we remand this matter for proper fact finding in line with the proof or, alternatively, to use our "inherent authority to find that the record substantiates in favor of

a finding of compensability." However, we do not review the Commission's decisions de novo on the record or make findings of fact that the Commission should have made but did not. Our function is to review the sufficiency of the evidence to support the Commission's findings, and when it fails to make specific findings, it is appropriate to reverse and remand for the Commission to make such findings. *Sonic Drive-In v. Wade*, 36 Ark. App. 4, 816 S.W.2d 889 (1991).

For these reasons, I would reverse.

Karsten CANNON *v.* STATE of Arkansas

CA CR 96-1018 947 S.W.2d 409

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered July 2, 1997

Thimothy A. Ginn, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

TERRY CRABTREE, Judge. Appellant Karsten Cannon appeals his conviction of delivery of a controlled substance for which he was sentenced to 240 months' incarceration. On appeal, appellant argues that the judgment should be reversed because he was forced to appear in court in prison garb, because the trial court admitted a lab report in violation of the controlling statute, and because the evidence was insufficient to support the verdict.

We affirm the judgment on the basis that appellant's abstract is flagrantly deficient. Appellant did not abstract the judgment and commitment order, the jury's verdict, the sentencing before the court, or the notice of appeal. One must go to the record to determine of what crime appellant was convicted and whether he timely filed a notice of appeal. Pursuant to Ark. R. Sup. Ct. 4-2(a)(6) and case law interpreting the rule, appellant's abstract is inadequate for us to reach the merits of his appeal. The following language from *King v. State*, 325 Ark. 313, 925 S.W.2d 159 (1996), is informative on the effect of failing to abstract pertinent pleadings:

> We have often held that a summary of the pleadings and the judgment appealed from are the bare essentials of an abstract. *D. Hawkins, Inc. v. Schumacher*, 322 Ark. 437, 909 S.W.2d 640 (1995). This court does not presume error simply because an appeal is made. *Mayo v. State*, 324 Ark. 322, 920 S.W.2d 843 (1996). It is the appellant's burden to produce a record sufficient to demonstrate error, and the record on appeal is confined to that which is abstracted. *Midgett v. State*, 316 Ark. 553, 873 S.W.2d 165 (1994).

Id. at 315, 925 S.W.2d at 160.

We are aware of the recent decision by the Supreme Court, *Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997), in which the appellants failed to abstract the judgment and commitment order, and the supreme court still chose to address the merits. In *Williams*, the court stated:

> We choose not to declare Mr. Williams's abstract "flagrantly deficient." Except for the omission of the judgment and commitment order, the abstract is complete and exemplary. We know from his uncontested statement of the case that Mr. Williams was convicted of conspiracy to deliver methamphetamine and that he was sentenced to thirty years' imprisonment for that offense. We are aware that in other cases, such as the recent decision in *Jewell v. Miller County Election Comm'n*, 327 Ark. 153, 936 S.W.2d 754 (1997), we have declined to look to other parts of a brief or abstract to find information that should have been included elsewhere. That, however, was a case in which we were given a nine-page abstract to depict a 1500-page record and six volumes of exhibits. Even in the case of *Winters v. Elders*, *supra*, where we declared an abstract of the judgment "essential," we had an additional reason for affirmance based on incompleteness of the record. While an abstract of the judgment from which the appeal comes is "ordinarily" required, its absence does not necessarily constitute a flagrant deficiency requiring affirmance, and it does not in this case.

Id. at 490, 944 S.W.2d at 824.

Unlike the appellant in *Williams*, appellant in the present case failed to abstract more than just the judgment and commitment order. The only pleading in the abstract is the information charging appellant. Also, in the case at bar, the statement of the case

does not provide the crime of which appellant was convicted. And, the notice of appeal is not abstracted. See *Davis v. State*, 325 Ark. 36, 924 S.W.2d 452 (1996) (holding an abstract that did not include several pleadings, including the jury verdict, the judgment and commitment order, and the notice of appeal insufficient).

The dissenting opinion states that appellant's conviction as evidenced by the judgment and commitment order, the timeliness of his appeal, and circumstances of his sentencing are not issues on appeal and, therefore, not necessary components of the abstract. This line of reasoning ignores the fact that the timely filing of a notice of appeal is a jurisdictional requirement. *Henry v. State*, 49 Ark. App. 16, 894 S.W.2d 610 (1995). Absent an effective notice of appeal, this court lacks jurisdiction to consider the appeal and must dismiss it. *Id. See also Parnell v. State*, 320 Ark. 250, 895 S.W.2d 911 (1995); *Schaeffer v. City of Russellville*, 52 Ark. App. 184, 916 S.W.2d 134 (1996). Therefore, whether appellant filed an effective notice of appeal is always an issue before the appellate court.

The dissenting opinion also reasons that this court can address appellant's argument that he should not have been required to appear for trial in prison attire when he and his attorney failed to obtain civilian clothing prior to the morning of trial. The basis of this argument is that the abstract contains the arguments before the trial court concerning the clothing and the references to appellant's attire as "jail garb," "prison garb," and "jail uniform." The error in this reasoning is that, although the abstract contains the references to appellant's clothing as prison attire, there is no description of that attire showing that it is distinctive as prison garb.

While it is generally true that a defendant should not be forced to appear for trial in prison attire and that this rule is founded on the principle that, since a defendant is presumed innocent until proven guilty, he should be allowed to appear before the jury with the appearance of an innocent man, for this rule to apply, the clothing or attire must be distinctive as prison garb. *Washington v. State*, 6 Ark. App. 23, 637 S.W.2d 614 (1982) (citing *Estelle v. Williams*, 425 U.S. 501 (1976)). *See also Holloway v.*

State, 260 Ark. 250, 539 S.W.2d 435 (1976), *rev'd on other grounds*, 435 U.S. 475 (1978). In the present case, there is no description of the jail attire that appellant wore at trial. This precludes appellant from prevailing on this issue on appeal. In *Barksdale v. State*, 255 Ark. 272, 499 S.W.2d 851 (1973), the supreme court explained:

> The court properly denied appellant's motion for a mistrial on the grounds that he was wearing prison garb. The record shows that appellant was wearing bell-bottom white trousers, a gold shirt, a white and brown striped jacket, and house shoes. There is no evidence of any name or number on the apparel. Nor do we find any merit in the allegation that appellant was brought handcuffed in full view of the jury.

Id. at 274, 499 S.W.2d at 852. *See also Washington v. State*, 6 Ark. App. 23, 637 S.W.2d 614 (1982) (noting that from the record it was not clear that defendant's orange jumpsuit was distinctive as jail attire).

In the present case, we have no description of appellant's prison attire whatsoever. There is no evidence that his clothing had a name, number, or other indicia of prison attire. Therefore, this court does not have a basis upon which to determine that appellant's prison attire was distinctive as such, which is essential to appellant's argument on this point. *See Washington, supra.*

Applying the well-established rules that were reiterated in *King, supra*, and *Davis, supra*, the abstract in the present case is flagrantly deficient. However, if we were to reach the merits of appellant's arguments, based on what we have been provided in the abstract, we would affirm.

Affirmed.

STROUD and MEADS, JJ., agree.

NEAL, GRIFFEN, and ROAF, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I dissent from the decision announced in the prevailing opinion that affirms the trial court's disregard of appellant's timely and uncontested objection to being brought to trial wearing prison clothing based on what

the prevailing opinion has termed an abstracting error. Contrary to the view stated in the prevailing opinion, the appellant has produced an abstract that clearly demonstrates that the trial judge acknowledged that appellant was wearing "jail garb," and that his lawyer had indicated that he did not want the appellant to appear before the jury so dressed. The abstract also demonstrates that the trial judge later stated that he would hold appellant's counsel in contempt for refusing to bring appellant to trial in what counsel termed "his prison garb." The abstract reveals that after the jury was impaneled, the trial judge mentioned to appellant's counsel during a sidebar conference that he (the judge) noticed that appellant was still wearing "a jail uniform." Nothing in the abstract or the record disputes appellant's assertion that he was wearing clothing that plainly identified him as a member of a prison population, and the State never disputed appellant's characterization of his attire before the trial judge. Thus, there is no justification for the conclusion urged by the State and reached in the prevailing opinion, that appellant either failed to preserve the trial court's blatant error or filed a flagrantly defective abstract, that prevents us from understanding the issue presented for appellate review.

For almost twenty-seven years, Arkansas courts have recognized that a person accused of committing a crime should not be forced to stand trial in prison clothing absent a waiver. Our supreme court issued that ruling in *Miller v. State*, 249 Ark. 3, 457 S.W.2d 848 (1970). The United States Supreme Court reached the same conclusion twenty-one years ago in *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In *Miller*, our supreme court reversed the appellant's robbery conviction based upon his contention that he was forced to trial in prison garb after being denied the opportunity to obtain civilian clothing, and issued the following statement as its reason for joining the strong majority rule that absent a waiver an accused person should not be forced to trial in prison garb:

> Since the defendant, pending and during the trial, is still presumed innocent, he is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require. He is therefore entitled to wear

> civilian clothes rather than prison clothing at his trial. It is improper to bring him into the presence of the jury which is to try him, or the venire from which his trial jury will be drawn, clothed as a convict.

Id. at 249 Ark. 6, *quoting* 21 AM. JUR. 2d *Criminal Law*, § 239.

As the Supreme Court of the United States observed in *Estelle v. Williams*, *supra*, the constant reminder of the accused's condition may affect a juror's judgment. "The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play." 425 U.S. at 505. The Supreme Court observed that compelling an accused to wear jail clothing furthers no essential state policy, and the fact that it may be more convenient for jail administrators provides no justification for the practice. *Id.* at 505. The Court also termed "troubling" the fact that compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. *Id.* Based on its view of these factors and their impact on the right of persons accused of crime to a fair trial, and the fact that the presumption of innocence is "a basic component of a fair trial under our system of criminal justice," the Court concluded in *Estelle v. Williams* that although the State cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The prevailing opinion ignores these fundamental realities as well as the undisputed portions of the abstract that have been offered in support of appellant's challenge to his conviction. If the fact of appellant's conviction, the timeliness of his appeal, or the circumstances of his sentencing were issues raised in this appeal, the absence of the judgment and commitment order, appellant's sentencing in the trial court, and the notice of appeal, would constitute defects so that the position stated in the prevailing opinion might have merit. The truth is that these are not the issues raised

in the appeal. To focus on them is to study the irrelevant and disregard an essential issue presented for appellate review.

It is especially revealing that the prevailing opinion has seized on appellant's failure to abstract the notice of appeal in an effort to justify affirming a flagrant constitutional violation by the trial court. The prevailing opinion correctly states that the timely filing of a notice of appeal is a jurisdictional requisite for appellate review, as if the timeliness of appellant's appeal is in question. The plain truth is that nobody has ever questioned the timeliness of the appeal. Furthermore, the proponents of the prevailing opinion do not argue that failure to abstract a notice of appeal has ever been held to mean that an appeal is not timely. Nevertheless, they have rushed to press this flimsy reason in order to affirm. The flimsiness of their reason is obvious. In the first place, appellant's appeal was filed on time. Nobody has ever denied this fact, and no amount of mental sleight-of-hand can establish otherwise. Beyond that, however, there is plain and profound difference between lack of jurisdiction to hear an appeal because it is not timely, and a timely appeal that has an incomplete abstract. Rule 4-2 governing the contents of briefs filed in appeals in Arkansas plainly provides that motions to dismiss an appeal for insufficiency of the appellant's abstract will not be recognized. Rule 4-2(b). If an appeal is untimely, we must dismiss it for lack of jurisdiction, not summarily affirm the result below. The reason we cannot summarily affirm an untimely appeal is because we have no jurisdiction to consider it in the first place. The prevailing opinion ignores this basic reality in the effort to justify the abuse of appellant's right to a fair trial.

But since the prevailing opinion has relied upon what it considers flagrant deficiencies in appellant's abstract, I am obliged to refer to Rule 4-2(b) to demonstrate that the rule requires a reasoning process that the proponents of the prevailing opinion have refused to undertake. Rule 4-2(b)(1) provides that if the appellee considers the appellant's abstract to be defective, the appellee's brief may call the deficiencies to the Court's attention and may, at the appellee's option, contain a supplemental abstract. Rule 4-2(b)(2) then provides as follows:

> Whether or not the appellee has called attention to deficiencies in the appellant's abstract, the Court may treat the question when the case is submitted on the merits. If the Court finds the abstract to be flagrantly deficient, or to cause an unreasonable or unjust delay in the disposition of the appeal, the judgment or decree may be affirmed for noncompliance with the Rule. *If the Court considers that action to be unduly harsh, the appellant's attorney may be allowed time to revise the brief, at his or her own expense, to conform to Rule 4-2(a)(6).* (Emphasis added.)

I can think of nothing more "unduly" harsh to someone whose right to a fair trial has been violated by being compelled to wear prison clothing before the jury than for his appeal to be summarily affirmed on account of an abstracting error. The prevailing opinion does not mention the harshness of summary affirmance because its proponents have not addressed its harshness due to what I consider extraordinary reluctance to address appellant's fair trial argument on its merits. When one understands the flagrant fallacy of linking appellant's failure to abstract the notice of appeal to the nonexistent issue of whether the notice of appeal was timely so as to deprive us of jurisdiction to even address an abstracting deficiency, the prevailing opinion's effort to justify affirming the trial court on account of purported abstracting errors must be seen as sorrowful at its best, outrageous at its worst. That the prevailing opinion cites the Supreme Court's recent decision in *Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997), and nevertheless concluded that affirmance is mandated makes this decision especially brazen.

The members of our court who join in the prevailing opinion have also indicated that they would affirm even if they were to reach the merits of appellant's argument. Although the State claims that appellant was not compelled to stand trial wearing prison garb, the abstract that the prevailing opinion has chosen to disregard plainly shows that the trial judge remarked with apparent displeasure that the appellant's appointed counsel had objected to being tried wearing the prison clothing. After that objection was made, the following exchange occurred between the trial judge and appellant's counsel:

> MR. GINN: Your Honor, you just instructed me to go and get him [appellant] out of the hallway and bring him here in his prison garb. If I refuse to do that, will I be held in contempt?
>
> THE COURT: Yes, sir, you sure will.
>
> MR. GINN: In that case, Your Honor, I'm gonna follow the Court's instruction only under the threat of jail or other punishment for contempt.
>
> THE COURT: That's fine. That's the way it's going to have to be. It is now a couple of minutes past ten.
>
> MR. GINN: I object to my being forced to do this. I object to the fact that he has to be brought in his prison clothes and my going to get him—I don't want that construed that I am agreeing with the Court.

After court convened the abstract shows that the following exchange occurred:

> THE COURT: Court will be in session. Show on the record that it's 10:20. Today's case is the State of Arkansas versus Karsten Cannon. How says the State?
>
> MR. FAIRLEY (counsel for the prosecution): The State is ready, your Honor.
>
> THE COURT: How says the defense?
>
> MR. GINN: The defense is ready, save for the objections made earlier.
>
> THE COURT: All right, that objection's already been noted and the Court's ruled on it.

Following jury selection and lunch, the following sidebar exchange occurred:

> THE COURT: Mr. Ginn, it is now one o'clock and I notice he's still wearing a jail uniform. Did his family not come up here with a change of clothes?
>
> MR. GINN: Apparently not.
>
> THE COURT: I want the record to reflect that we had a recess and it is still not here and there's no assurance that it would ever be here. I just don't want it to happen again.
>
> MR. GINN: For the record, if the Court had allowed us, we would have gone out to Wal-Mart and gotten him some clothes.
>
> THE COURT: That should have been done yesterday — if it is any big deal — which I don't think it is.

> MR. GINN: As far as whether or not we would have gotten him any now during lunch, I don't see there's any use. He's already been paraded in front of the jury.
> THE COURT: That may be true, but I want it in the record that they've had ample opportunity and it still hasn't been here yet.

This series of comments between the trial judge and appellant's appointed counsel disproves the State's argument that appellant was not "compelled" to wear jail clothing.

The State also argues that appellant failed to show that he was prejudiced by appearing before the jury in prison garb. Aside from conceding that appellant did appear before the jury in prison garb (as appellant's abstract plainly shows), this argument has already been rejected by the holdings in *Estelle v. Williams*, *Miller v. State*, and a host of other decisions. The right to a fair trial does not depend on whether the person exercising it can show that it is violated by wearing prison clothing. As our supreme court observed in *Miller v. State*, absent a waiver, the law holds that an accused person should not be forced to stand trial in prison garb. Requiring that one do so is prejudicial to the right to fair trial in itself, without additional proof of harm, because of the possible impairment of the presumption of innocence that is so basic to our criminal justice system. *Estelle v. Williams*, *supra*, 425 U.S. 504. The prevailing opinion does not indicate how its proponents have been able to dismiss this principle in favor of the long-rejected position asserted by the State.

The State also claims that appellant's objection was untimely. If this is the reason that the proponents of the prevailing opinion have voted to affirm, then it is both inaccurate and ironic. Its inaccuracy arises from the fact that appellant's objection to being tried in prison attire was made out of the presence of the potential jurors and to the trial court before trial began. This case is different from *Young v. State*, 283 Ark. 435, 678 S.W.2d 329 (1984), where our supreme court affirmed a trial court's denial of an appellant's motion for mistrial based on the fact that he stood trial wearing prison garb because the objection was not raised until after the jury was seated. In the case before us, no jury had been

impaneled, *voir dire* had not commenced, and appellant had not been presented to the trial court when his counsel objected.

Furthermore, it is ironic that the State argues that appellant's objection was untimely if this is the basis for the view taken by the proponents of the prevailing opinion that they would affirm if they dealt with this appeal on the merits. The irony lies in the fact that the State never contended before the trial court that appellant's objection was untimely. The State has not presented us with a supplemental abstract containing the argument that it resisted appellant's objection as untimely before the trial court. As far as the record is concerned, the State's claim of untimeliness is being raised for the first time in response to appellant's appeal. I find it both ironic and more than slightly unfair that an appeal involving plain proof of a constitutional violation is being denied on an alleged abstracting error by decision-makers who contend that if they addressed the appeal on its merits, they would reach the same result by disregarding our own principle of not considering arguments raised for the first time on appeal.

Whether it would have been smart trial strategy to present appellant for trial wearing the same garments that he wore when he was arrested is beside the point. Appellant had a right to wear civilian clothing during his trial. If he chose to be tried wearing civilian clothing that made him easier to be identified by the police officers who arrested him for sale of a controlled substance, that was his choice to make. The right to appear for trial in civilian clothes carries with it the freedom to unwisely select one's clothes, and the fact that appellant might have made an unsound choice does not justify denying his right to wear civilian clothes at all.

Finally, it is amazing that the prevailing opinion acknowledges that a defendant should not be forced to trial wearing prison attire based on the principle that doing so would impermissibly contradict the presumption that one is innocent until proven guilty, yet reasons that appellant's challenge to the trial court's action compelling him to stand trial in what the trial judge plainly called "a jail uniform" is unpersuasive because appellant failed to prove that the jail uniform was distinctive. What makes that rea-

soning amazing is that one would ordinarily think that appellate judges would respect the basic intelligence of a trial judge enough to believe that the judge knew a jail uniform when he said that he saw one, and that we would respect the integrity of the trial judge enough to at least not implicitly question whether he actually saw somebody wearing a jail uniform in the middle of a trial when he said that he saw it on the record. If this appeal did not involve something as fundamental and serious as the cherished right to a fair trial then the prevailing opinion's assertion that appellant failed to establish that his clothing distinguished him as a member of a prison population after the trial judge said that he saw appellant sitting in the courtroom wearing "a jail uniform" would be as amusing as it is amazing. However, there is nothing funny about being denied a fair trial, no matter how absurd the reasons may be for affirming that denial.

For these reasons, I respectfully dissent from the result announced by the prevailing opinion. Instead of affirming the result below, I would reverse appellant's conviction and remand his case for a new trial.

I am authorized to state that Judges NEAL and ROAF join in this opinion.

Lilly KILDOW *v.* BALDWIN PIANO & ORGAN

CA 96-1268 948 S.W.2d 100

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered July 2, 1997

[Petition for rehearing denied August 20, 1997.*]

* GRIFFEN, J., would grant.

[redacted]

Odom, Elliott, Winburn, Watson, Smith, Odom, & Myers, by: *Timothy J. Myers*, for appellant.

Ledbetter, Hornberger, Cogbill, Arnold & Harrison, by: *James A. Arnold, II*, for appellee.

TERRY CRABTREE, Judge. Appellant Lilly Kildow appeals the decision of the Workers' Compensation Commission affirming the Administrative Law Judge's order denying benefits for her Carpal Tunnel Syndrome (CTS). The Commission based its denial of benefits on appellant's failure to prove adequate rapidity of motion to satisfy the Commission's interpretation of "rapid

repetitive motion injury." *See* Ark. Code Ann. § 11-9-102(5)(A)(ii)(a) (1996).

Appellant urges two points for reversal. First, she argues that the Commission's interpretation of the statute requiring proof of rapid repetitive motion is erroneous in light of the specific inclusion of CTS as a compensable injury in the statute. Second, appellant argues that the Commission's denial of benefits, even under its interpretation of the "rapid repetitive" dispute, is not supported by substantial evidence. We reverse based on a lack of substantial evidence to support the Commission's decision; however, in doing so, we reject appellant's statutory construction argument and affirm the Commission's requirement that carpal tunnel syndrome claimants must prove rapid repetitive motion.

I. Facts

Appellant was employed by appellee Baldwin Piano Company from February 1, 1993, until March 7, 1994. Her duties consisted primarily of manning a station on an assembly line where she secured small electrical components to a 1/8th-inch-thick board with three to five small wires that were two to three inches in length. Appellant typically gripped the board with her left hand while squeezing and twisting the wires with pliers in her right hand, and then sent her completed task to the next station on the assembly line. She testified that she performed these operations over and over again for eight to ten hours a day, five to six days a week, with two fifteen-minute breaks, a thirty-minute lunch break, and short restroom breaks as needed for nearly a year. Beginning in January of 1994, she complained to her supervisor of pain in her wrists. The pain worsened until she saw the company physician, Dr. David Ureckis, on March 10, 1994.

Dr. Ureckis's initial report noted a nerve conduction velocity test suggesting borderline CTS. Dr. Ureckis put appellant in splints, took her off work, prescribed anti-inflammatory medication, and referred her to Dr. Tom Patrick Coker for surgical evaluation.

Dr. Coker's initial report from March 31, 1994, stated that she had "an EMG which confirms a right carpal tunnel. The left

wrist was non-significant." Appellant was seen by Dr. Coker seven times and completed a multi-visit course of physical therapy over the next several months.

Appellant was involved in a motor-vehicle accident on August 20, 1994, which complicated her medical records with chiropractic and psychological treatment apparently unrelated to her workers' compensation claim. Eventually, she was referred to another specialist, Dr. David A. Davis, a neurologist, who opined:

> Her constellation of symptoms would suggest reflex sympathetic dystrophy, perhaps supported by the bone scan. I am unable to make that diagnosis because of the absence of significant temperature or skin changes, and because of the give way weakness and peculiar hypethesia, both of which suggest symptom magnification. I'll be discussing with you referring her to the University of Arkansas Medical School for evaluation in that regard.

Appellant was referred to UAMS, and treated by Dr. Harris Gellman, a professor and Chief of the Hand Surgery Service. Dr. Gellman reviewed the tests of the previous treating physicians and administered additional tests before recommending carpal tunnel release surgery.

Appellee denied coverage for appellant's CTS and medical treatment. The Administrative Law Judge held that appellant's activities were not sufficiently rapid, and the Commission agreed. Appellant brings this appeal, raising two points.

II. Substantial Evidence

This court reviews decisions of the Workers' Compensation Commission to see if they are supported by substantial evidence. *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether this court might have reached a different result from that reached by the Commission or whether the evidence would have supported a contrary finding. *Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995). If reasonable

minds could reach the result shown by the Commission's decision, we must affirm the decision. *Id.*

Even if the Commission's reading of the statute requiring claimants to prove both rapid and repetitive motion is upheld, appellant still claims that the facts here do not amount to substantial evidence to support a finding that her work was not sufficiently rapid to qualify as a rapid repetitive motion injury. The question for this court is whether reasonable minds would accept the finding that appellant's work was not "rapid" based on the evidence in the record.

More specifically, the relevant finding is found in the opinion of the Commission, along with some explanation of the Commission's view of the proof required to establish carpal tunnel syndrome as compensable:

> The claimant failed to prove by a preponderance of the evidence that her carpal tunnel syndrome was cause [*sic*] by rapid repetitive motion. Although the Act does not establish any guidelines with regard to the extent of motion necessary to satisfy the requirement of rapid motion or with regard to the nature of the motion necessary to satisfy the requirement of repetitive motion, we held in *Throckmorton v. J&J Metals*, FC Opinion filed August 14, 1995 (E405318), that "the requirement that the condition be caused by rapid repetitive motion requires proof that the claimant's employment duties involved, at least in part, a notably high rate of activity involving the exact, or almost exactly, same movement again and again over extended periods of time." We further held that whether the employment duties satisfied the statutory requirement is a fact question to be decided based upon the evidence presented in each case.
>
> . . .
>
> The claimant has failed to prove by a preponderance of the evidence that her injury was caused by rapid repetitive motion. There is simply no evidence in the record to prove that the claimant's activities fall within the definition of rapid.

The only evidence regarding appellant's job activities came from her own testimony before the ALJ. No company representatives disputed her account of her daily tasks.

In denying benefits for appellant's CTS, the Commission relied on the requirements for gradual-onset injuries announced in its own opinion, *Throckmorton, supra.* Notably, the Commission defines the two terms, "rapid repetitive," together as a single, interrelated concept.

However, our holding in *Baysinger v. Air Systems*, 55 Ark. App. 174, 934 S.W.2d 230 (1996), rejected the Commission's language "exact, or almost exactly, the same movement again and again." In light of our holding in *Baysinger*, the Commission's decision in *Throckmorton* is erroneous, as a matter of law, to the extent that it requires claimants to prove "exact, or almost exactly, the same movement again and again."

In discerning a definition for the term "rapid repetitive"[1], we are bound to give the words their ordinary meaning, give effect to the intent of the legislature, and make use of common sense. *State Office of Child Support Enforcement v. Harnage*, 322 Ark. 461, 910 S.W.2d 207 (1995).

In its ordinary usage, rapid means swift or quick. CONCISE OXFORD DICTIONARY 1137 (9th Ed. 1995). In the present case, appellant testified that her job entailed assembling electrical components on boards by gripping and twisting short wires on small pieces for eight to ten hours a day, five to six days a week on an assembly line. Further, when appellant returned to work under her doctor's light-duty orders, she was restricted to placing no

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[1] At least one commentator has noted the anomalous inclusion of "rapid" in Arkansas's statute, and suggested that, "Possibly, the term rapid does not have any real significance in the 1993 Act. The addition of the term may be the result of unartful drafting arising out of the common knowledge that many repetitive motion cases involve rapid repetitive motion." John D. Copeland, *The New Arkansas Workers' Compensation Act; Did the Pendulum Swing Too Far?*, 47 ARK. L. REV. 1, 15 (1994).

We are mindful that assigning meaning to the term "rapid repetitive" may inappropriately exclude valid work-related carpal tunnel syndrome claims in certain fields of work that are characterized not by the speed of the work, but by abnormally strenuous or meticulous activity with the hands. We welcome from the legislature their promise in Act 796 of 1993 stating in part, "In the future if such things as . . . the extent to which any physical condition, injury or disease should be excluded from or added to coverage by the law . . . it shall be addressed by the General Assembly . . . and should not be done by the courts." *Id.* at 2256.

more than one board per minute onto the line. It is clear to us that reasonable minds could not agree that appellant's testimony does not establish that her job did involve swift or quick motion. While testimony on how many boards appellant assembled in a given day might better prove rapidity, it is a matter of common sense that reasonable minds would expect work on an assembly line to move at a swift or quick pace.

Further, our recent opinion in *Baysinger v. Air Systems, Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996), stated, "We feel that the Commission's interpretation of the statute is too restrictive and precludes multiple tasks — such as the hammering and grinding motions performed by claimant — from being considered together to satisfy the requirements of the statute." *Id.* at 176, 934 S.W.2d at 231. While *Baysinger* addressed the repetitive nature of a claimant's CTS, and the Commission in this case takes issue with the "rapid" prong of the rapid-repetitive analysis, *Baysinger* is analogous to the facts here, and supports reversal based on the fact that the Commission's application of "rapid" is not supported by substantial evidence.

The appellant in *Baysinger* was a metal worker who used his hands to shape, grind, polish, and pound pieces of metal with heavy vibrating tools. We remanded to the Commission for a finding of whether such exertion, considered together, would satisfy the requirements of the statute. Here, when considered together, reasonable minds could not agree that appellant's assembly-line work of gripping, twisting, and squeezing wires to secure small components to boards all day long does not qualify as "rapid repetitive" in the ordinary and generally accepted meaning of the words. Therefore, we reverse and remand to the Commission for an award of benefits.

III. Statutory Construction

Next, appellant argues that the Commission's interpretation of Ark. Code Ann. § 11-9-102(5)(A)(ii)(a) (1996) is erroneous based on the plain meaning of the Act, the legislative intent, and various maxims of statutory interpretation. Specifically, appellant argues that it is unnecessary to prove rapidity and repetition when

there is a diagnosis of CTS since CTS is specifically defined as compensable in the statute. The relevant part of the statute reads:

> (5)(A) "Compensable injury" means:
>
> (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:
>
> (a) *Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition*;

Ark. Code Ann. § 11-9-102 (5)(A)(ii)(a) (1996) (emphasis added).

Commissioner Humphrey, dissenting from the Commission's decision in the present case, best stated appellant's argument for applying the statute to CTS claimants:

> The plain language of the statute in question supports claimant's contention, in that it explicitly states that CTS is both compensable and falls within the *definition* of "rapid repetitive motion" — *without* provision or regard for how either "rapid" or "repetitive" are themselves defined. Thus, Ark. Code Ann. 11-9-102(5)(A) amounts to no less than an affirmative declaration that CTS is, without limitation, a compensable injury *already* within the category of injuries caused by rapid repetitive motion.

(Emphasis in original.)

Appellant discusses the law of statutory interpretation for her argument that CTS is specifically categorized as compensable. However, the first rule in considering the meaning of a statute is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Henson v. Fleet Mortg. Co.*, 319 Ark. 491, 892 S.W.2d 250 (1995). While this court has frequently cited the legislative intent expressed in Act 796 of 1993 mandating strict and literal construction of the workers' compensation statutes, and admonishing the court to leave policy changes to the legislature, this colorful history does not change the court's duty to settle disputes arising from the questioned language. Additionally, basic principles of administrative law mandate that we give some deference to an

agency's construction of statutes, and we view the Commission's construction as persuasive, unless it is clearly wrong. *Ark. Dept. of Human Serv. v. Hillsboro Manor Nursing Home, Inc.*, 304 Ark. 476, 803 S.W.2d 891 (1991).

While we reverse for lack of substantial evidence supporting the Commission's decision, we affirm the Commission on its holding that carpal tunnel syndrome claimants must prove rapid repetitive motion to sustain a claim for a compensable injury. In so holding, we read the challenged language of the statute *in pari materia*, or in context with the entire section defining compensable injuries, we view the Commission's construction as persuasive, and we hold that carpal tunnel syndrome is not exempted from the proof requirement of other gradual-onset injuries, but is merely listed as an example of a type of gradual-onset injury that may be proven by evidence of rapid repetitive motion.

Affirmed in part, reversed in part, and remanded for an award of benefits.

STROUD and ROAF, JJ., agree.

MEADS and NEAL, JJ., concur.

GRIFFEN, J., dissents.

MARGARET MEADS, Judge, concurring. I concur with the majority opinion, which reverses the decision of the Workers' Compensation Commission in this case for lack of substantial evidence. That finding, in my judgment, makes it unnecessary for us to reach appellant's argument that the Commission's interpretation of Ark. Code Ann. § 11-9-102(5)(A)(ii)(a) (1996), is erroneous.

The majority opinion clearly and logically reaches the conclusion that reasonable minds could not agree that appellant's assembly line work does not qualify as "rapid repetitive" in the ordinary and generally accepted meaning of the words, and I agree with it. Having so determined, there is no need for interpretation of the statute.

NEAL, J., joins in this concurrence.

WENDELL L. GRIFFEN, Judge, dissenting. While I agree that Ark. Code Ann. § 11-9-102(5)(A)(ii) requires proof of rapid repetitive motion in order to establish a compensable carpal tunnel syndrome injury pursuant to that provision of the Workers' Compensation Law, I disagree with and dissent from the majority opinion because it reverses the Commission's determination that appellant failed to prove that her carpal tunnel syndrome condition was caused by rapid repetitive motion arising out of and in the course of her employment. Simply put, I cannot agree that mere proof that one performs a given series of tasks "over and over again for eight to ten hours a day, five to six days a week, with two fifteen-minute breaks, a thirty-minute lunch break, and short restroom breaks as needed for nearly a year" (majority opinion) satisfies the rapid repetitive motion causation requirement, and certainly not as a matter of law. The record contains no proof about how many times appellant did anything on her job, let alone how rapidly she did it. Therefore, I believe that reasonable persons could have reached the same conclusion that the Commission reached, namely, that appellant failed to prove by a preponderance of the evidence that her carpal tunnel syndrome condition was caused by rapid repetitive motion arising out of and in the course of the employment. For that reason I would affirm the Commission; however, I would also provide the Commission with a workable standard that it could at least apply in deciding the many cases that are certain to arise under this statute.

On one hand, the majority has properly rejected the Commission's definition of "rapid repetitive" as meaning a notably high rate of activity involving the exact, or almost exactly, same movement again and again over extended periods of time. I agree that our decision last year in *Baysinger v. Air Systems, Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996), means that this definition cannot stand. The case now before us presents the proper situation for defining rapid repetitive motion so that the Commission can apply an approved definition to future cases. For reasons that are unclear, the majority opinion does not provide that guiding definition, yet remands the case to the Commission to continue wrestling with the problem. One would think that the proper role of

an appellate court is to provide the very guidance that the majority opinion is careful to avoid.

On the other hand, there is no proof before us about how rapidly appellant assembled electrical components on boards. Appellant presented no proof to the Commission and has pointed to nothing in the record that establishes how many boards she assembled per minute, per hour, or otherwise. The record does not show how many other persons did the same job on the assembly line, the speed of the assembly line, the frequency with which the boards arrived at appellant's work station, whether appellant assembled every board, every other board, every third board, or assembled the boards according to any other arrangement. Mere proof that she worked on an assembly line for eight to ten hours a day, five to six days a week, proves nothing about how rapidly appellant did anything, let alone how repetitiously she did anything rapidly.

I recognize that any rule will necessarily fail to cover every kind of case that involves rapid repetitive motion, and that the Commission will use its special knowledge concerning workplace injuries in evaluating whether the proof in specific cases fits whatever definition of rapid repetitive motion that is crafted. Nevertheless, we owe it to the Commission, its law judges, and the lawyers who must counsel and represent workers and employers to articulate some meaningful standard that can be used to assess the proof. If one accepts the traditional rule of statutory construction that words must be given their ordinary meaning to effect the intent of the legislature, and that we should follow common sense in that process, we may properly arrive at a workable definition for rapid repetitive motion. *Webster's Third New International Dictionary* contains the following definitions:

> "Rapid" — marked by a notably high rate of motion, activity, succession, or occurrence.
>
> "Repetitive" (from repetition) — the fact of occurring, appearing, or being repeated again.
>
> "Motion" — an act or instance of moving the body or any of its members.

Thus, rapid repetitive motion should be defined for purposes of the statute before us as referring to injuries caused by a fast or notably high rate of recurring motion, processes, or actions. This definition can be applied to a broad category of gradual onset conditions without becoming entangled in the specific medical characteristics of particular conditions.

There is a sensible reason why we should not expect physicians to develop or have developed a definition of rapid repetitive motion or activity. "Rapid repetitive motion" is a legal term that the Arkansas General Assembly has developed as part of the causation element for one class of injuries not caused by a specific incident or which are not identifiable by time and place of occurrence. Furthermore, even if medical science might eventually recognize the "rapid repetitive motion" term, the injuries caused by gradual onset conditions attributed to rapid repetitive motion causes will vary so widely that lawyers, judges, and litigants will not be able to apply condition-specific medical definitions with any degree of reliability. The definition that I propose is based on the ordinary usage and meaning of "rapid repetitive motion" consistent with time-honored principles of statutory construction.

It is clear that the General Assembly intended the word "rapid" to modify "repetitive" when it amended the Workers' Compensation Law in 1993 by requiring that so-called gradual onset or cumulative trauma conditions such as carpal tunnel syndrome be caused by rapid repetitive motion in order to constitute a compensable injury under the statute before us. The majority appears to recognize that to have been the legislative design. Thus, one would think that a worker claiming benefits for carpal tunnel syndrome under this provision of the statute would be required to at least prove how much of anything was done within a given period of time on a repeated basis. If the law requires proof of rapid repetitive motion, how can the requirement be satisfied without proof about how rapidly a worker's motions are repeated? Surely the law requires something other than for the Commission to take what amounts to judicial notice that work on an assembly line will move at a swift or quick pace. After all, the statute refers to the rapid repetitive motion of the worker claiming

benefits, not the speed with which the assembly line moves. Otherwise, the burden of proving rapid repetitive motion is no burden at all. A worker need only present the kind of proof found in this record, that she was employed on an assembly line, that she did the same task "over and over again," and that she worked all day, every day, at that job except for breaks and meals.

Act 793 of 1993 radically changed the way that compensable injury is defined in the Workers' Compensation Law. Before its enactment, "injury" was defined as "only accidental injury arising out of and in the course of employment." Ark. Code Ann. §11-9-102(4) (1987). However, considerable litigation arose over the years concerning whether injuries were "accidental" so as to be compensable for workers' compensation analysis. Employers argued in many instances that an "accidental injury" required proof of some specific incident rather than the gradual onset of a condition over a period of time due to repeated effort. *Stallings Bros. Feed Mill v. Stovall*, 221 Ark. 541, 254 S.W.2d 460 (1953). But in *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956), the Arkansas Supreme Court held that the adjective "accidental" referred to and modified the noun "injury," and did not refer to the cause of the injury, thereby obviating the requirement that the cause of the injury itself be accidental. Thus, after *Bryant Stave*, an "accidental injury" was defined to mean every injury to an employee arising out of and in the course of the employment except those injuries caused by the employee's intoxication or by her wilful intention to bring about the injury or death of herself or another.

The present statute represents the result of efforts by employers to persuade the General Assembly to narrow the compensable injury definition in 1993. Arkansas Code Annotated § 11-9-102(5)(A) contains the definition of "compensable injury," and sub-categorizes that definition into five areas. Subsection (i) specifically provides that an injury is "accidental" only if it is caused by a "specific incident and is identifiable by time and place of occurrence." Subsection (ii) refers to those injuries that arise out of the employment and within its course but are not caused by a specific incident or that are not identifiable by time and place of occurrence so as to be deemed "accidental" for compensability

analysis. The General Assembly purposely placed a causal requirement of rapid repetitive motion on carpal tunnel syndrome claims arising within subsection (ii), and also imposed a different burden of proof for those claims. Instead of the usual burden of proof (by a preponderance of the evidence), claims arising under subdivision (5)(A)(ii) must be established by a preponderance of the evidence *and* by proof that the alleged compensable injury (rapid repetitive motion arising out of and in the course of employment causing carpal tunnel syndrome in this case) is the major cause of the disability or need for treatment.

Proof of rapid repetitive motion must mean that a worker has to at least show the rate that she performed the allegedly repetitive motion and how often she repeated that motion. Otherwise, we are disregarding the legislative purpose and the judicial history that underlie the "accidental injury" versus "compensable injury" debate that has occurred in Arkansas for more than forty years concerning gradual onset conditions such as carpal tunnel syndrome. The General Assembly believed that it was resolving that debate in 1993. Despite the concerns of some observers that the changes in the Workers' Compensation Law are harsh, the legislature made it clear that courts are not to liberalize, broaden, or narrow the law's scope. Today's decision is not consistent with that plain legislative purpose to the extent that it essentially gives lip service to the rapid repetitive motion causation requirement for carpal tunnel syndrome injuries in holding that a carpal tunnel syndrome claim is a "compensable injury" absent proof about how rapidly a worker repeated anything, let alone how often she repeated it.

I respectfully dissent.

Bill GOLDEN *v.* WESTARK COMMUNITY COLLEGE
and Public Employee Claims Division

CA 96-1338 948 S.W.2d 108

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered July 2, 1997

[Petition for rehearing denied August 20, 1997.]

[redacted]

Sexton & Fields, P.L.L.C., by: *William J. Kropp III*, for appellant.

Nathan C. Culp, for appellee Public Employee Claims Division.

ANDREE LAYTON ROAF, Judge. Bill Golden sustained a compensable injury while at work as a security officer for Westark Community College (Westark). Golden was ultimately assigned a 20% permanent partial disability to the body as a whole. However, the Commission found that Westark was entitled to offset all of Golden's permanent disability benefits pursuant to Ark. Code Ann. § 11-9-522(f) (Repl. 1996), since Golden was over sixty-five and drawing retirement benefits from Social Security. Golden raises four arguments in his appeal. He claims that (1) Ark. Code Ann. § 11-9-522(f) is unconstitutional in that it violates the Equal Protection Clauses of the state and federal constitutions; (2) the Age Discrimination in Employment Act promulgated by Congress preempts the application of Ark. Code Ann. § 11-9-522(f); (3) there is not substantial evidence to support the Commission's finding that he is entitled to only 20% permanent partial disability to the body as a whole; and (4) permanent partial disability benefits do not include money or benefits for permanent physical impairment. We affirm.

Golden worked as a security guard for Westark and was 67 years old at the time of his injury. His duties included walking or driving around the campus and ensuring the security of the buildings and facilities. He was required to walk up and down stairs and otherwise remain on his feet for extended periods of time.

In November 1993, when crossing a bridge connecting two buildings on the campus, Golden slipped on ice and injured his back. He underwent prolonged treatment as a result of the injury, and continued to suffer from pain and discomfort at the time of his

workers' compensation hearing. Golden's treating physician gave him a 5% physical impairment rating and permanent restrictions on the type of work he was allowed to perform. The restrictions effectively prevented him from performing his duties as a security guard, and he was subsequently terminated. Golden was sixty-nine years old at the time of his workers' compensation hearing and was receiving $575 per month in social security retirement benefits. Westark paid, without contest, Golden's medical expenses and temporary total disability through his healing period. However, Westark contested the extent of Golden's permanent disability, and denied payment of any permanent disability benefits because of the operation of Ark. Code Ann. § 11-9-522(f).

The administrative law judge (ALJ) found that Golden sustained a 20% impairment to his body as a whole (5% physical disability and 15% wage-loss disability). The ALJ recognized that Ark. Code Ann. § 11-9-522(f) provides for a dollar-for-dollar offset for anyone aged sixty-five or older who either is drawing or is eligible to draw benefits from a publicly or privately funded retirement plan. However, the ALJ found that Golden was entitled to receive disability payments of $119 for 22 and one-half weeks based on his 5% physical disability, reasoning that the statutory offset did not apply to benefits for physical impairment. The ALJ did not reach the issue of constitutionality of the statute. Golden appealed to the Commission, which reversed the judgment of the ALJ with respect to the finding that a portion of Golden's benefits should not be offset pursuant to Ark. Code Ann. § 11-9-522(f), and found the statute not violative of equal protection. Because Golden's social security benefits of $575 per month were greater than the amount of his permanent disability benefits, Golden was thus left without any benefits for his permanent partial disability.

1. *Constitutionality of Ark. Code Ann. 11-9-522(f)*

Golden first argues that Ark. Code Ann. § 11-9-522(f) is unconstitutional in that it violates the Equal Protection Clauses of the state and federal constitutions. Golden claims that the classification in the statute is arbitrary, unreasonable, and allows for persons similarly situated to be treated differently. Golden also alleges

that the classification of people found in the statute has no rational basis to any legitimate objective of the state.

Arkansas Code Annotated § 11-9-522(f) (Repl. 1996) was included among the major changes to the workers' compensation law enacted by the Arkansas General Assembly in 1993, and provides:

> (1) Any permanent partial disability benefits payable to an injured worker age sixty-five (65) or older shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker received or is eligible to receive from a publicly or privately funded retirement or pension plan but not reduced by the employee's contributions to a privately funded retirement or pension plan.
>
> (2) The purpose and intent of this subsection is to prohibit workers' compensation from becoming a retirement supplement.

A companion statute, Ark. Code Ann. § 11-9-519(g) (Repl. 1996) provides for an identical offset with respect to permanent total disability benefits.

■■ Because age, unlike race or gender, is not a suspect or quasi-suspect classification, this court should apply a rational-basis test to determine if the statute violates equal protection. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). It is well settled that an act by the legislature is entitled to a presumption of constitutionality. *American Trucking Ass'n v. Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986); *Pulaski County Mun. Court v. Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981). On appellate review, this court must presume that a statute is constitutional, and the party challenging the statute has the burden of proving otherwise. All doubts are resolved in favor of constitutionality. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996)(citing *Reed v. Glover*, 319 Ark. 16, 889 S.W.2d 729 (1994)).

■■ The Equal Protection Clause does not preclude all statutory classifications. *Cook v. State*, 321 Ark. 641, 906 S.W.2d 681 (1995); *Hamilton v. Hamilton*, 317 Ark. 572, 879 S.W.2d 416 (1994). Classifications are permitted that have a rational basis and are reasonably related to a legitimate government purpose. *McFarland v. McFarland*, 318 Ark. 446, 885 S.W.2d 897 (1994). The

role of the reviewing court is not to discover the actual basis for the legislation, but to consider whether any rational basis exists that demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government purpose. *Misskelley, supra; Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). This court must presume that the challenged classification will promote a legitimate state purpose if there is "any conceivable set of facts to uphold the law's rational basis." *Bosworth v. Pledger*, 305 Ark. 598, 810 S.W.2d 918 (1991).

Neither of Arkansas's two workers' compensation retirement offset statutes have faced a constitutional challenge since their enactment in 1993. However, a number of other states have considered similar statutes and have consistently upheld the constitutionality of the offset provisions. It is necessary to understand the underlying rationale for this legislation in order to properly consider the constitutionality of a particular statute. The premise for both state and federal offset legislation is the impropriety of duplicate benefits. This premise is based upon the idea that all wage-loss legislation is social legislation designed to restore to workers a portion of wages lost due to the three major causes of wage loss: disability, unemployment, and old age, and that, despite the cause, a worker experiences only one wage loss and should receive only one wage-loss benefit. *See* 9 LARSON'S WORKERS' COMPENSATION LAW, § 97.10. The primary aim of both federal and state offset legislation is to avoid duplicate benefits and, in addition, to designate the primary source for payment of a particular benefit.

With this premise in mind, the majority of jurisdictions have upheld the constitutionality of offset legislation against equal protection attacks, and even the two courts that have struck down their statutes have not done so based upon the lack of a legitimate governmental concern. These jurisdictions have found a variety of valid governmental purposes for the offset statutes. *See e.g. Brown v. Goodyear Tire & Rubber Co.*, 599 P.2d 1031 (Kan. App. 1979) (to prevent duplicate benefits); *Sasso v. Ram Property Management*, 431 So. 2d 204 (Fla. Dist. Ct. App. 1983) (to avoid "double dipping;" to reduce payment of fringe benefits due to age-related decline in productivity and physical abilities; to make

room in the job market for younger workers by inducing retirement of older workers; to reduce costs of insurance premiums to employers); *Harris v. State*, 843 P.2d 1056 (Wash. 1993) (to avoid duplicate payments; to reduce industrial insurance premiums; to save money for the state fund); *State v. Richardson*, 482 S.E.2d 162 (W.Va. 1996) (to preserve fiscal integrity of workers' compensation fund, to avoid duplicate benefits); *Case of Tobin*, 675 N.E.2d 781 (Mass. 1997)(coordination of benefits to prevent stacking of benefits; to reduce the cost of workers' compensation premiums for employers who pay into multiple-benefit systems).

It is clear that the Arkansas offset statutes are founded upon legitimate governmental concerns. The stated purpose of Ark. Code Ann. § 11-9-522(f) is "to prohibit workers' compensation from becoming a retirement supplement." Arkansas Code Annotated § 11-9-101 (Repl. 1996) provides that one of the primary purposes of the workers' compensation laws is "to emphasize that the workers' compensation system in this state must be returned to a state of economic viability." These purposes are simply a restatement of the goals of avoiding duplicate payments and of curtailing the cost of workers' compensation insurance, which have been found by other jurisdictions to be legitimate governmental concerns, and we do not disagree with their conclusions on this issue.

However, we must also determine whether the offset legislation is rationally related to these stated governmental purposes. Although two states have held that similar statutes are not, the two statutes held to be violative of equal protection provided for termination or reduction of benefits for totally disabled workers aged sixty-five or older, but not for partially disabled workers in the same age classification. However, both courts further held that the statutes in question would not be rationally related to the stated governmental purposes even if this discriminatory aspect of the legislation were eliminated. In *Industrial Claims Appeals Office v. Romero*, 912 P.2d 62 (Colo. 1996), the court found that a statute that provided for the outright termination of workers' compensation benefits to permanently totally disabled workers, aged sixty-five or older, without regard to their eligibility for social security or other retirement benefits, was not rationally related to the pur-

pose of preventing duplicate payments because social security retirement benefits and workers' compensation benefits do not serve the same purposes. The court also found that because the statute was based upon a "convenient perception that [persons aged sixty-five or older] receive retirement benefits," it impermissibly denied these persons equal protection of the laws for mere administrative convenience.

In *State ex rel. Boan v. Richardson*, 482 S.E.2d 162 (W.Va. 1996), the court differentiated between old-age social security benefits and permanent total disability benefits and also found that there was a "lack of commonality of purpose" for the two benefits. The court characterized workers' compensation benefits as payments in lieu of tort damages, and stated that the disability payments could not be considered a duplication of old-age social security benefits, which were earned retirement benefits. The West Virginia statute, which provided for a reduction in the permanent total disability benefits for persons receiving social security old-age benefits was thus held not rationally related to the legitimate governmental purpose of avoiding duplicate benefits.

Although Golden makes similar arguments to those advanced in *Romero* and *Richardson*, we must agree with the remaining jurisdictions that have found a rational relationship between legitimate governmental purposes and the age classification contained in the offset statutes.

■ ■ We cannot say that the classification in Ark. Code Ann. § 11-9-522(f) between those workers aged sixty-five and older, who are receiving or who are eligible to receive public or private retirement benefits, and all other workers, is arbitrary and capricious, for which there is no legitimate government purpose. *See Reed v. Glover*, 319 Ark. 16, 889 S.W.2d 729 (1994). Although this classification undoubtedly will exclude some persons under sixty-five who may also be eligible for retirement benefits, if there is *any* rational basis for the disparate treatment, the classification must be upheld. *Allen v. State*, 327 Ark. 350, 939 S.W.2d 270 (1997).

■ ■ Moreover, a court will not strike down a classification merely because it is underinclusive. *Medlock v. Leathers*, 311

Ark. 175, 842 S.W.2d 428 (1992). We conclude that the classification contained in the Arkansas statute is based upon a reasonable, not arbitrary, distinction. The Legislature undoubtedly considered, as have other jurisdictions, that sixty-five is the age at which most workers will be eligible for retirement benefits.

Furthermore, the Arkansas Supreme Court has recognized the social nature of workers' compensation legislation in *Corbitt v. Mohawk Rubber Co.*, 256 Ark. 932, 511 S.W.2d 184 (1974), where the court stated, "[t]he Workmen's Compensation Act is based largely on the social theory of providing disabled employees support and preventing their destitution." *Corbitt*, 256 Ark. at 935, 511 S.W.2d 186. We thus cannot say that the decision to offset permanent disability benefits at age sixty-five, for those disabled workers who are eligible to receive retirement benefits, is arbitrary and capricious.

2. *Preemption by Federal Law*

Golden also argues that the Age Discrimination in Employment Act (ADEA) promulgated by Congress preempts the application of Ark. Code Ann. § 11-9-522(f).

The doctrine of federal preemption is based upon the Supremacy Clause in Article VI of the United States Constitution. Under the Supremacy Clause, state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution" are invalid. *Gibbons v. Ogden*, 22 U.S. 1, 211 (9 Wheat.) (1824); *Lawson v. Sipple*, 319 Ark. 543, 893 S.W.2d 757 (1995). The doctrine involves a congressional intent to supplant state authority in a particular field. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

The test for determining whether a state law would be preempted is based upon four factors: whether Congress expressed a clear intent to preempt state law; whether Congress occupies the field so as to leave no room for the states to supplement; whether compliance with both the state and federal laws is impossible; and whether the state law stands as an obstacle to Congress's objective or purpose. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

Absent express preemptive language, congressional intent to supersede state law may be implied. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). Implied preemption can occur: (1) when the scope of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the state to act, (2) when the state and federal law actually conflict, (3) when compliance with state and federal law is physically impossible, and (4) when the state law stands as an obstacle to the accomplishment of the full objectives of Congress. *Ciba-Geigy, supra. See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

However, the reviewing court begins with the assumption that the historic police powers of the states are not to be superseded by a federal act unless that is the clear and manifest purpose of Congress. *Rice, supra.* The burden is on the moving party to prove that Congress intended to preempt state law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

Golden argues that the ADEA preempts Ark. Code Ann. § 11-9-522(f) from operation, because the Act prohibits an employer from discriminating against any individual with respect to "compensation, terms, conditions, or privileges of employment" on the basis of age. Golden asserts that disability benefits fall within the meaning of the ADEA and thus, any action by a private employer or state government which compels older workers to substitute retirement benefits for disability benefits is precluded.

However, the ADEA contains no clear expression of the intent to preempt the state's administration of workers' compensation benefits. We also cannot say preemption may be implied to preclude the state-enacted offset because the ADEA prohibits only an employer from discriminating against individuals. We agree with the Supreme Judicial Court of Massachusetts that the ADEA "concerns age-based discrimination against employees resulting from activities within the employer's control." *Tobin*, 675 N.E.2d at 786.

3. *Substantial Evidence*

Golden also argues that there is not substantial evidence to support the full Commission's finding that he is entitled to only 20% permanent partial disability to the body as a whole. We find no merit in this argument.

Golden's doctor assigned him a physical impairment rating of 5% and released him with permanent restrictions. Taking into consideration his age, education, and physical restrictions, the ALJ and the Commission found that he was also entitled to a 15% impairment rating attributable to his decreased earning capacity. Golden argues that his age, education, and physical restrictions require a far greater award.

Golden was sixty-nine years old at the time of the hearing, and had a tenth-grade education. He testified that he had applied for jobs since his injury, because he was required to do so to qualify for unemployment, but that he applied "cold turkey" where no positions were advertised. Golden further testified that his work history included employment as a salesman, as owner and operator of a pest control company for over thirty years, and truck driver.

Arkansas Code Annotated § 11-9-522(b)(1) (Repl. 1996) provides that the Commission may consider in addition to the percentage of permanent physical impairment, "such factors as . . . age, education, and work experience," in considering claims for permanent partial disability benefits in excess of the employee's permanent physical impairment. Here, the Commission awarded Golden an additional 15% benefit for reduction in his wage-earning capacity, in addition to the 5% physical impairment assigned by his treating physician. The Commission found that Golden had sustained a 15% impairment to his earning capacity "after consideration of [Golden's] restrictions, along with [his] physical limitations, his age, education, and previous work experience." Golden's age and lack of education, while factors to be considered, do not constitute a disability. Although Golden's physical restrictions prevent him from working in a job where he must lift heavy items or do a lot of bending or stooping, we cannot say that there was not substantial evidence to uphold the finding of the Commission that he was entitled to only a 20% disability rating.

Moreover, because of our resolution of Golden's constitutional argument, even a 100% disability rating would not allow Golden any recovery because it would not increase the amount of his weekly benefits, but would only extend the period of payment. *See* Ark. Code Ann. § 11-9-522(a) (Repl. 1996).

4. *Physical Impairment*

Golden finally contends that permanent partial disability benefits do not include money or benefits for permanent physical impairment. He argues that the finding of the Commission that loss in earning capacity and physical impairment are two components of permanent partial disability which can exist with or without each other was in error. Golden argues that the definition of "disability," found at Ark. Code Ann. § 11-9-102(9) does not include actual physical disability or impairment and that it is not otherwise defined. Therefore, he asserts that the implication is that benefits for permanent physical impairment are not considered permanent partial disability benefits and that they should not be treated as such.

In declining to adopt this position, the Commission noted that, in Arkansas, a worker is considered "disabled" if he suffers an impairment to his ability to earn wages, or if he suffers an anatomical impairment. The Commission noted that "disability," within the meaning of the workers' compensation law, includes loss of use of the body to earn substantial wages, as well as anatomical impairment. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). A person can be disabled if the injury has caused physical loss or an inability to earn as much as he was earning when he was hurt. *Fund v. Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985); *Bragg v. Evans-St. Clair, Inc.*, 15 Ark. App. 53, 688 S.W.2d 956 (1985). *See also Terrell v. Austin Bridge Co.*, 10 Ark. App. 1, 660 S.W.2d 941 (1983).

Consequently, although the definition of "disability" fails to include any specific reference to physical impairment, Arkansas law clearly indicates that both physical and earning impairment are components of "disability." Moreover, in making

his constitutional argument, Golden states that "[p]ermanent partial disability benefits are, as the Commission suggests, based on two components. The first is physical anatomical impairment." This assertion by Golden, although it serves to advance his constitutional argument, seems to concede the very point he now argues. We thus conclude that the Commission did not err in finding that physical impairment is included within the definition of disability.

Although we declare that Ark. Code Ann. § 11-9-522(f) does not violate Bill Golden's right to equal protection under the laws, we may only consider the question of the constitutionality of this statute. If indeed this statute is unfair to older workers, many of whom must continue to work to supplement their social security retirement benefits, this is a matter for the Legislature to address, not this court. As our supreme court has often said:

> the question of the wisdom or expediency of a statute is for the Legislature alone. The mere fact that a statute may seem unreasonable or unwise does not justify a court in annulling it, as courts do not sit to supervise legislation. Courts do not make the law; they merely construe, apply, and interpret it.

S.W. Bell Tel. Co. & Wheeler v. Roberts, 246 Ark. 864, 868, 440 S.W.2d 208, 210 (1969)(quoting *Newton County Republican Cent. Comm. v. Clark*, 228 Ark. 965, 311 S.W.2d (1958)).

Affirmed.

JENNINGS, BIRD, and AREY, JJ., agree.

ROBBINS, C.J., and NEAL, J., dissent.

JOHN B. ROBBINS, Chief Judge, dissenting.

> Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all — the least deserving as well as the most virtuous.

Hill v. Texas, 316 U.S. 400, 406 (1942). Mr. Bill Golden will have good cause to wonder just why he and other Arkansas workers

who choose to continue working after attaining age sixty-five somehow fall outside our constitutional safeguards as were so eloquently stated by Justice Harlan Stone.

The majority opinion fairly sets forth the facts giving rise to this appeal, but so that there will be no misunderstanding about what has been done to Mr. Golden, I will briefly recap his situation. Mr. Golden chose to continue working after age sixty-five, perhaps in large part because his social security pension benefits were only $575 per month, which is below the poverty level set by the federal poverty guidelines. He was injured on his job at age sixty-seven, and the Workers' Compensation Commission determined that he was permanently disabled to the extent of 20% of his body as a whole. A younger worker at the same wage level and with the same disability rating would have been entitled to receive $119 per week for ninety weeks as compensation for such disability. But because Mr. Golden was receiving $575 per month in social security old-age benefits, not social security disability benefits, Ark. Code Ann. § 9-11-522(f) (Repl. 1996) deprives him of any workers' compensation benefits at all for his permanent disability.

While I have some difficulty with the notion that the federal Age Discrimination in Employment Act prevents employers from discriminating against employees on the basis of age yet does not bar a state from enacting a workers' compensation law that does so, I can concur in the majority's disposition of all points on appeal except the constitutionality issue. The majority holds that Ark. Code Ann. § 11-9-522(f) does not violate the equal protection provisions of the federal and Arkansas constitutions. I respectfully disagree.

I acknowledge that the right to receive workers' compensation benefits is not a fundamental right, nor is a class of workers over the age of sixty-five a suspect classification. Consequently, I agree with the majority that an equal protection analysis of the subject statute requires application of the rational-basis test, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and that this legislation is entitled to a presumption of constitutionality. *Amer. Trucking Assn. v. Gray*, 288 Ark. 488, 707 S.W.2d 759

(1986); *Lambert v. Baldor Electric*, 44 Ark. App. 117, 868 S.W.2d 513 (1993). As stated in *Corbitt v. Mohawk Rubber Co.*, 256 Ark. 932, 935, 511 S.W.2d 184, 186 (1974), quoting from *Reed v. Reed*, 404 U.S. 71 (1971), a classification must be reasonable, not arbitrary, and must rest upon some ground of deference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike.

An essential step in this analysis is to ascertain the governmental purpose or objective sought to be served by the legislation. *Hamilton v. Hamilton*, 317 Ark. 572, 879 S.W.2d 416 (1994); *Corbitt, supra*, citing *Dunn v. Blumstein*, 405 U.S. 330 (1971). The majority identifies two such purposes that are served by Act 796 of 1993, which enacted § 11-9-522(f). Both are expressly set forth in Act 796. One of these pertains specifically to § 11-9-522(f) and provides that it is intended "to prohibit workers' compensation from becoming a retirement supplement." Ark. Code Ann. § 11-9-522(f)(2). The other governmental objective stated in Act 796 as one of its primary purposes is "to emphasize that the Workers' Compensation Commission system in this state must be returned to a state of economic viability." Ark. Code Ann. § 11-9-101(b) (Repl. 1996).

Having identified the governmental purposes of Act 796, the next step in our analysis is whether § 11-9-522(f), which imposes an offset or reduction of workers' compensation benefits, dollar-for-dollar, for any social security old-age benefits or other retirement benefits received by a worker over the age of sixty-five, is rationally related to these governmental objectives, or as stated in *Corbitt*, whether § 11-9-522(f) has a fair and substantial relation to the objects of this legislation.

Prohibition of workers' compensation benefits from becoming a retirement supplement. The Commission construed this objective to mean that § 11-9-522(f) is intended to prevent collection of "overlapping awards." The majority opinion similarly characterizes the object to be "avoiding duplicate payments." My difficulty with this characterization is that it confuses apples with oranges, i.e., workers' compensation disability benefits are not the same as social security old-age benefits or other retirement benefits.

Therefore, workers' compensation disability payments would never be an overlapping award or duplicate payment of social security retirement benefits.

As noted by the West Virginia Supreme Court of Appeals, disability awarded under workers' compensation is part of a comprehensive plan designed to rectify the results of an injury in the work place. *State v. Richardson*, 482 S.E.2d 162 (W.Va. 1996). Payments to injured workers are in lieu of such elements of damages for common law tort as lost wages, lost earning capacity, reimbursement of past and future medical expenses, past and present pain and suffering, emotional distress, and other factors. *Id.* The injured worker's right to seek workers' compensation disability benefits has been substituted for his cause of action against the negligent employer and this remedy has become his exclusive remedy. Ark. Code Ann. § 11-9-105.

Social security old-age insurance benefits do not serve the same purpose as workers' compensation benefits. *Industrial Claims Appeals Office v. Romero*, 912 P.2d 62 (Colo. 1996). Social security constitutes retirement benefits that are earned by continued employment in the work force and attainment of the age of sixty-two or sixty-five or older. *State v. Richardson, supra.* Employers and employees contribute to the system and the benefits are, in effect, additional compensation paid by insurance as a result of having worked some period of time at some average taxable salary, except as the payments reflect the recipient's wage contributions to the system. *Id.* Those benefits are neither designed nor intended to compensate for a workplace injury or replace elements of damage that might be recovered in a common-law tort action for such an injury.

Furthermore, it should be noted that a person receiving social security old-age benefits may also be employed and earn additional wages, as Mr. Golden was doing in this case at the time of his injury, without any offset against these old-age benefits, limited in amount however until age seventy. We have held that the Commission erred in denying an injured worker disability benefits, specifically wage loss, solely because the worker was receiving old-age social security benefits. *Curry v. Franklin Elec.*,

32 Ark. App. 168, 798 S.W.2d 130 (1990). Although *Curry* was decided prior to the 1993 act, it is notable that in that opinion we cited with approval *Meyers v. Walsh*, 12 A.D.2d 371, 211 N.Y.S.2d 590 (1961), and quoted from that opinion as follows: "The fact that claimant ceased work and elected to receive social security benefits is not decisive of his right to compensation nor does such action, of itself, justify the finding that the claimant has removed himself from the labor market. Recipients of social security are permitted to work within certain monetary limitations."

Mr. Golden's circumstance is not at all the situation that we addressed in *Cook v. Aluminum Co. of Amer.*, 35 Ark. App. 16, 811 S.W.2d 329 (1991), where we found a legitimate governmental objective was served in the statute that prevented an employer from being liable for benefits for wage loss while the injured worker was actually *earning* wages equal to the wages he was earning at the time of his injury. Mr. Golden's workers' compensation disability benefits were reduced because of old-age insurance benefits, not *earned* wage income. Consequently, a governmental objective to avoid or prohibit duplicate or overlapping benefits is not served by reducing workers' compensation disability benefits because of social security old-age retirement benefits received by the injured worker.

Returning the workers' compensation system to a state of economic viability. I acknowledge that § 11-9-522(f) does serve to reduce the cost of workers' compensation insurance and is a legitimate governmental purpose. However, § 11-9-522(f) is not rationally related to achieving this purpose because it reduces, and in the case of Mr. Golden completely extinguishes, the right to disability benefits for injured workers who are age sixty-five or older and who are receiving social security retirement benefits, but yet does not similarly reduce the workers' compensation benefits of an injured worker who is age sixty-two, sixty-three, or sixty-four, and who also receives social security retirement benefits. Nor would the workers compensation disability benefits of an injured worker age sixty-five, or older, be reduced by any sum if the injured employee was for some reason not entitled to receive social security retirement benefits. This disparate treatment of similarly

situated individuals violates the equal protection guarantees of the state and federal constitutions and should not be permitted.

Finding that a law serves a governmental interest does not necessarily equate to constitutionality. Workers' compensation insurance premiums could be reduced by legislation that denied benefits to left-handed or blue-eyed injured employees. However, simply because a governmental objective or purpose is served does not preclude consideration of a statute's basic fairness. A review of relevant cases reveals that at the heart of equal protection analysis is a standard of reasonableness. *Reed v. Reed, supra,* and *Corbitt v. Mohawk Rubber Co., supra,* (a classification must be *reasonable,* not arbitrary); *Misskelley v. State,* 323 Ark. 449, 915 S.W.2d 702 (1996) (classification must be *reasonably* related to a legitimate governmental purpose); *Hamilton v. Hamilton,* 317 Ark. 572 879 S.W.2d 416 (1994) (statutory classification must be *reasonably* related to the purpose of the statute); *McFarland v. McFarland,* 318 Ark. 446, 885 S.W.2d 897 (1994) (even if statute bears a rational relationship to a state interest, the distinction drawn between the classes *must be reasonable*); *Carney v. State,* 305 Ark. 431, 808 S.W.2d 755 (1991) (statute must not be *unreasonable* or arbitrary); *Hamilton v. Jeffery Stone Co.,* 25 Ark. App. 66, 752 S.W.2d 288 (1988) (a classification must be *reasonable,* not arbitrary) *Holland v. Willis,* 293 Ark. 418, 739 S.W.2d 529 (1987) (classification must be *reasonably* related to the purpose of the statue). How in good conscience can it be contended that a law that reduces or precludes workers' compensation disability benefits to an injured worker over the age of sixty-five is reasonable? It is unreasonable to deny a sixty-five-year-old Arkansan who is injured on his job the right to be compensated for his disability simply because, after working several years and contributing social security taxes, his old-age insurance benefits exceed the weekly disability benefit rate that he would otherwise be entitled to receive.

While a determination of whether a statute is constitutional should never be taken lightly, especially given the strong attendant presumption of validity, I am convinced that the statute before the court fails to pass constitutional muster. Section 9-11-522(f) discriminates against and demeans the value of thousands of older Arkansans who choose to remain in the work force. If such a

worker suffers a permanent disability and his social security benefits exceed the permanent disability benefits that a younger worker would receive and to which this older worker would otherwise be entitled, the older worker receives nothing and he has no redress. He is left without compensation for his disability, either in tort or under the workers' compensation system. Relegation to second-class status as a member of Arkansas' work force is not fair, it is not reasonable, and it does not pass the test of not being arbitrary or capricious. Such a statute should not be found constitutional by this court. I would reverse and remand this case for an award of benefits.

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

Malika L. STEPP *v.* Winifred T. GRAY

CA 96-730 947 S.W.2d 798

Court of Appeals of Arkansas
Division IV
Opinion delivered July 2, 1997

Ogles Law Firm, P.A., by: *John Ogles*, for appellant.

Robert Batton, for appellee.

ANDREE LAYTON ROAF, Judge. Malika L. Stepp appeals from an order increasing the child-support payments made to her by the appellee, Winifred T. Gray. She argues that the chancellor erred in: 1) calculating the amount of child support; 2) making the increase retroactive for only six months; 3) allowing Gray to pay a part of the child support in an annual, lump-sum payment; and 4) denying her request for attorney fees and expert witness fees. We agree that the chancellor erred by excluding the amount of a depreciation deduction reflected on Gray's income tax return in calculating the child support, and reverse and remand on the first

issue. We affirm the chancellor on the remaining three issues raised.

Stepp and Gray were divorced in 1991. Stepp was awarded custody of the parties' three minor children, and Gray was ordered to pay child support of $1075 per month. On December 1, 1994, Stepp petitioned for an increase in child support, alleging, among other changes in circumstances, that Gray was earning more from his business than when the prior support order was entered in 1991.

At the hearing held on September 11, 1995, Stepp placed into evidence the fact that Gray had acquired a dozen rental properties since the divorce, and as a result had substantially increased his after-tax income. On December 12, 1995, the chancellor entered a letter order raising Gray's child-support obligation from $1,075 to $3,054.46 per month. On January 5, 1996, Gray filed a motion to reconsider, and after a February 13, 1996, hearing in which the chancellor accepted additional evidence, he lowered Gray's child-support obligation to $2,418.56 per month, retroactive for six months. The chancellor also denied Stepp's motion for attorney and expert-witness fees.

After Stepp's motion to reconsider this order was deemed denied, Stepp timely filed her notice of appeal. There was a subsequent order entered on April 29, 1996, which apparently allowed Gray to pay a part of his regular support in a lump-sum, end-of-the-year annual payment. This order is not abstracted and does not appear in the record; however, Stepp has abstracted her notice of appeal from this order.

1. Child-Support Calculation

Stepp first argues that the chancellor erred in calculating Gray's child-support obligation because he: 1) allowed a $34,861 depreciation deduction on Gray's rental properties; 2) failed to consider the fact that Gray received a company car; 3) failed to consider that Gray received income from seventeen rent houses; and 4) allowed a self-employed health-insurance tax deduction of $793. Stepp urges that this court remand to the chancellor for him to consider all the factors stated in the 1993 Supreme Court

Per Curiam Order setting forth child-support guidelines. Stepp further cites *Black v. Black*, 306 Ark. 209, 812 S.W.2d 480 (1991), in urging that Gray should be ordered to pay additional child support based on a net-worth approach, because Gray owns seventeen rent houses and a company car. We agree that Stepp's argument has merit only with regard to the depreciation tax deduction.

Gray's sources of income for 1994 were clearly established at the hearings. His two main sources of income were his primary business, Bart Gray Realty, from which he drew a regular salary of $44,650, and his rental properties, with gross receipts of $152,513 and net taxable income of $24,226. This income, as well as income from several other ventures, was clearly reflected on Gray's tax returns, which were entered into evidence and relied upon by the chancellor. Gray's adjusted gross income for 1994 was $127,820. From this sum, the chancellor disallowed a $2,000 deduction for an IRA, which brought his adjusted gross income to $129,820. After properly subtracting federal and state income taxes, FICA, and a deduction for maintaining health insurance on the minor children, which are specifically allowed by the child-support guidelines, *In Re Guidelines for Child Support*, 314 Ark. App. 644, 863 S.W.2d 291 (1993), the amount of Gray's income upon which his child-support obligation was calculated stood at $90,696. Because he owed support for three children, his monthly support obligation pursuant to the child-support guidelines was 32% of this total, or $2,418.56, the amount ultimately ordered by the chancellor.

Stepp presented testimony by her accountant and argued to the chancellor that a depreciation deduction claimed by Gray on his rental properties should be included as income for the purpose of calculating Gray's child-support obligation because it was not an actual expenditure. However, the chancellor based the support award on Gray's adjusted gross income, allowing all of the business deductions claimed by Gray and disallowing only a deduction for an IRA.

For the purposes of calculating child support, the child-support guidelines state that, "Income refers to the definition in the federal income tax laws," less proper deductions for:

1. Federal and state income tax;
2. Social security (FICA) or railroad retirement equivalent;
3. Medical insurance paid for dependent children; and
4. Presently paid support for other dependents by Court order.

The guidelines further provide that:

> For self-employed payors, support shall be calculated based on last year's federal and state income tax returns and the quarterly estimates for the current year. Also the court shall consider the amount the payor is capable of earning or a net-worth approach based on property, life-style, etc.

However, the Internal Revenue Code contains a number of provisions which purport to define income. "Gross income" is defined in 26 U.S.C. § 61 (1994). Section 62 defines "adjusted gross income," while section 63 defines "taxable income."

Section 61 defines gross income as comprising a laundry list of various forms of compensation, including gross income derived from business, gains derived from dealings in property, and income from discharge of indebtedness. Clearly, reference to this definition alone will not suffice to determine a proper amount on which to calculate child support because at least one of the items, income from discharge of indebtedness, does not represent funds actually received, and business income is defined as "gross income derived from business," before deduction of any out-of-pocket business expenses.

We also do not find that section 62, which defines adjusted gross income, provides a sufficient basis for calculating income for the purpose of the support guidelines. This section allows deductions from gross income for, among other items, "trade and business deductions," and "losses from the sale or exchange of property," which could also lead to an inequitable result in calculating a child-support obligation. Finally, taxable income is defined in section 63 as adjusted gross income less certain deductions including personal and itemized deductions. Consequently, we conclude that the chancellor may not simply utilize one of the definitions of "income" found in the tax code, particularly in the case of self-employed persons, to arrive at the true disposable income of the support obligor.

Moreover, Arkansas appellate courts have suggested that a depreciation deduction should properly be considered in awarding child support, in two pre-child-support-guideline cases. In *Hoyt v. Hoyt*, 249 Ark. 266, 459 S.W.2d 65 (1970), the supreme court declined to reduce an award of child support and alimony totaling $1000 per month, which the appellant, a practicing physician, argued was excessive. The court commented that, although the appellant's net income after taxes was about $24,000, "if personal exemptions and *unfunded depreciation* are added to that figure, it appears that Dr. Hoyt had about $32,000 of *spendable income* in that year." *Id.* at 267, 459 S.W.2d at 66 (emphasis added).

[redacted] In *Pierce v. Pierce*, 268 Ark. 864, 596 S.W.2d 364 (Ark. App. 1980), this court affirmed a denial of a petition for reduction of child-support payments filed by a self-employed payor whose federal tax return showed an income, for tax purposes, of only $2,892.12 for the previous year. The court noted that the appellant admitted that he had a gross income of over $15,000 and had included a deduction for depreciation on business equipment of $4,930.61 on his return. The court stated that "it is clear from this and other evidence in the record that *the tax return alone is not an accurate indicator of his available expendable income* for 1978." *Id.* at 866, 596 S.W.2d at 366 (emphasis added), *c.f.*, *Belue v. Belue*, 38 Ark. App. 81, 85, 828 S.W.2d 855, 857 (1992)(it is appropriate for a chancellor to look beyond the technical definitions of income). Surely, determining the "expendable income" of a child-support payor is still the ultimate task of the chancellor following the adoption of the child-support guidelines in 1989.

[redacted] Once income is determined, Arkansas Code Annotated section 9-12-312(a)(2) (Repl. 1993) makes reference to the family support chart mandatory when determining the appropriate amount of child support. The statute creates a rebuttable presumption that the amount of child support indicated by the chart is correct, and the presumption shall only be rebutted "upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under the established criteria set forth in the family support chart." *Id.* Moreover, in *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993), this court stated "[r]eference to the

chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount which can only be explained away by written findings stating why the chart amount is unjust or inappropriate." We recognize that Gray's income exceeds the amount for which there is a specific entry on the child-support chart and that this necessitated a separate calculation made in accordance with the child-support guidelines, but find that the same imperative applies regarding written findings for deviation from the level of support indicated by the guidelines.

By omitting that portion of the depreciation deduction which represents spendable income to Gray without entering a specific finding on the record that it would be unjust or inappropriate to calculate Gray's support based on its inclusion, the chancellor in effect deviated from the child-support chart without making the requisite written findings. We came to a similar conclusion in *Fontenot v. Fontenot*, 49 Ark. App. 106, 898 S.W.2d 55 (1995), a case that involved awarding to a noncustodial parent the right to claim the parties' children as a tax exemption. We held that allowing the noncustodial parent to benefit from the tax deduction was a deviation from the support chart without the requisite findings to support such a deviation. *Id.*

Although this court has the power to decide chancery cases de novo on the record, we think it appropriate to remand this case to the chancellor for further consideration of the depreciation deduction issue. *See Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993). Stepp argues that the entire $34,861 depreciation should be included in Gray's income. However, Gray testified that he acquired his rental properties with 100% financing. His tax returns reflect that he claimed the interest paid on the mortgages as a business deduction, but not the principal. It also appears from the evidence presented concerning Gray's mortgage payments that he would have approximately $20,000 in disposable income remaining from the depreciation deduction even if he is credited with the amount of principal paid on the rental properties. Consequently, we leave it to the discretion of the chancellor to determine whether further evidence is needed to arrive at the amount of the depreciation deduction to be considered as income to Gray.

Stepp also claims that the chancellor failed to consider the fact that Gray received a company car. However, this allegation is not supported by the evidence. According to Stepp's own witness, CPA Keith Mabry, personal use of the company car should have been reflected on Gray's W-2, but he could not say it was not included because the W-2 was not "broken down." Moreover, there was no evidence presented by Stepp with regard to the actual monetary value for the use of this car. Therefore, she has failed to bring up a record sufficient to demonstrate error in this regard. *See Jones v. Jones, supra.*

Also meritless is Stepp's claim that the chancellor failed to consider that Gray received rent from seventeen rent houses. This income was clearly reflected on Gray's tax returns and was a substantial portion of the income upon which his support obligation was calculated.

Finally, we do not agree with Stepp's assertion that the court erred in allowing Gray a self-employed health-insurance tax deduction of $793. Gray claimed that health-insurance coverage on his three minor children cost $3540.94 per year, and he was credited with these payments pursuant to the Family Support Guidelines. On appeal, Stepp argues only that Gray's health-insurance policy also covered Gray and another son. Stepp does not argue that excluding the $793 tax deduction from Gray's income in effect allows Gray a double credit for the health-insurance payments; consequently, we cannot say that the chancellor erred by excluding this amount from Gray's income.

As we agree that the chancellor erred by failing to consider the depreciation deduction in calculating Gray's support obligation, we must remand this case to the chancellor for further consideration of the child-support award consistent with this opinion.

2. *Retroactive Support Award*

Stepp also argues that the chancellor erred in denying her request that the child-support increase be made retroactive to December 27, 1994, the date her petition for increase was filed. The increase was instead awarded retroactive to approximately the date of the hearing on the petition in September 1995. She argues

that awarding child support retroactive for only six months was inequitable because she deserved the increase retroactive to the date of the filing of the petition. She relies upon *Pardon v. Pardon*, 30 Ark. App. 91, 722 S.W.2d 379 (1990), as authority for the proposition that requesting support retroactive to the petition date was proper. However, Stepp's argument on this point is without merit.

A chancellor has discretion to set the amount of child support, and his findings in this area will not be disturbed absent an abuse of discretion. *Creason v. Creason*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). While it is well settled that a chancellor may retroactively modify a child-support obligation up to the date a modification petition is filed, *Grable v. Grable*, 307 Ark. 410, 821 S.W.2d 21 (1991), such an award is not mandatory. Stepp relies on *Pardon, supra*, which quotes with approval 27C C.J.S. *Divorce* § 684 (1986). Section 684 sets forth the range of options available to a chancellor regarding retroactive modification of child support, and provides in pertinent part:

> In an appropriate case, it is within the discretion of the court to make an order for child support retroactive to an earlier date *where it appears that the needs of the child existed as of that date.* However, it has been held that child support payments may not be ordered to commence earlier than the date the divorce action was commenced.
>
> Thus, in various instances it has been held proper for the court to fix the effective date of an order of child support from the date of filing of the petition or complaint, *or from the date of the trial* . . . .

(Emphasis added.)

There is nothing in the record which suggests that the needs of the children would justify a finding that the chancellor abused his discretion in ordering the increase retroactive for only six months. In fact, although Stepp testified that a private school in which she had enrolled the children was expensive, she nonetheless stated that she did not need the increase in support because of this additional expense, and further stated that she was "perfectly capable" of paying for it. Virtually all of Stepp's evidence consisted of proof that Gray's income had increased substantially since the entry of the previous support order. While this evidence

clearly supports an increase in Gray's child-support obligation, *see* Ark. Code Ann. § 9-14-107 (Supp. 1995), it does not provide an adequate basis for finding that the chancellor abused his discretion in ruling that the increase be made retroactive for only six months.

3. Annual Payment of Support

Stepp next argues that the chancellor erred in allowing Gray to pay the child support in two parts. Stepp argues that allowing Gray to pay $752 twice a month, with the balance payable at the end of the year when he receives a bonus, violates the intent of the supreme court per curiam order setting forth the support guidelines.

However, we cannot reach this issue because permission to pay part of the support in a lump sum was apparently granted in an order that is not included in the record. Parties seeking relief in this court must bring up a record sufficient to show error. *See Reynolds v. Rogers*, 297 Ark. 506, 763 S.W.2d 660 (1989). Moreover, although Stepp has abstracted comments made by the chancellor from the bench regarding the lump-sum payment, the chancellor's statements fall far short of even constituting a specific ruling on this issue.

4. Attorney's Fees

Stepp's final argument is that the chancellor erred in denying her request for attorney's fees and expert-witness fees for her accountant. Stepp asserts that the chancellor abused his discretion by increasing her child support, but denying her request for attorney fees. We find her reliance on *Scroggins v. Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990), as authority for this argument to be misplaced.

In *Scroggins*, the supreme court deferred to a chancellor's determination of whether to award attorney fees in a divorce case, stating that "the chancellor is in a better position to evaluate the services of counsel than an appellate court." As in *Scroggins*, here, the chancellor asked Stepp's counsel for an itemized billing record, but he awarded no fees; the chancellor in *Scroggins* had awarded less than one-half the amount that the appellant had

requested. However, we do not read *Scroggins* as departing from the well-settled rule that an award of fees in domestic-relations cases is a matter within the sound discretion of the chancellor and not a matter of right. *Ryan v. Baxter*, 253 Ark. 821, 489 S.W.2d 241 (1973).

Reversed in part and remanded, affirmed in part.

ROBBINS, C.J., and AREY, J., agree.

Michael Glen BRANCH *v.* STATE of Arkansas

CA CR 96-737 950 S.W.2d 221

Court of Appeals of Arkansas
Opinion delivered August 20, 1997

J.F. Atkinson, Jr., and *R. Paul Hughes, III*, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi*, Asst. Att'y Gen., for appellee.

PER CURIAM. On June 25, 1997, we delivered an opinion reversing the conviction of appellant Michael Glen Branch and remanding the case to the trial court. Mr. J. F. Atkinson, Jr., has filed his motion for an award of an attorney's fee as appointed counsel in this appeal. We note that an earlier motion was filed by Mr. R. Paul Hughes, III, in which an attorney's fee was also sought as appointed counsel. It was not made apparent in

either motion that appellant was represented by two attorneys in this appeal. We previously awarded a fee of $850 to Mr. Hughes. We now award an additional fee of $500 to Mr. Atkinson. The lesser award does not reflect an opinion that Mr. Hughes should receive a greater fee than Mr. Atkinson, but rather that the court was not aware that another motion for a fee would be filed when it granted the earlier award.

So that this situation does not reoccur in the future, we direct that in cases where co-counsel have been appointed for an indigent defendant, such co-counsel must submit their applications for fees jointly or at the same time.

Joanne WENTWORTH *v.* SPARKS REGIONAL MEDICAL CENTER

CA 96-1496 950 S.W.2d 221

Court of Appeals of Arkansas
Division III
Opinion delivered August 27, 1997

Walker, Shock & Harp, P.L.L.C., by: *Eddie H. Walker, Jr.*, for appellant.

Jones Law Firm, by: *Charles R. Garner, Jr.*, for appellee.

JOHN E. JENNINGS, Judge. The claimant in this workers' compensation case appeals from the Commission's order, which found that the respondent was entitled to a credit based upon a settlement entered into between the claimant and a third-party tortfeasor. Claimant argues that the Commission erred in allowing the credit. We disagree and affirm.

Joanne Wentworth was on her way to work at Sparks Regional Medical Center on August 17, 1992, when, while walking across the street between the parking lot and the hospital entrance, she was hit by a car driven by Emma Jo Couthern and was injured. In December 1992, she filed a claim for workers' compensation benefits, which was fully controverted by the respondent. The issue of compensability was finally determined by this court in a decision handed down March 5, 1995.[1] On May 14, 1993, while the compensation claim was still pending, claimant settled with Emma Jo Couthern and her liability carrier for $50,000.00.

Claimant and respondent stipulated before the Commission that, prior to the third-party settlement, respondent's attorney was aware that Couthern had insurance coverage on the automobile

[1] *Wentworth v. Sparks Regional Medical Center*, 49 Ark. App. 10, 894 S.W.2d 956 (1995).

that struck claimant and that claimant had retained counsel to represent her in a third-party claim. Neither claimant nor her attorneys notified the respondent or its attorney of the third-party settlement until after it had been agreed on. The release that was executed in regard to the settlement failed to reserve and protect any subrogation or lien rights of the respondent in the event the compensation claim was allowed. The release operated as a bar to any action by the respondent against Couthern and her liability insurance carrier. The settlement was not approved by any court or by the Commission. Claimant never filed a lawsuit against Couthern or her liability carrier.

Arkansas Code Annotated section 11-9-410 (1987), in effect at the time of claimant's injury, provided:

> (a) LIABILITY UNAFFECTED.
>
> (1) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in court against any third party for the injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in the action. If they, or either of them, join in the action, they shall be entitled to a first lien upon two-thirds (2/3) of the net proceeds recovered in the action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.
>
> (2) The commencement of an action by an employee or his dependents against a third party for damages by reason of an injury to which this chapter is applicable, or the adjustment of any claim, shall not affect the rights of the injured employee or his dependents to recover compensation, but any amount recovered by the injured employee or his dependents from a third party shall be applied as follows:
>
> (A) Reasonable costs of collection shall be deducted;
>
> (B) Then, in every case, one-third (1/3) of the remainder shall belong to the injured employee or his dependents, as the case may be;

(C) The remainder, or so much as is necessary to discharge the actual amount of the liability of the employer and the carrier; and

(D) Any excess shall belong to the injured or his dependents.

(b) SUBROGATION.

(1) An employer or carrier liable for compensation under this chapter for the injury or death of an employee shall have the right to maintain an action in tort against any third party responsible for the injury or death.

(2) After reasonable notice and opportunity to be represented in the action has been given to the compensation beneficiary, the liability of the third party to the compensation beneficiary shall be determined in the action as well as the third party's liability to the employer and carrier.

(3) After recovery shall be had against the third party, by suit or otherwise, the compensation beneficiary shall be entitled to any amount recovered over and above the amount that the employer and carrier have paid or are liable for in compensation, after deducting reasonable costs of collection. In no event shall the compensation beneficiary be entitled to less than one-third (1/3) of the amount recovered from the third party, after deducting the reasonable cost of collection.

(c) SETTLEMENT OF CLAIMS.

(1) Settlement of claims under subsections (a) and (b) of this section must have the approval of the court or of the commission, except that the distribution of that portion of the settlement which represents the compensation payable under this chapter must have the approval of the commission.

(2) Where liability is admitted to the injured employee or his dependents by the employer or carrier, no cost of collection shall be deducted from that portion of the settlement under subsections (a) or (b) of this section representing compensation, except upon direction and approval of the commission.

In *St. Paul Fire & Marine Ins. Co. v. Wood*, 242 Ark. 879, 416 S.W.2d 322 (1967), the supreme court construed Ark. Stat. Ann. § 81-1340 (Repl. 1960) (the predecessor to Ark. Code Ann. § 11-

9-410 (1987)) to allow an employee to settle his common-law cause of action in negligence against a tortfeasor free of any claims of his employer's workers' compensation carrier where the settlement documents specifically preserved all rights of the carrier. In that case, the compensation carrier had provided benefits to the injured employee and intervened in the employee's action against the tortfeasor. While the injured employee and the tortfeasor could agree on what they considered a fair settlement, the tortfeasor and compensation carrier could not agree on a settlement of the carrier's subrogation claim.

In *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (1972), the compensation carrier paid benefits to the injured employee, who later sued third-party tortfeasors. Although there were conversations and correspondence between the compensation carrier's attorney and the employee's attorney, the compensation carrier did not intervene and received no notice of an offer and settlement between one of the tortfeasors and the employee. The release preserved the compensation carrier's subrogation rights. The supreme court, while holding that the compensation carrier was not entitled to a lien upon the settlement proceeds because it did not intervene in the employee's action against the tortfeasors, recognized that "[f]undamental fairness, justice and reason dictate that [Ark. Stat. Ann. § 81-1340] subsection (c) should apply to any settlement[,]" and held:

> Since the statutory purpose of § 81-1340 is to protect the rights of both the compensation carrier and the employee, we shall hereafter interpret *Wood* to require that as between the employer (or carrier) and employee, the proceeds of *any* compromise settlement of a tort claim be subject to the lien of the employer or the compensation carrier unless the settlement has been approved by a court having jurisdiction or by the Workmen's Compensation Commission, after the compensation carrier has been afforded adequate opportunity to be heard.

252 Ark. at 1052.

In *Jackson Cookie Co. v. Fausett*, 17 Ark. App. 76, 703 S.W.2d 468 (1986), the employer sought a credit against the settlement of a tort action entered into by the employee and a third party. The

Commission found that the employer had actual knowledge of the ongoing third-party action and, by failing to intervene, was precluded from recovering any part of the settlement. This court affirmed, stating:

> Where the employee has made a claim under the Worker's Compensation Act and the employer or carrier has had reasonable notice and an opportunity to join in a third-party action, we hold that the employer and its carrier must intervene in a third-party action to have a right to a credit, whether or not the liability of the employer has been determined.

17 Ark. App. at 81.

In *John Garner Meats v. Ault*, 38 Ark. App. 111, 828 S.W.2d 866 (1992), the employer and its carrier paid benefits for the employee's compensable injury. The employee filed suit against a third-party tortfeasor, giving his employer and its carrier notice of the suit and making demand that they assist in prosecution of the suit. They declined to intervene or participate. The employee's third-party action settled and the Commission ruled that the employer and its carrier were not entitled to a lien or credit from the settlement funds. The employer and carrier appealed, arguing that they were entitled to a lien because the employee did not obtain court or Commission approval of the settlement and also because their subrogation rights were not preserved in the settlement. We held that, while Ark. Code Ann. § 11-9-410(c) (1987) was controlling and required court or Commission approval of settlement of such third-party actions, that approval was meant to protect the various rights of the parties, and by failing to intervene the employer and its carrier had waived the rights that the statute was designed to protect.

In the case at bar, the Commission's opinion reviews the statute and the applicable case law, and then states:

> Thus, where the employee and third-party tortfeasor propose a settlement *after* the claimant has filed a claim for workers' compensation benefits, as in the present case, the employee and third party may only settle around the employer or carrier's right to a lien on settlement proceeds received by the employee where at least three conditions are met:

(1) The settlement agreement between the employee and the third party must protect the statutory right of the employer or carrier to pursue an action against the third party tortfeasor. *Wood, supra.*

(2) The employer or carrier must be provided reasonable notice of the proposed settlement and an opportunity to be heard. *McCluskey, supra.*

(3) The settlement agreement must be approved by a court or by the Commission. *Id.*

However, in *John Garner Meats v. Ault*, 38 Ark. App. 111, 828 S.W.2d (1992), the Arkansas Court of Appeals held that an employer or carrier waives its protection to have an agreement approved by the Commission or a court of competent jurisdiction unless the carrier or employer first intervenes in an ongoing third-party lawsuit even where the settlement agreement between the employee and the third party extinguishes the employer's right of subrogation. *Id.*

We find that the present case is clearly distinguishable from *Ault, McCluskey,* and *Fausett.* In those three cases, the carrier or employer was provided actual notice of a lawsuit filed in court, and simply chose not to intervene in the ongoing lawsuit. In the present case, however, the claimant settled her claim against the tortfeasor and terminated the respondent's statutory right of subrogation without ever filing an action in *any* Court.

. . . .

In short, the stipulated facts indicate that the claimant entered into a settlement agreement which terminated the respondent's subrogation rights against the third-party tortfeasor. The claimant did not file an action in court prior to entering the settlement agreement, and the settlement agreement was not approved by the Commission or a court of competent jurisdiction. In addition, the claimant's failure to institute judicial proceedings prior to entering a settlement agreement with the third party denied the respondents their statutory right to reasonable notice and an opportunity to intervene in an action in court to preserve their statutory lien under the provisions of Ark. Code Ann. § 11-9-410(a)(1) (1987). Therefore, after a *de novo* review

> of the entire record, and for the reasons discussed herein, we find that, under the facts presented in the present case, the respondent is entitled to a credit to the extent of the lien provided for in Ark. Code Ann. § 11-9-410(a)(1) (1987).

On appeal, the claimant argues that here the employer had actual knowledge of the third-party claim against the tortfeasor but failed to take any action to preserve its right to a credit against the settlement. She argues that an employer's ability to protect its subrogation rights is not dependent on whether the injured employee files a lawsuit, and that the absence of a lawsuit in which the employer could intervene should not excuse the employer's failure to take any action to protect its subrogation rights. Claimant suggests that "a determination should be made in regard to what action is required to preserve an employer's subrogation interest in a third-party case once that employer has actual knowledge of the existence of the third-party claim."

The "determination" that appellant seeks is readily disclosed by reviewing § 11-9-410 (1987) and the case law, as the Commission's opinion in this case makes apparent. The statutory purpose of Ark. Code Ann. § 11-9-410 is to protect the rights of both the compensation carrier and the employee. If there is an action by the employee against a third party in which the employer or carrier can intervene, they are entitled to reasonable notice and opportunity to join in the action; failure to do so waives their rights. *See* Ark. Code Ann. § 11-9-410(a)(1) (1987); *John Garner Meats v. Ault*, 38 Ark. App. 111, 828 S.W.2d 866 (1992). The proceeds of any compromise settlement of a tort claim is subject to the lien of the employer or compensation carrier unless the settlement has been approved by a court having jurisdiction or by the Commission after the carrier has been afforded an adequate opportunity to be heard. *See* Ark. Code Ann. § 11-9-410(c) (1987); *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (1972).[2]

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[2] Since the time of claimant's injury, an addition has been made to subsection (c) of the Code to make this even more explicit:

> (c)(3) No party shall settle a claim under subsections (a) and (b) of this section without first giving three (3) days' written notice to all parties with an interest in

The Commission's decision is affirmed.

MEADS and ROAF, JJ., agree.

Kendra Dotson JONES *v.* LITTLE ROCK FAMILY PLANNING SERVICES, P.A., Curtis E. Stover, M.D., David C. Kolb, M.D., Lisa D. Jamroz, M.D., and T. Eric Bowen, M.D.

CA 97-309 949 S.W.2d 568

Court of Appeals of Arkansas
Opinion delivered August 27, 1997

Amshoff, Donovan & Smith, P.C., by: *Theodore H. Amshoff, Jr.* and *Paul P. Clemens*; *The Law Offices of Brad Hendricks*, by: *Lamar Porter*, for appellant.

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the claim of the intent to settle. Each party with an interest in a claim under subsections (a) and (b) shall cooperate with all other parties in litigation or settlement of such claims.

Ark. Code Ann. § 11-9-410(c)(3) (Supp. 1995).

Wright, Lindsey & Jennings, by: *Bettina E. Brownstein*, for appellee Little Rock Family Planning Services, P.A.

Friday, Eldredge & Clark, by: *Tonia P. Jones*, for appellee Lisa D. Jamroz, M.D.

Clevenger, Angel & Miller, P.L.L.C., by: *Richard L. Angel* and *Stuart P. Miller*, for appellees David C. Kolb, M.D., and T. Eric Bowen, M.D.

PER CURIAM. Before the Court is a Motion to Correct the Record brought by separate appellees David C. Kolb, M.D., and T. Eric Bowen, M.D. Separate appellees note that the record in this case was in the possession of appellant's counsel until it was checked out to their counsel. Upon receipt, counsel for separate appellees discovered that several pages of the record contained highlighted sections or notations. Separate appellees identify several pages in their motion that are said to be highlighted or annotated. Further, separate appellees, through their counsel, certify that these notations and highlights were placed on the record prior to its receipt by counsel for separate appellees.

Separate appellees served their motion on all parties to this appeal. No responses were filed, and the time to respond has expired.

The clerk's records indicate that counsel for the appellant checked out the record on March 20, 1997. Counsel then returned the record to the clerk's office on July 18, 1997; on that same date, counsel for separate appellees checked out the record. Separate appellee's motion was filed on July 25, 1997.

A review of the record confirms that, as alleged by separate appellees, it has been highlighted with notations added on a substantial number of pages. This cannot be permitted; the record should not be tampered with in any fashion. Therefore, pursuant to Ark. R. App. P.—Civ. 6(e), we order counsel for the appellant to correct all pages of the record that contain highlights or notations by preparing a supplemental record, properly certified, replacing these pages. This supplemental record shall be filed within 30 days of the date of this opinion. Appellant is to bear all

costs in connection with the preparation, certification and transmission of the supplemental record.

By this Per Curiam, we place all counsel and parties, in this case and all future cases, on notice: the Court's record on appeal is not to be disfigured, marked upon, or otherwise tampered with.

MORRILTON MANOR *v.* Jennifer BRIMMAGE

CA 96-1542 952 S.W.2d 170

Court of Appeals of Arkansas
Division II
Opinion delivered September 3, 1997

Walter A. Murray, for appellant.

The Whetstone Law Firm, P.A., by: *Gary Davis*, for appellee.

SAM BIRD, Judge. Morrilton Manor, a nursing home, appeals a decision of the Workers' Compensation Commission that held that appellee had sustained a work-related back injury on June 6, 1995, and was entitled to medical benefits, temporary total disability benefits from June 8, 1995, to June 23, 1995, and the maximum allowable attorney's fee for full controversion of the claim.

Appellant argues that (1) the Commission erred in failing to recognize that a presumption contained in Ark. Code Ann. § 11-9-102(5)(B)(iv) (Repl. 1996) is an absolute bar to this claim, and

that appellee waived any objection to the admission of the result of the drug test; (2) the Commission improperly gave the benefit of the doubt to the appellee; and (3) the Commission's opinion is not supported by substantial evidence.

The parties stipulated that the employer-employee-carrier relationship existed on June 6, 1995. Appellee testified that she was assigned to the laundry room and had just taken some linens from a dryer, put them into a basket, and moved them to a folding table. In the process, a sheet fell to the floor, and when appellee bent over to pick it up, her back popped. She immediately reported the incident to her supervisor who filled out an accident report and directed appellee to submit a urine specimen for a drug screen. Although appellee was not scheduled to work on June 7th and 8th, she went in on June 8th to pick up her paycheck, and was told that the urine sample she gave on June 6th had been collected in an "inappropriate" container. She was asked to submit another specimen, and she did. The second specimen appellee gave tested positive for opiates (morphine and codeine), and on that basis appellant terminated appellee's employment and controverted her workers' compensation claim.

Appellant contended before the Commission that Ark. Code Ann. § 11-9-102(5)(B)(iv) (Repl. 1996) operates as an absolute bar to appellee's claim because the urine specimen collected two days after her injury tested positive for codeine. That statute provides:

> (B) "Compensable injury" does not include:
>
> . . .
>
> (iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.
>
> (b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

> (c) Every employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.
>
> (d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

Appellee contended that she was neither intoxicated nor had she taken drugs prior to her injury. She explained that the night before the *second* urine specimen was collected she was in pain and had taken a Tylenol #3 tablet given to her by her father, with whom she lived. Appellee said she had informed the nurse who collected the second sample that she had taken the Tylenol, which contains codeine. Appellee's father confirmed that he had given her the Tylenol #3 tablet for pain.

The administrative law judge said that the appellant had failed to prove that the drug screen performed on a urine specimen taken two days after an injury was a "'reasonable and responsible' test on which to base a denial of benefits for an injury 'substantially occasioned' by an intoxicant." He held that the claimant had proven that she sustained a compensable back injury and was entitled to temporary total disability benefits from June 8, 1995, to June 23, 1995, and medical expenses. The Commission affirmed and adopted the opinion of the law judge.

Appellant argues that the Commission's interpretation of the statute was erroneous, and that because appellee failed to object to the result of the drug test being considered by the Commission, any objection to it was waived. Appellant argues that, consequently, the Commission *could not find* that the drug test was not "reasonable and responsible," or that it was insufficient evidence on which to base a denial of benefits. Appellee argues that the Commission may disregard the result of a drug test done on a urine specimen collected two days after an injury when the injured party admits having taken pain medication in the interim between the injury and submission of the urine specimen. We

agree with appellee and find the appellant's interpretation of the statute to be flawed.

Prior to 1993, the burden was upon the employer to prove that a claimant's injury was the result of intoxication or drug use. Act 796 of 1993 shifted the burden to the claimant by creating a rebuttable presumption that an injury was substantially occasioned by an intoxicant if one is found to be present in the body. Now, if the claimant is found to have alcohol or drugs in his body after an injury, he must prove by a preponderance of the evidence that his injury was not substantially occasioned by the alcohol or drugs. In such cases, however, our standard of review remains the same.

> This court on appeal is required to review the evidence in the light most favorable to the findings of the Commission and to give the testimony its strongest probative value in favor of the order of that Commission. . . . [I]t is the function of this court to determine whether there is any substantial evidence to support the Commission's finding.

Davis v. C & M Tractor Co., 4 Ark. App. 34, 40-41, 627 S.W.2d 561, 564 (1982); *Country Pride v. Holly*, 3 Ark. App. 216, 624 S.W.2d 443 (1981).

In *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996), we explained:

> Under our prior workers' compensation law, there was a *prima facie* presumption that an injury did not result from intoxication of the injured employee while on duty. *See* Ark. Code Ann. § 11-9-707(4) (1987). Act 796 of 1993, however, changed that presumption[.]

55 Ark. App. at 401-02, 935 S.W.2d at 585.

> The plain language of the last sentence of section 11-9-102(5)(B)(iv)(d) denies compensation "unless it is proved by a preponderance of the evidence that the . . . illegal drugs . . . did not substantially occasion the injury or accident." Furthermore, section 11-7-104(c)(3) [11-9-704(c)(3)] requires that all provisions of the chapter be strictly construed. It was up to the Commission to determine whether appellant met its burden of proof

> in rebutting the presumption, and it did so by addressing in its decision "whether the presumption has been overcome." Whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *See Eagle Safe Corp. v. Egan*, 39 Ark. App. 79, 842 S.W.2d 438 (1992).
>
> When reviewing a finding of fact made by the Commission, we must affirm if the Commission's decision is supported by substantial evidence. *Purolator Courier v. Chancey*, 40 Ark. App. 1, 841 S.W.2d 159 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Southern Steel & Wire v. Kahler*, 54 Ark. App. 376, 927 S.W.2d 822 (1996). Furthermore, it is well established that the credibility of witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. *James River Corp. v. Walters*, 53 Ark. App. 59, 918 S.W.2d 211 (1996). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

55 Ark. App. at 403-04, 935 S.W.2d at 586-87.

[redacted] The Commission was well within its fact-finding authority in holding that the statutory presumption had been rebutted and giving little credence to the positive result of a drug test when the specimen was not collected until two days after the injury, particularly when the claimant admitted that she had taken pain medication containing codeine before the test.

[redacted] We agree with appellant that under Ark. Code Ann. § 11-9-102(5)(B)(iv) (Repl. 1996), when the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders is detected in an employee following an injury, the burden is on the claimant to rebut the presumption that the injury was substantially occasioned by the alcohol or drugs. However, in this case, there was no evidence whatsoever that the claimant was intoxicated or under the influence of drugs at the time of the injury. The urine sample collected immediately after the injury, which would have provided an accurate test of the presence of alcohol or drugs in appellee's body at the time of the injury, was rendered defective and unreliable due to a mistake imputed to the

employer. The suggestion that codeine found in a urine sample collected two days after an injury proves that the injury was caused by the drug stretches credulity, especially when the claimant presents a credible explanation for the existence of the codeine in her urine. Under these circumstances, we do not think the presumption arises at all, but if it does, it has been effectively rebutted.

Appellant also argues that the law judge was biased and had impermissibly given the benefit of the doubt to appellee. While it is a correct statement of the law that the Commission is no longer allowed to give the benefit of the doubt to either party, we find no evidence in the record to support the allegation that appellee was given the benefit of the doubt. Appellant also submits that there was no evidence that appellee was not intoxicated after the injury. There is also no evidence that appellee *was* intoxicated *before* the injury. That she had taken pain medication following the injury is not indicative of intoxication before the injury.

Finally, appellant contends there is no substantial evidence to support the Commission's decision. That the collection of the urine specimen for drug screen was not contemporaneous with the injury and that no causal connection was shown between the injury and the presence of codeine in appellee's urine two days later is substantial evidence supporting the Commission's decision.

Affirmed.

ROBBINS, C.J., and STROUD, J., agree.

Kenneth BLANKENSHIP *v.* OFFICE OF CHILD SUPPORT ENFORCEMENT

CA 96-1147 952 S.W.2d 173

Court of Appeals of Arkansas
Division I
Opinion delivered September 10, 1997

[redacted]

Jack W. Barker, for appellant.

Beverly E. Carpenter, for appellee.

TERRY CRABTREE, Judge. Appellant Kenneth Blankenship argues that the trial court erred by exercising personal jurisdiction over him for a paternity complaint when the mother testified that the conception occurred outside of Arkansas. Further, appellant argues that the trial court erred in refusing his motion to dismiss — based on a dismissal of an earlier complaint for lack of the statutorily required evidence — on the theory of *res judicata*.

Appellant has defended three separate actions regarding this paternity suit.

The first paternity action was brought by the Office of Child Support Enforcement on behalf of the maternal grandmother, who had custody of the child at the time. That action was dismissed due to the State's failure to put on corroborating testimo-

nial evidence from the mother to support the DNA evidence of paternity. Ark. Code Ann. § 9-10-108(a)(1)(4)(Repl. 1993).

The State refiled the same paternity complaint a second time, but in the name of the mother instead of the maternal grandmother. The second trial, before a different chancellor, resulted in dismissal when the mother testified, contrary to the allegations in the complaint for paternity, that she and appellant lived in Louisiana, not Arkansas, at the time of conception. Based on this admission, appellant objected to lack of personal jurisdiction, and the trial court granted a dismissal.

The State asked the trial judge to reconsider, arguing that appellant's appearance and failure to raise the personal jurisdiction defense by motion or special appearance constituted a waiver of the defense. The trial court agreed, reinstated the action, and commenced a third trial. At the third trial, the court denied appellant's motion to dismiss based on collateral estoppel and *res judicata*, viewed the DNA testing, heard corroborating testimony from the mother, entered a finding of paternity, and ordered support payments to a trust pending this appeal.

Personal Jurisdiction

Appellant argues that the court could not properly exercise personal jurisdiction over him when the mother admitted that the child was conceived in Monroe, Louisiana. However, Ark. R. Civ. P. 12 provides that the defense of lack of personal jurisdiction is waived if not raised in a motion before the cause is heard on the merits. *Searcy Steel Co. v. Mercantile Bank*, 19 Ark. App. 220, 719 S.W.2d 277 (1986). While a special appearance to contest jurisdiction is no longer required, *see Fausett v. Host*, 315 Ark. 527, 868 S.W.2d 472 (1994), appellant failed to assert lack of personal jurisdiction as a defense until midway through his second trial. Accordingly, we hold the appellant's failure to assert the defense of lack of personal jurisdiction in a timely manner amounts to a waiver of the defense.

Collateral Estoppel and Res Judicata

Collateral estoppel bars the relitigation of issues, while *res judicata* bars the relitigation of claims. The policy consideration behind both theories is the finality of litigation. *Coleman's Serv. Ctr. Inc. v. Federal Deposit Ins. Corp.*, 55 Ark. App. 275, 935 S.W.2d 289 (1996); *see also* NEWBERN, ARKANSAS CIVIL PRACTICE AND PROCEDURE (2d ed.), § 26-13. *Res judicata* is applicable here since appellant seeks to bar the entire litigation based on the initial dismissal for the State's failure of proof.

Res judicata bars a later suit when (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involved the same cause of action; and (4) both suits involved the same parties or their privies. *Ward v. Arkansas State Police*, 653 F.2d 346 (8th Cir. 1981). *Res judicata* or claim preclusion bars the relitigation of issues which were actually litigated *or which could have been litigated in the first suit. Federated Dep't. Stores v. Moitie*, 452 U.S. 394 (1981)(emphasis added). Finally, *res judicata* can only apply where both parties had a "full and fair opportunity" to litigate the claim. *Id.*

Res judicata may not apply when a trial court splits a claim, preserving certain issues for future litigation, or when the court makes an express reservation, commonly denoted "without prejudice." *See Coleman's Serv. Ctr., supra* at 294-96, citing Section 26(1)(b) of the RESTATEMENT (SECOND) OF JUDGMENTS (held that court must expressly reserve future claims to avoid *res judicata* preclusion).

Here, the first suit and dismissal for the State's failure of proof satisfy the elements of *res judicata*. First, the dismissal was granted after both sides had a full and fair opportunity to put on evidence. The trial court noted that the State failed to seek a continuance to find the mother and acquire her necessary testimony. Instead, the State put on a case consisting entirely of the DNA testing report. While this scientific evidence is logically conclusive that appellant is the father, Judge Guthrie's reading of the statute, Ark. Code Ann. § 9-10-108 (Repl. 1993), places appropriate emphasis on the use of "and," which plainly requires

that DNA results must be accompanied by corroborating testimony of the mother. The State apparently later convinced Judge Anthony that Judge Guthrie's dismissal was "without prejudice," and that refiling was therefore not barred. However, the text of the initial order, along with the accompanying analysis in Judge Guthrie's letter opinion, lacks any express reservation of the right to refile, and is therefore a proper basis for applying *res judicata.*

The second prong of the *res judicata* test requires that the initial suit be based on proper jurisdiction. While appellant objects to personal jurisdiction in this appeal, which if the court agreed would be fatal to this prong of the *res judicata* analysis, appellant's waiver, as discussed above, amounts to proper jurisdiction.

Third, the initial suit, and the subsequent two, involve the same cause of action. Each was a complaint for paternity seeking reimbursement for benefits and future child support in the best interest of the same child.

[redacted] Finally, much *res judicata* litigation turns on privity. The parties to the suits must be the same, or must be in privity with each other. "Privity of parties within the meaning of *res judicata* means 'a person so identified in interest with another that he represents the same legal right.'" *Robinson v. Buie*, 307 Ark. 112, 817 S.W.2d 431 (1991), (quoting *Spears v. State Farm Fire & Cas. Ins.*, 291 Ark. 465, 725 S.W.2d 835 (1987)). "The parties need not be precisely the same for a judgment in one action to bar another, as long as there is a substantial identity and the same claim is at stake." Newbern, *supra*, citing *Terry v. Taylor*, 293 Ark. 237, 737 S.W.2d 437 (1987). Here, the first case was brought by the State on behalf of the maternal grandmother, while the second and third cases were brought by the State on behalf of the mother. However, the same State agency represented each claim, the claims were identical — seeking paternity and support — and the basis for all three claims was identical — the minor child in question. Further, both the grandmother and mother presumably represent the child and its best interests, and it therefore seems logical to hold them in privity on behalf of the child's interest, thus satisfying the fourth element of the *res judicata* analysis.

This approach is consistent with our holding in *Department of Human Servs. ex rel. Davis v. Seamster*, 36 Ark. App. 202, 820 S.W.2d 298 (1991). In *Seamster*, *res judicata* barred the State from relitigating a paternity action previously brought by the mother. However, we also recognized that paternity actions may be filed by the child as the named party, and that the child's rights in such matters may be different from those of the mother. *Id.* at 205. In the present case, while the State, the mother, and the maternal grandmother have exhausted their rights under *res judicata*, our holding here does not bar the child from pursuing her own paternity action.

Conclusion

In the present case, attorneys for both parties were confused about whether the initial order included the words "without prejudice," and related conflicting opinions on this matter to the second chancellor. However, the record, as abstracted, is clear that the initial dismissal included no express reservation which would work to hold open the claim. Further, Judge Guthrie, in his letter opinion accompanying the first order of dismissal, discussed the fact that his decision would work to bar the plaintiff and her privies from collecting child support. His comments reflect this court's own analysis:

> In its letter brief plaintiff requested the opportunity to submit additional testimony. Defendant has objected to such request. At the hearing, neither plaintiff's client, the grandmother, nor the natural mother of the child was present. The absence of these crucial witnesses could have been remedied by a motion for a continuance prior to the hearing. In light of defendant's objection and the untimeliness of the request, additional testimony will not be allowed.
>
> The end result of this ruling is that the individual who is in all probability the natural father of the child will not be held accountable for the support of that child. However, this is a statutory cause of action with the requirements clearly set forth by the legislature. Regardless of the consequences, the Court must render its ruling according to the law.

We do not take lightly the consequence of reversing and dismissing this matter. Such a remedy is harsh in light of the scientific proof establishing appellant as the father and the ongoing duty of support inherent in all parents. However, this case is an egregious example of the Office of Child Support Enforcement repeating the same litigation three times to the detriment of judicial efficiency, the undermining of the finality of judgments, and the expense and time of the parties. While support of children is a vital State interest, the office charged with protecting this interest has no greater rights than private litigants before the courts, and the State's initial failure of proof is controlling in this case, despite the very strong countervailing policy of a child's right to support from his parents. *See Davis v. Office of Child Sup. Enforcement*, 322 Ark. 352, 356, 908 S.W.2d 649, 651-52 (1995).

Reversed and dismissed.

PITTMAN and AREY, JJ., agree.

GEORGIA-PACIFIC CORPORATION *v.* Laurin DICKENS

CA 97-74 950 S.W.2d 463

Court of Appeals of Arkansas
Division III
Opinion delivered September 10, 1997

Wright, Lindsey & Jennings, by: *John D. Davis*, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellee.

ANDREE LAYTON ROAF, Judge. Georgia-Pacific Corporation appeals a ruling by the Workers' Compensation Commission that the appellee Laurin P. Dickens was entitled to compensation for routine medical care provided to her in 1993, 1994, and 1995, for a compensable injury which she sustained in 1984. On appeal, Georgia-Pacific argues that there is no substantial evidence to support the Commission's findings 1) that the medical care was reasonably necessary for the treatment of Dickens's injury, and 2) that Dickens's claim, which was filed in 1995 for additional benefits, is not barred by the statute of limitations. We affirm.

Dickens sustained a compensable right elbow injury in 1984. Surgery was performed on her elbow in 1986, 1988, and 1989, and Dickens returned to work at Georgia-Pacific in 1989. In 1991, her treating physician determined that her healing period had ended and assigned a permanent impairment rating to her right elbow and shoulder. Although Dickens was administratively terminated by Georgia-Pacific in 1992, the company continued to

pay for Dickens's routine follow-up visits to the University of Arkansas for Medical Sciences (UAMS) in 1992 and 1993.

On March 12, 1993, the administrative law judge (ALJ) issued an opinion in a separate claim, finding that Dickens had not sustained a right shoulder injury in addition to her compensable right elbow injury. Dickens did not appeal that ruling. Subsequently, Georgia-Pacific paid for Dickens's May 21, 1993, visit to UAMS for treatment of her elbow, but failed to pay for any further visits, although they acknowledged that they had received bills for Dickens's office visits on April 21, 1994, and March 31, 1995. Dickens was not charged for a visit on November 4, 1993, and, therefore, no bill was sent by UAMS for this service.

After receiving the bill for the March 31, 1995, examination, Georgia-Pacific sent a letter to Dickens on May 18, 1995, informing her that they would not pay any additional medical bills because the statute of limitations had run on her workers' compensation claim. Dickens filed a claim on May 24, 1995, for additional benefits, which gives rise to this appeal.

The ALJ denied Dickens's claim for additional benefits, finding that the medical services provided on November 4, 1993, and April 21, 1994, did not constitute reasonably necessary medical treatment because the record reflected that Dickens's visits to UAMS at approximately six-month intervals were for the purpose of keeping her workers' compensation claim open. The ALJ also found that Dickens's claim filed in 1995 was barred by the statute of limitations, because the visits in 1993 and 1994 were not reasonably necessary for the treatment of her injury and thus did not toll the statute of limitations.

The Commission reversed the decision of the ALJ, finding that the medical care provided to Dickens in 1993, 1994, and 1995, was reasonably necessary for treatment of her compensable injury. The Commission also found that the statute of limitations had not run on Dickens's claim because Georgia-Pacific was deemed to have continued to provide medical treatment to Dickens until they informed her that they would no longer do so in the letter of May 1995.

Georgia-Pacific first argues that there is not substantial evidence to support the Commission's finding that Dickens's visits to UAMS on November 4, 1993, and April 21, 1994, were reasonably necessary for the treatment of her injury. Arkansas Code Annotated § 11-9-508(a) (1996) states that an employer shall provide "such medical . . . services . . . as may be reasonably necessary in connection with the injury received by the employee." What constitutes reasonable and necessary treatment under this section is a question of fact for the Commission. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996) (citing *Arkansas Dep't of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994)); see also *Morgan v. Desha County Tax Assessor's Office*, 45 Ark. App. 95, 871 S.W.2d 429 (1994).

It is well settled that when reviewing decisions from the Workers' Compensation Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms if supported by substantial evidence. *Crawford v. Pace Indus.*, 55 Ark. App. 60, 929 S.W.2d 727 (1996) (citing *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992)). The issue is not whether this court might have reached a different result from that reached by the Commission or whether the evidence would have supported a contrary finding. If reasonable minds could reach the result shown by the Commission's decision, the court must affirm the decision. *Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995).

In support of its argument that the visits were not reasonably necessary for the treatment of the 1984 injury, Georgia-Pacific relies upon the testimony of Dickens and upon notes made by the treating physicians during the disputed medical visits. During the hearing before the ALJ, Dickens testified that she began seeing the doctor at six-month intervals because she was advised by her attorney that she should always go back to the doctor every six months until her workers' compensation claim was settled.

The medical records of the office visits in dispute state in part:

> November 4, 1993: Ms. Dickens RTC here today for follow up of right cubital tunnel syndrome. . . . She has been given a permanent impairment rating. She thinks she is about the same. . . . She is still a little tender about the elbow and there is no really appreciable Tinel. Status about the same with s/p anterior transposition of ulnar nerve. RTC six months for follow up.
>
> April 24, 1994: Pt. is being followed on a bi-annual basis until her Worker's Compensation claim is settled. PE - She is no better or worse than she was six months ago. She has a slight pain around the cubital tunnel area, tenderness proximally and Tinel sign at Guyon's canal. . . . We will see this pt. again in six months for repeat clinical exam.
>
> December 4, 1994: . . . This is a workman's compensation case and settlement has not been completed. She has symptoms of numbness to the ulnar distribution bilaterally, and it has remained stable. She is complaining of some new pain in the right shoulder. . . . Stable post-op course s/p bilateral cubital tunnel release. Due to her previous treatment by Dr. Hixson, I recommended to her that she should be followed by Dr. Hixson and a referral will be made for her to see Dr. Hixson. She will also be referred to Dr. Tom Roberts in the shoulder clinic.
>
> March 31, 1995: Ms. Dickens was reexamined on March 30, 1995. Her injury appears to be stable since my last examination. Her main complaints are those of right elbow and shoulder pain and irritation along the course of the ulnar nerve. . . . She still uses her TENS unit and takes medication for her pain. . . . Ms. Dickens has remained approximately stable since her last examination. . . . I will be happy to examine her on an as-needed basis.

Dickens also testified at length about ongoing problems with her elbow, and stated that she continued to take medication and to use a TENS unit for pain. She testified that her treating physician advised her to return every six months, or earlier, if she had any problems.

In fact, the disputed visits were at intervals of six, six, eight, and three months, respectively. The records describe the ongoing nature of Dickens's symptoms, and indicate that she continued to use a TENS unit and take medication. In its decision, the Commission considered the multiple surgeries, Dickens's persistent symptoms of pain, irritation, and limitation of motion in her elbow, and her continued use of medication and a TENS unit for

pain control, in finding that the office visits to UAMS in 1993 through 1995 were reasonably necessary. The Commission further found that the medical evidence indicated that Dickens received examinations, diagnoses, and proposals for additional follow-up treatment during each of the disputed office visits.

As to Dickens's motivation for seeking follow-up care, the Commission stated that the issue was whether she was *entitled* to the follow-up care, not her reasons for seeking it, and concluded that she was so entitled. We agree, and hold that there was substantial evidence from which the Commission could find that Dickens's follow-up medical care was reasonably necessary for treatment of her compensable injury.

Although Georgia-Pacific also argues that there is not substantial evidence to support the Commission's finding that Dickens's claim for additional benefits is not barred by the statute of limitations, it concedes that this court should not reach this argument if we affirm the Commission's findings on its first point on appeal. In so doing, Georgia-Pacific acknowledges that it "cannot start the running of the statute of limitations by refusing to pay what it owes." *See Conway Printing Co. v. Higdon*, 45 Ark. App. 188-A, 878 S.W.2d 4 (1994).

Affirmed.

JENNINGS and MEADS, JJ., agree.

Rickey Lynn STRONG *v.* Karen D. MORGAN

CA 96-1390 950 S.W.2d 466

Court of Appeals of Arkansas
Division II
Opinion delivered September 17, 1997

Jo L. Hart, for appellant.

Ralph Blagg, for appellee.

JOHN B. ROBBINS, Chief Judge. This appeal arises out of the divorce of appellant Rickey Strong and his former wife, appellee Karen Morgan. As part of the divorce proceedings, Strong and Morgan agreed that the Stone County Chancery Court would conduct a judicial sale of a four-acre parcel of real estate they owned. Strong submitted the winning bid for this land at the judicial sale, and the chancery court entered an order of confirmation of the court commissioner's report of the sale. Subsequently, Morgan filed a motion with the chancery court in which she

requested that it set aside the judicial sale of the four-acre parcel to Strong. The chancery court granted Morgan's request and set the sale aside. On appeal, Strong asserts that the chancery court erred in granting Morgan's request to set aside the judicial sale of the four-acre parcel. We agree. Because the chancery court did not set aside its order of confirmation of the commissioner's report of the judicial sale within ninety days of the date of its entry, the court lacked jurisdiction to act.

In January of 1994 the parties' marriage ended in divorce. They agreed to sell a four-acre parcel of real property upon which they had lived while they were married and listed the four-acre parcel with a local realtor. However, they also agreed that if the property were not sold by the realtor within ninety days, it would be sold by the Stone County Chancery Court, with the proceeds to be divided equally between them.

On March 10, 1995, Strong submitted the winning bid for the land at a judicial sale held by the chancery court's commissioner, who was the chancery court clerk. Previously, pursuant to Ark. Code Ann. § 16-66-408(a) (1987), the chancery court's commissioner advertised the judicial sale of the land in a local newspaper on February 22 and March 1, 1995. Both of the newspaper advertisements and the commissioner's notice of sale incorrectly noted that the four-acre parcel was located in Stone County. Actually, the parcel was located in Searcy County. The record does not show that anyone brought this clerical error to the attention of the commissioner prior to the sale.

On March 14, 1995, four days after Strong purchased the four-acre parcel at issue, the Stone County Chancery Court entered an order confirming the commissioner's sale of the land to him. Subsequently, beginning on April 14, 1995, Morgan filed several motions requesting that the chancery court set aside the judicial sale of the land to Strong. In these motions Morgan asserted that the judicial sale was invalid for two reasons: (1) on the morning of the judicial sale she was told, incorrectly as it turned out, by the Searcy County Sheriff that the judicial sale had been canceled; and (2) the commissioner's notice of sale and the news-

paper advertisements thereof incorrectly listed the four-acre parcel as being located in Stone County.

The Stone County Chancery Court initially dismissed Morgan's motion to set aside the judicial sale of the four-acre parcel to Strong. However, it reversed this decision and entered an order setting the judicial sale aside on July 29, 1996. It is this July 29, 1996, order, setting aside the March 14, 1995, order of confirmation of the judicial sale, that is the object of Strong's appeal to this Court.[1] We conclude that the chancery court erred in setting aside its March 14, 1995, order of confirmation of the judicial sale of the four-acre parcel to appellant Strong because the court lacked jurisdiction to do so more than ninety days after it had been entered.

Pursuant to Arkansas Rule of Civil Procedure 60(b), a trial court may set aside an order to correct any error or mistake or to prevent the miscarriage of justice. However, pursuant to Rule 60(b), if a trial court decides to set a previous order aside, it must do so within ninety days of the order's having been filed with the clerk. *See Steward v. Wurtz*, 327 Ark. 292, 296, 938 S.W.2d 837 (1997). It is pursuant to Rule 60(b) that a trial court may set aside an order to correct clerical mistakes and errors arising from oversight or omission. *See United S. Assurance Co. v. Beard*, 320 Ark. 115, 118, 894 S.W.2d 948, 950 (1995). However, a trial court loses authority to modify an order pursuant to Rule 60(b) after the expiration of ninety days from the date of entry of the order. *See Griggs v. Cook*, 315 Ark. 74, 77-78, 864 S.W.2d 832, 834 (1993); *Lamb v. JFM, Inc.*, 311 Ark. 89, 92, 842 S.W.2d 10, 11 (1992); *City of Little Rock v. Ragan*, 297 Ark. 525, 763 S.W.2d 87 (1989); and *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716, *supp. op. on reh'g*, 294 Ark. 506-A, 506-C, 746 S.W.2d 558 (1988). Because the chancery court did not set aside the order of confirmation of the judicial sale at issue until more than ninety days after

[1] An order granting a motion to set aside a chancery court order is a final order, and therefore appealable, if the order granting the motion to set aside is entered more than ninety days after entry of the order that was set aside. *See Lamb v. JFM, Inc.*, 311 Ark. 89, 92, 842 S.W.2d 10, 11 (1992). Here, the order setting the judicial sale aside was entered on July 29, 1996, which is more than ninety days after entry of the order of confirmation of the judicial sale, which was on March 14, 1995.

entry of this order, the chancery court lacked jurisdiction to do so.[2] *See Griggs*, 315 Ark. at 77-78, 864 S.W.2d at 834; *see also State Nat'l Bank v. Neel*, 53 Ark. 110, 113-14, 13 S.W. 700, 701 (1890) (order of confirmation of a judicial sale is a final order and cannot be set aside in a subsequent term of court).

Therefore, for the reasons set forth above, we reverse the Stone County Chancery Court's order setting aside the judicial sale to appellant Strong of the four-acre parcel of land at issue. We remand for further proceedings consistent with this opinion.

Reversed and remanded.

BIRD and STROUD, JJ., agree.

STEPHENS TRUCK LINES *v.* Robert MILLICAN

CA 97-3 950 S.W.2d 472

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[2] Pursuant to Ark. R. Civ. P. 60(c)(3), a trial court may modify or vacate a judgment at any time "for misprisions of the clerk." Rule 60(c)(3) could not authorize the setting aside at any time of an order on the basis of the sort of "Stone/Searcy" County clerical error that occurred in this case because such errors fall within the ambit of Rule 60(b) and its ninety-day limitation. *See Beard*, 320 Ark. at 118.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley* and *Julia L. Busfield*, for appellant.

Dowd, Harrelson, Moore & Giles, by: *Greg Giles*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellee was employed by the appellant trucking company on July 26, 1994. He filed a claim for benefits alleging that he injured his back and neck on that date when he fell while pulling a tarp over the load. The administrative law judge found that he sustained a compensable injury and awarded temporary total disability benefits. On *de novo* review, the Commission likewise found that appellee sustained a compensable injury to his cervical spine, and that he was entitled to temporary total disability benefits from July 26, 1994, until August 25, 1995. This appeal followed.

For reversal, appellant contends that the evidence is insufficient to support the Commission's findings that appellee sustained a compensable neck injury and that appellee was temporarily totally disabled from July 26, 1994, through August 26, 1995.

In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Weldon v. Pierce Brothers Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). Substantial evidence is such relevant evidence

as a reasonable mind might accept as adequate to support a conclusion. *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995). The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.*

Appellant first contends that there is no substantial evidence to support the Commission's finding that appellee sustained a compensable neck injury. We do not agree. Appellee testified that, while attempting to cover the load with a tarp, he fell from his trailer and that his "head popped back" when he struck the ground. He further testified that he was treated in the emergency room, where he informed medical personnel that he was experiencing pain in his neck. The employer refused to provide additional medical treatment, and appellee did not obtain further medical care until September 1994, when an MRI scan revealed a large disc herniation of the cervical spine at C4-C5.

Appellant argues that there were inconsistencies in appellee's testimony that render it unworthy of belief. However, this argument goes to the weight and credibility of the testimony, and these matters are exclusively within the province of the Commission. *Crawford v. Pace*, 55 Ark. App. 60, 929 S.W.2d 727 (1996).

Appellant also argues that the finding of a compensable injury was not supported by substantial evidence because the only objec-

tive medical evidence of a neck injury was an MRI performed in September 1994 that revealed a herniation at C4-C5. Appellant does not argue that the MRI fails to show an injury, but instead asserts that there is no objective medical evidence to show that the injury took place on July 26, 1994, or that appellee injured his neck while working for appellant.

Appellant's argument requires us to decide the scope of Ark. Code Ann. § 11-9-102(5)(D) (Repl. 1996), which provides that "[a] compensable injury must be established by medical evidence supported by 'objective findings' as defined in § 11-9-102(16)." This statute is part of the Arkansas Workers' Compensation Law, which by legislative mandate must be strictly and literally construed by the Commission and the courts. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996); *Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996). Appellant, in effect, asks us to apply the statutorily mandated standard of strict construction to hold that a claimant must offer objective medical evidence to prove not only the existence of an injury, but also to show the circumstances under which the injury was sustained and the precise time of the injury's occurrence. This we cannot do. Although it is irrefutably true that the legislature has required medical evidence supported by objective findings to establish a compensable injury, it does not follow that such evidence is required to establish each and every element of compensability. The statutory definition of compensability as set out in Ark. Code Ann. § 11-9-102(5) contains many elements that simply are not susceptible of proof by medical evidence supported by objective findings. For example, a compensable accidental injury must be shown to have been caused by a specific incident and to be identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(5)(A)(i). Injuries inflicted at a time when employment services were not being performed are not compensable, Ark. Code Ann. § 11-9-102(5)(B)(iii), nor are injuries resulting from engaging in horseplay. Ark. Code Ann. § 11-9-102(5)(B)(i). We know of no type of medical examination or test that would result in objective findings to show exactly where and when an injury was incurred, or whether the employee was injured while performing employment services rather than while engaging in horseplay.

Even statutes that must be strictly construed will not be given a literal interpretation leading to absurd consequences that are clearly contrary to legislative intent. *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993).

[redacted] The legislature has declared that the major and controlling purpose of workers' compensation is to pay timely benefits to all legitimately injured workers and return them to work. Ark. Code Ann. § 11-9-1001 (Repl. 1996). Were we to interpret the Act so strictly as to require objective medical evidence to prove nonmedical elements of compensability, we would defeat the overriding legislative intent. Consequently, we hold the requirement that a compensable injury must be established by medical evidence supported by objective findings applies only to the existence and extent of the injury.

[redacted] Next, appellant contends that the Commission's finding that appellee was temporarily totally disabled from July 26, 1994, through August 26, 1995, is not supported by substantial evidence because appellee did not show that he remained in his healing period until August 26, 1995. Appellant argues that the record is "devoid of any medical evidence indicating that appellee was ever within his healing period." The Commission noted the paucity of medical evidence to show the duration of appellee's healing period but nevertheless found that he remained in his healing period until he returned to work in August 1995. In so finding, the Commission emphasized the employer's refusal to provide further treatment and the appellee's inability to pursue treatment on his own due to restricted finances following his termination. Although the Commission did not expressly state that it was applying the doctrine of estoppel, it is implicit in its opinion that it did so.[1] *See Southern Hospitalities v. Britain*, 54 Ark. App. 318, 925 S.W.2d 810 (1996). However, because estoppel is ordinarily a question of fact, *see Dickson v. Delhi Seed Co.*, 26 Ark.

[1] The concurring judge misconstrues our holding. We do not hold that estoppel was the basis for the Commission's decision. Although that decision strongly suggests that the Commission applied the doctrine of estoppel to bar the employer's argument that the medical evidence was inadequate, the fact remains that the Commission did not explain the basis for its decision on this point, nor did it make specific findings of fact to support estoppel if estoppel was in fact applied. These matters will be clarified on remand.

App. 83, 760 S.W.2d 382 (1988), and because the Commission did not make a specific determination that the employer was estopped, we reverse and remand on this point for the Commission to make findings sufficient for us to determine whether this issue was resolved in conformity with the law. *See Wright v. American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986).

Affirmed in part; reversed and remanded in part.

CRABTREE, J., agrees.

AREY, J., concurs.

D. FRANKLIN AREY, III, Judge, concurring. I agree that the evidence is sufficient to support the Commission's finding that appellee sustained a compensable neck injury. I also agree that the temporary total disability claim should be remanded. Because the majority pulls an estoppel argument out of thin air, and does so in a fashion that favors one party over the other, I must concur.

Nothing before us justifies an implication of estoppel. Nothing in the Commission's opinion suggests that the appellant failed to assert a claim or right, and that the appellee relied on that failure to his detriment. *Compare, e.g., Johnson v. Spencer*, 222 Ark. 710, 262 S.W.2d 290 (1953) (noting that where one stands by and fails to assert a claim, he cannot later assert it against another who relied on his silence). Nothing in the Commission's opinion suggests that appellant told appellee to seek medical care, and then refused to pay. *Compare Southern Hospitalities v. Britain*, 54 Ark. App. 318, 925 S.W.2d 810 (1996) (finding employer liable to pay for medical treatment that it directed the employee to obtain, on a theory of estoppel). The majority puts the cart before the horse: it implies estoppel, without any factual findings by the Commission to support the implication, and remands to the Commission for it to supply the missing findings.

Further, the majority's implication favors the appellee over the appellant. Without any basis for believing the Commission relied on estoppel, it implies a theory which prevents further argu-

ment by the appellant concerning appellee's healing period.[1] The Commission's opinion could just as easily have been read to suggest that the appellant consistently exercised its right not to pay for medical expenses *until* the appellee was determined to have suffered a compensable injury. *See* Ark. Code Ann. § 11-9-102(5)(F)(i) (Repl. 1996); *Southern Hospitalities*, 54 Ark. App. at 322, 925 S.W.2d at 812. Hopefully, on remand the Commission will realize that it is not required to utilize estoppel without giving both sides a chance to argue its applicability.

I would, nonetheless, remand this matter. In my opinion, substantial evidence does not support the Commission's finding that the appellee's healing period ended on the same day appellee returned to work. On these facts, I believe fair-minded persons would conclude that this was a happy coincidence, and nothing more; I do not believe fair-minded persons would reach the same conclusion as the Commission. However, we are allowed to remand even if we do not find substantial evidence of record. *See* Ark. Code Ann. § 11-9-711(b)(4). Therefore, I concur.

Rebekah PRIEST *v.* UNITED PARCEL SERVICE

CA 97-5 950 S.W.2d 476

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[1] We should not assume that the appellant's refusal to pay for further medical care somehow stymied the presentation of appellee's claim. For example, the Commission, in its discretion, could have ordered a medical examination of appellee. *See* Ark. Code Ann. §§ 11-9-511(b), -811.

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

Friday, Eldredge & Clark, by: *James C. Baker, Jr.*, for appellees.

D. FRANKLIN AREY, III, Judge. The appellant, Rebekah Priest, challenges the Workers' Compensation Commission's determination that she sustained a 5% impairment to the body as a whole. This rating is based upon an independent medical evaluation by Dr. Jim Moore. The claimant sought to cross-examine Dr. Moore at the hearing before the Administrative Law Judge pursuant to Ark. Code Ann. § 11-9-705(c)(2)(B) (Repl. 1996). When the ALJ failed to issue a subpoena to ensure Dr. Moore's presence, appellant raised a due process claim grounded on the denial of her right to cross-examine Dr. Moore at the hearing. We reverse and remand.

The parties stipulated that the appellant sustained a compensable back injury on November 2, 1990. Her injury was primarily treated by Dr. Phillip Johnson; he assigned the appellant permanent physical impairment to the extent of 15% to the body as a whole. The appellant agreed to an independent medical evaluation by Dr. Moore. Dr. Moore's report of this evaluation, dated September 13, 1993, opined that the appellant sustained a 5% impairment to the body as a whole.

The employer indicated its intent to offer Dr. Moore's independent medical evaluation into evidence. The appellant requested the opportunity to cross-examine Dr. Moore by deposition, but cancelled a scheduled deposition contending that she was unable to pay Dr. Moore's fees. Thereafter, the appellant requested that the employer produce Dr. Moore for cross-examination at the hearing before the Administrative Law Judge pursuant to Ark. Code Ann. § 11-9-705(c)(2)(B). When the employer declined, the appellant sought a subpoena for Dr. Moore pursuant to Ark. Code Ann. § 11-9-706(a). The ALJ did not issue the requested subpoena. The appellant then objected to the

introduction of Dr. Moore's report, arguing that she was denied due process because she was unable to cross-examine Dr. Moore.

The ALJ concluded that the appellant was not denied due process by the admission of Dr. Moore's medical evaluation into evidence. The ALJ cited Dr. Moore's report, and determined that Dr. Moore's rating of 5% impairment was more accurate than Dr. Johnson's rating of 15%. The full Commission affirmed and adopted the ALJ's decision as its own decision.

On appeal, the appellant presses her claim that her due process right to cross-examine Dr. Moore was violated by the ALJ's failure to issue the requested subpoena. We cannot reach the merits of this issue. The full Commission did not make findings of fact in support of its conclusion that the appellant was not denied due process. "The Commission must find as facts the basic component elements on which its conclusion is based." *Lowe v. Car Care Marketing*, 53 Ark. App. 100, 102, 919 S.W.2d 520, 521 (1996). Such fact-findings are necessary to permit appellate review of the constitutional issues presented. *Green v. Smith & Scott Logging*, 54 Ark. App. 53, 54-55, 922 S.W.2d 746, 747 (1996). Since we are unable to determine the facts upon which the Commission relied in concluding that appellant's due process rights were not violated, we reverse and remand for the Commission to make specific findings of fact. *Lowe*, 53 Ark. App. at 102-103, 919 S.W.2d at 521.

We take this opportunity to provide the Commission with some guidance on remand.[1] Parties appearing before admin-

[1] The concurrence suggests that we err when we provide guidance on the law to be followed on remand of this case. If we err by providing such guidance, we do so in good company. *See Crockett & Brown, P.A. v. Wilson*, 321 Ark. 150, 901 S.W.2d 826 (1995); *Spring Creek Living Center v. Sarrett*, 319 Ark. 259, 890 S.W.2d 598 (1995); *Suggs v. State*, 317 Ark. 541, 879 S.W.2d 428 (1994); *Grimes v. M.H.M., Inc.*, 299 Ark. 560, 776 S.W.2d 336 (1989). Our court has given the Commission guidance on the law involved upon remand for making findings of fact. *See Belcher v. Holiday Inn*, 49 Ark. App. 64, 896 S.W.2d 440 (1995); *cf. Tabor v. Levi Strauss & Co.*, 33 Ark. App. 71, 801 S.W.2d 311 (1990) (remand with instructions to recalculate wages based upon directions from our court).

We agree with the concurring judge that this due process discussion is dicta; the last paragraph of this opinion confirms our agreement. Nothing in this due process discussion

istrative agencies are entitled to due process in the proceedings. U.S. Const. amend. XIV, § 1; Ark. Const. art. II, § 8; *see Smith v. Everett*, 276 Ark. 430, 637 S.W.2d 537 (1982); *Arkansas Pub. Service Comm'n v. Continental Tel. Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978); *Arkansas State Bd. of Nursing v. Long*, 8 Ark. App. 288, 651 S.W.2d 109 (1983). The Workers' Compensation Commission is no exception: parties appearing before the Commission should not be deprived of the essential requisites of due process of law. *See Aetna Cas. & Sur. Co. v. Dyer*, 6 Ark. App. 211, 639 S.W.2d 536 (1982); 7 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 79.25(c) (1997).

One aspect of due process is the opportunity to subpoena and cross-examine adverse witnesses. *Branch v. Hempstead County Mem'l Hosp.*, 539 F.Supp. 908 (W.D. Ark. 1982) (cross-examination); *Smith*, 276 Ark. at 431-32, 637 S.W.2d at 538. The right to cross-examine adverse witnesses extends to parties appearing before the Workers' Compensation Commission. *See Davis v. Arkansas Best Freight Sys., Inc.*, 239 Ark. 632, 393 S.W.2d 237 (1965); *accord, Commercial Union Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976); *Artis v. Industrial Comm'n*, 164 Ariz. 452, 793 P.2d 1119 (Ariz. Ct. App. 1990); *Scheytt v. Industrial Comm'n*, 134 Ariz. 25, 653 P.2d 375 (Ariz. Ct. App. 1982); *Hart v. JJ. Newberry Co.*, 179 Mont. 160, 587 P.2d 11 (1978); 7 LARSON, *supra*, § 79.25(c).

The Commission is not "bound by technical or statutory rules of evidence or by technical or formal rules of procedure. . . ." Ark. Code Ann. § 11-9-705(a). That does not end our inquiry. "It is true that the Workmen's Compensation Commission is an administrative agency and that the technical rules of evidence do not apply to its procedure. . ., nevertheless, it has been repeatedly held that a litigant has the right to cross-examine a witness." *Davis*, 239 Ark. at 634, 393 S.W.2d at 238 (citation

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prevents counsel from marshalling their arguments and proof; it does not dictate an outcome before the Workers' Compensation Commission, or a consideration of some other aspect of due process that we have not discussed.

Finally, we note that the concurrence does not object to the accuracy of our recitation of the law, only to its articulation.

omitted); *see Hart*, 179 Mont. at 162, 587 P.2d at 12. Thus, a hearing before the Commission cannot be conducted in such a way that a party is denied the right to cross-examine an adverse witness.

The Commission also has some discretion in the issuance of subpoenas to compel the attendance of witnesses at its hearings. Ark. Code Ann. § 11-9-706(a). Of what moment is the right to cross-examine an adverse witness, if that adverse witness cannot be brought to the hearing by subpoena? The Commission's discretion to issue subpoenas cannot be exercised in such a way that a party is denied a reasonable opportunity to cross-examine an adverse witness. *Cf. Smith*, 276 Ark. at 432, 637 S.W.2d at 538 (in a proceeding before the appeals tribunal, the opportunity to subpoena and cross-examine witnesses is a component of due process). This is consistent with our supreme court's concern for the rights of parties appearing before administrative agencies.

> Where reliance is placed by an administrative agency upon testimony of certain witnesses in making a critical factual determination, it will be an abuse of discretion to fail to hear material evidence which might impeach, not only the testimony, but the findings made by the agency as well. . . . The more liberal the practice in admitting testimony, the more imperative is the obligation to preserve the essential rules by which rights are asserted or defended.

Arkansas Pub. Service Comm'n, 262 Ark. at 838-39, 561 S.W.2d at 655 (citations omitted).

We do not mean to suggest that parties can rest on their right to cross-examine adverse witnesses in administrative proceedings. In some instances, the right to cross-examine must be reserved in a timely fashion. *See Chambers v. Bigelow-Liptak Corp.*, 233 Ark. 330, 344 S.W.2d 588 (1961). The right to cross-examine may be waived. *See Palazzolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

We want to be clear as to what this opinion does not determine. We do not reach the merits of this matter; we do not decide whether appellant has a valid constitutional claim, and we

do not decide whether there is substantial evidence to support the Commission's award. We simply note that we cannot affirm the Commission's decision, because there is a question whether the appellant's procedural due process claim was properly disposed of below. This question can only be answered after the Commission makes its findings of fact.

Reversed and remanded.

CRABTREE, J., agrees.

PITTMAN, J., concurs.

JOHN MAUZY PITTMAN, Judge, concurring. I agree with the Court's decision to reverse and remand for the Commission to make adequate findings of fact. I write separately to note that the guidance provided to the Commission on remand is mere dicta which binds neither the Commission on remand nor this court in a subsequent appeal. While the general citations of law relating to due process in the majority opinion may be correct, it does not follow that they are apropos in the case at bar, or that the parties and the Commission will find them to be helpful. It must be remembered that the facts of this case have yet to be determined and, as Mr. Justice Jackson stated in *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944):

> It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading.

LIBERTY MUTUAL INSURANCE COMPANY
v. Cleophes THOMAS

CA 96-1305 951 S.W.2d 564

Court of Appeals of Arkansas
Division III
Opinion delivered September 17, 1997

Friday, Eldredge & Clark, by: *James C. Baker* and *R. Christopher Lawson*, for appellant.

James Gerard Schulze and *William Gary Holt*, for appellee.

JOHN E. JENNINGS, Judge. This case presents a question in the law of insurance. The facts are not in dispute. On June 6, 1994, James Austin rented a 1994 Ford Probe from Trotter Ford in Pine Bluff. The rental agreement he signed provided that he would use the vehicle in conformity with all laws and would refrain from using it while under the influence of intoxicants.

Later that day Mr. Austin became intoxicated and rear-ended a car driven by the appellee, Cleophes Thomas. Thomas sued Austin and obtained a default judgment for $17,500.00. In October 1995, Thomas filed a direct action against appellant, Liberty Mutual Insurance Company, the liability carrier for Trotter Ford. Liberty Mutual defended on the basis that Austin had violated the terms of the rental agreement by driving under the influence of alcohol. The circuit court granted Thomas's motion for summary judgment and Liberty Mutual appeals. We affirm.

[redacted] The circuit judge held that the supreme court's decision in *Commercial Union Ins. Co. v. Johnson*, 294 Ark. 444, 745 S.W.2d 589 (1988), controlled. We agree. In *Commercial Union*, the liability carrier's insured, Teresa Davis, loaned her car to Marty Self with the express restriction that he drive it only "on a county road for a short distance." Instead, Self drove the car upon a highway and collided with a vehicle driven by Ray Johnson. Johnson obtained a judgment against Self and then sued Commercial Union directly. In granting summary judgment in favor of Johnson the circuit court held that, "Commercial [Union] may not deny coverage due to the fact that Teresa Davis issued limitations on the manner of usage of the insured automobile." *Commercial Union Ins. Co. v. Johnson*, 294 Ark. at 446. The supreme court affirmed:

> We hold that if permission has been given by the insured owner of the insured vehicle to a driver who then causes injury or property damage during the permissive use, insurance coverage pursuant to an omnibus clause is not affected by the fact that the permissive use may have exceeded or differed from that which was specified or intended by the owner.

Commercial Union at 445.

In the course of its opinion the supreme court considered both authority and policy. The court quoted with approval from *Arndt v. Davis*, 183 Neb. 726, 163 N.W.2d 886 (1969). There the Nebraska Supreme Court said:

> Proponents of this rule ["initial permission rule"] justify it on the ground that it is good public policy to protect persons injured in automobile accidents against uninsured motorists. They fur-

> ther justify the rule on the theory that the purpose of the omnibus clause is to broaden the coverage of the policy to cover all persons operating the insured automobile with the knowledge and consent of the insured owner and insist that once the owner has placed the automobile in the possession of the driver and consented to his operating the automobile, any deviation from the purposes for which the automobile was entrusted to the operator is immaterial.

Commercial Union, 294 Ark. at 448.

The *Commercial Union* court stated that other cases which have adopted the rule usually provide that it governs "short of theft or conversion." 294 Ark. at 454. Appellant argues that Austin's use of the vehicle while under the influence of alcohol constituted a conversion. Appellant notes that the *Restatement (Second) of Torts* § 228 (1965) provides that "[o]ne who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is seriously violated." The *Restatement (Second) of Torts* § 222A, in defining what constitutes a conversion, gives these examples in comment d:

> 25. A rents an automobile to B to drive to X City and return. In violation of the agreement, B drives to Y City, ten miles beyond X City. No harm is done to the car. This is not a conversion.
> 26. The same facts as in illustration 25, except that while the car is in Y City it is seriously damaged in a collision, with or without negligence on the part of B. This is a conversion.

Obviously, if a technical conversion such as the one given in the example in the *Restatement (Second) of Torts* provided an exception to the initial-permission rule, the plaintiff in *Commercial Union* would not have prevailed. This is not, however, what the supreme court had in mind. The court said, "Although the question is not before us now, we agree that an insurer should not be liable to a *thief or a person who has no permission to use a vehicle* and who converts it to his or her own use." *Commercial Union*, 294 Ark. at 454 (emphasis added).

Appellant also argues that Austin's gross misuse of the vehicle warrants a weighing of competing public policies and that the State's interest in protecting the public from drunk drivers outweighs the competing interest in protecting the public from uninsured motorists. The argument is based in part on the concurrence of three justices in *Commercial Union* written by Justice Glaze:

> The majority now adopts a rule which extends insurance coverage to all situations, regardless of how grossly the person using the vehicle violates the original terms of the entrustment or bailment. I have a strong reluctance to adopt such an all-inclusive rule, especially when the facts here do not require it and the parties do not brief or argue the various rules set out in the majority opinion.
>
> Suffice it to say, there are jurisdictions — noted by the majority — that have rejected the "initial permission" or "Hell or High Water" rule the majority adopts today. There are compelling and sound reasons to reject a rule that extends insurance coverage to situations where a person grossly violates the trust of an insured who permits the person to use the insured's vehicle. Until the proper facts and arguments are before the court on this issue, the court should limit its decision, leaving open the issue of whether Arkansas should adopt such a rule.

While we might well appreciate the point made by the concurring justices, our duty is to follow the majority decision. Beyond that, we agree with the appellant that this State has a strong policy of discouraging driving while intoxicated and also has a policy against driving through stop signs. Both are forbidden by the rental agreement in the case at bar. It seems unlikely, however, that a clause in a liability insurance contract relieving the carrier from liability because of its insured's violation of these or any other traffic laws would be upheld. Arkansas Code Annotated section 27-19-713(f)(1) (Repl. 1994) provides that no violation of a motor-vehicle liability policy shall defeat or void that insurance policy. A state's public policy is best evidenced by its statutes. *See Guaranty Nat'l Ins. v. Denver Roller, Inc.*, 313 Ark. 128, 854 S.W.2d 312 (1993). If, as it seems, a liability carrier may not escape liability based on a violation of law by its own insured, may

it then obtain the same object by way of restrictions contained in its insured's rental agreement?

We conclude that the supreme court's decision in *Commercial Union* governs this case, in principle; that a technical conversion under the law of torts does not provide an exception to the initial-permission rule; that public policy considerations do not require reversal; and that the decision of the trial court must be affirmed.

Affirmed.

MEADS and ROAF, JJ., agree.

Robert Lawrence LEE, et al. *v.* HOT SPRINGS VILLAGE GOLF SCHOOLS

CA 96-1009 951 S.W.2d 315

Court of Appeals of Arkansas
Division IV
Opinion delivered September 17, 1997

[Supplemental opinion on denial of rehearing issued November 5, 1997.]

Timothy O. Dudley, for appellants.

Rose Law Firm, by: *David L. Williams* and *Grant E. Fortson*, for appellee.

JUDITH ROGERS, Judge. The appellants, Robert Lawrence Lee, Lyman John Endsley II, Garth Wellshear, and Roger Kluska, appeal from an order of summary judgment in favor of their former employer, appellee Hot Springs Village Golf Schools. Appellants raise two issues for reversal. First, they contend that the trial

court erred in granting appellee's motion for summary judgment, and secondly they argue that the trial court erred in ruling that they lacked standing to assert, as an affirmative defense, appellee's breach of the covenant of good faith and fair dealing. We agree that appellee's motion for summary judgment was granted improvidently, and we reverse.

Appellants were hired by appellee as instructors at a golf school pursuant to separate written contracts dated January 1, 1993. According to the agreements, appellants were to be compensated based on commissions generated by the operation of the school, and they were advanced certain sums on a monthly basis as a draw against future commissions. The school ceased operations in December of 1994. Appellee thereafter brought this suit against appellants to collect the "excess draws," or the portion of those monthly sums advanced to appellants but which had not been offset by commissions earned by them when their contracts were terminated. Appellee filed a motion for summary judgment contending that it was entitled to a refund of these monies as a matter of law. In making this argument, appellee relied on the following provision contained in each of the employment agreements:

> 3.1 As full compensation for all services to be rendered pursuant to this Agreement, the Partnership agrees to pay the Employee, during the Term, compensation based upon fees generated by the Partnership's operation of the School, based upon the fee schedule as set out herein.

The trial court accepted appellee's reasoning and ruled that, because appellants were paid by commission, the contract clearly and unambiguously required the return of the sums advanced in excess of commissions earned, and it granted judgment against appellants Lee, Endsley, Wellshear, and Kluska in the respective amounts, including prejudgment interest, of $34,891.36, $34,227.84, $24,581.89, and $20,371.47. This appeal followed, wherein appellants argue as their primary issue that the trial court erred in granting appellee's motion for summary judgment.

[redacted] Summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that

there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Johnson v. Harrywell, Inc.*, 47 Ark. App. 61, 885 S.W.2d 25 (1994). All proof submitted must be considered in the light most favorable to the non-moving party, and any doubts or inferences must be resolved against the moving party. *Wozniak v. Colonial Insurance. Co.*, 46 Ark. App. 331, 885 S.W.2d 902 (1994). Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Kimble v. Pulaski County Special School District*, 53 Ark. App. 234, 921 S.W.2d 611 (1996).

We agree with the appellants that the contract is not so clear and free of ambiguity that the trial court could declare as a matter of law that appellants were bound to return the monies advanced simply because they were paid on a commission basis. As argued by appellants below, the contract is conspicuously silent on this question in that it contains no provision for the refund of advance payments in the event that the golf school closed or their employment was otherwise terminated. By its silence, the contract is susceptible of differing interpretations, and is thus ambiguous. *Triska v. Savage*, 219 Ark. 80, 239 S.W.2d 1018 (1951). And, if there is ambiguity in the contract, a question of fact remains as to the parties' intent. *Albright v. Southern Farm Bureau Life Ins. Co.*, 327 Ark. 715, 940 S.W.2d 488 (1997). Therefore, the trial court erred in granting appellee's motion for summary judgment. In so holding, we have also applied the well-known rule of contract construction that, if there is any ambiguity in the contract, it must be construed most strongly against the party who prepared it, which in this case is the appellee. *Prepkat Concrete Co. v. Whitehurst Bros.*, 261 Ark. 815, 552 S.W.2d 212 (1977). Thus any inference to be made from the contract's silence should have been resolved in appellants' favor.

In their brief, appellants also refer us to a body of law from other jurisdictions, to which we add our own citation, *Carter Construction Co., Inc. v. Sims*, 253 Ark. 868, 491 S.W.2d 50 (1973), and suggest that they are entitled to prevail as a matter of law because of the contract's silence on the issue of recoupment.

While our review of the record reflects that appellants resisted appellee's motion for summary judgment on the ground that the contract was ambiguous, we are in agreement with appellee that appellants did not make this precise argument below. Since appellants did not present their own motion for summary judgment, we do not address this contention. We will not consider arguments on appeal that were not fully developed at the trial level. *Bradford v. Bradford*, 52 Ark. App. 81, 915 S.W.2d 723 (1996). We only hold that the trial court erred in concluding that the contract was clear and unambiguous and that appellee was entitled to judgment as a matter of law.

We cannot accept appellants' second argument, however. In response to appellee's motion for summary judgment, appellants alleged that there remained a dispute as to material fact concerning their defense that appellee had breached the covenant of good faith and fair dealing. Citing *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991), appellants maintained that every contract of employment contains this implied covenant, and in support of this claim or defense, appellants urged that appellee had lured them away from other work, that appellee had promised to vigorously promote and advertise the golf school to make it a success, and that appellee had promised to keep the school open unless it showed a loss of $200,000. They alleged that appellee had not vigorously supported the school and that it had manipulated the books to create a $200,000 loss so as to justify the closure of the school. Appellants argued that appellee's breach of the covenant should excuse their performance of the contract.

The trial court ruled that this was a claim being asserted in another lawsuit by a corporation of which appellants were stockholders and that appellants, as shareholders, lacked standing to assert the claim of the corporation as a defense in this action. In their argument on appeal, appellants concede that the trial court's ruling was correct, but claim error because the court failed to address their status as employees under an employment agreement. The short answer to appellants' argument is that the trial court did address appellants' claim with respect to their status as employees. In addition to the issue of standing, the court recognized from the cited authority of *Smith v. American Greetings*

Corp., *id.*, that the covenant of good faith and fair dealing prohibits an employee's discharge for reasons that contravene public policy. The court then ruled that the allegations made by appellants did not support such a claim. Appellants have not contested this aspect of the trial court's ruling and make no argument that the termination of their employment violated public policy. We can thus find no error in the trial court's decision.

Reversed and remanded.

NEAL and GRIFFEN, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

November 5, 1997

Timothy O. Dudley, for appellants.

The Rose Law Firm, by: *David L. Williams* and *Grant E. Fortson*, for appellee.

JUDITH ROGERS, Judge. ■ In our recent opinion, dated September 17, 1997, we reversed and remanded an order of summary judgment, holding that the contracts in question were not so clear and unambiguous so as to entitle appellee to prevail on its complaint as a matter of law. In reaching that decision, we applied the rule of contract construction that ambiguities in a contract are to be construed most strongly against the party who prepared the contract, naming appellee as that party. In a petition for rehearing, appellee maintains that there is no record proof that it indeed prepared the contracts. We agree that we overlooked the origin of this assertion. The only reference to appellee's having prepared the contracts was contained in appellants' trial brief. We acknowledge that it was not proper to consider factual allegations made in trial briefs. *See Pyle v. Robertson*, 313 Ark. 692, 871 S.W.2d 345 (1994).

■ However, this factual misstatement does not alter the result of the appeal. Our essential holding remains unaffected that the contracts were ambiguous and that appellee was not entitled to judgment as a matter of law.

Petition denied.

Donald C. KING *v.* STATE of Arkansas,
Office of Child Support Enforcement

CA 96-1370 952 S.W.2d 180

Court of Appeals of Arkansas

Division II

Opinion delivered September 17, 1997

Vowell & Atchley, P.A., by: *Stevan E. Vowell*, for appellant.

Lori Hoggard, for appellee.

JOHN F. STROUD, JR., Judge. Donald King has appealed from an order of the Carroll County Chancery Court granting judgment to appellee, Office of Child Support Enforcement, in the amount of $28,240.67 for child-support arrearages owed to Candida Paschall that had accrued since August 2, 1979. We hold that the chancellor should have applied Arkansas's statute of limitations and remand this case for a determination of the amount of arrearages owed by appellant.

Appellant and Ms. Paschall were divorced in Nevada on August 2, 1979, and appellant was ordered to pay $150.00 per month in child support. On May 18, 1995, appellee filed a motion in Carroll County, Arkansas, alleging that appellant had failed to comply with the Nevada order and requesting judgment for arrearages through March 31, 1995, in the amount of $27,600.00. The Nevada order was registered with the Arkansas court, and a hearing was held to determine the amount of arrearages owed by appellant.

At the hearing, the chancellor raised the issue of the statute of limitations. Appellee's counsel responded that the Nevada statute of limitations should apply, but he did not know the precise date at which it would terminate appellee's right to obtain arrear-

ages. Appellant's attorney argued that the Arkansas statute of limitations should apply. Appellee's counsel then asserted that appellant could not raise this defense because he had failed to do so in his pleadings. At that point, appellant moved to amend his pleadings to conform to the proof. Although the chancellor did not specifically rule on appellant's motion, he continued to discuss the statute of limitations issue with counsel for both parties. At the conclusion of the hearing, the chancellor directed counsel to provide him with the Nevada statute of limitations. On July 19, 1996, the chancellor entered judgment against appellant in the amount of $28,240.67 for arrearages that had accrued since August 2, 1979. In the judgment, the chancellor did not mention the statute of limitations and did not apply either the Arkansas or the Nevada statute.

In his brief, appellant argues that the chancellor erred in awarding judgment for arrearages dating back to the original divorce decree. In response, appellee contends that, because appellant did not raise the affirmative defense of statute of limitations as a defense in his pleadings, he cannot now argue that issue on appeal. It is true that the statute of limitations is an affirmative defense that must be specifically pled. Ark. R. Civ. P. 8(c), *Smallwood v. Ellis Gin Co.*, 10 Ark. App. 41, 661 S.W.2d 410 (1983). Although appellant did not raise this issue in his pleadings, he did move to amend the pleadings to include this defense after the chancellor had raised this issue and discussed it at length with counsel for both parties. In fact, the hearing concluded with the chancellor directing counsel to supply him with applicable Nevada law, which he would not have needed if he had not considered the pleadings to be amended to include the statute of limitations defense. That he considered the pleadings to be amended is clear to us from his actions, if not his words.

Arkansas Rule of Civil Procedure 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to

> amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

The trial court is vested with broad discretion in allowing or denying amendments to pleadings. *Cawood v. Smith*, 310 Ark. 619, 839 S.W.2d 208 (1992). Given the extensive discussion of this defense at the hearing and the chancellor's delay in making a decision until the parties supplied him with the Nevada statute of limitations, we cannot say that he abused his discretion in considering the issue. However, we conclude that once the chancellor considered this issue, he erred in not applying the Arkansas statute of limitations.

[redacted] Arkansas Code Annotated § 9-17-604(b) (Repl. 1993), which is part of the Uniform Interstate Family Support Act, provides: "In a proceeding for arrearages, the statute of limitation under the laws of this state or of the issuing state, whichever is longer, applies." *See Durham v. Arkansas Dep't of Human Servs.*, 322 Ark. 789, 912 S.W.2d 412 (1995). Our current statute, Ark. Code Ann. § 9-14-236 (Supp. 1995) (Act 870 of 1991), provides that the statute of limitations for child support now commences with an initial order of support and extends until a child reaches the age of twenty-three. However, in *Branch v. Carter*, 326 Ark. 748, 933 S.W.2d 806 (1996), the supreme court affirmed our decision in *Branch v. Carter*, 54 Ark. App. 70, 923 S.W.2d 874 (1996), and held that Act 870 of 1991 cannot be retroactively applied beyond March 29, 1986. Therefore, any cause of action for child-support arrearages accruing prior to March 29, 1986, is barred.

[redacted] Citing *McKellar v. McKellar*, 110 Nev. 200, 871 P.2d 296 (1994), appellant and appellee state that the law of Nevada would bar the recovery of any arrearages which accrued more than six years prior to May 18, 1995 (when appellee's motion for citation was filed). Both parties argue that, under Nevada law, all child-support arrearages accruing prior to May 18, 1989, would be barred and, under Arkansas law, all child-support arrearages accruing prior to March 29, 1986, would be barred in this case.

Although appellant urged the chancellor to apply the Arkansas statute of limitations at the hearing, he now argues that the chancellor should have applied the Nevada statute of limitations to bar all arrearages accruing prior to May 18, 1989. We cannot agree. It is clear, for the purpose of this case, that the Arkansas limitations period is longer than that of Nevada and should have been applied.

In its brief, appellee urges this court, if it chooses to apply the Arkansas statute of limitations, to modify the judgment against appellant to $16,240.67. It is true that we consider chancery appeals *de novo*, and where the record is sufficiently developed, we may enter the order which the chancellor should have entered. *See Cochran v. Cochran*, 309 Ark. 604, 832 S.W.2d 252 (1992). However, we find the interests of justice would be better served in this case by remanding this issue to the chancellor in order that he can compute the arrearages after applying the Arkansas statute of limitations.

Reversed and remanded.

ROBBINS, C.J., and BIRD, J., agree.

M.T. *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 96-949 952 S.W.2d 177

Court of Appeals of Arkansas
Division II
Opinion delivered September 17, 1997

Anne Orsi Smith, for appellant.

Stephen B. Whiting, for appellee Arkansas Department of Human Services.

Louis "Whit" Light, for appellee J.L.

Kathleen Bailey O'Connor, Guardian Ad Litem for the minor child.

JOHN F. STROUD, JR., Judge. In June 1995 the Arkansas Department of Human Services filed a petition to terminate the parental rights of M.T. in her biological son, J.L., Jr. The case came before the chancellor in December 1995. At the beginning of the hearing DHS made an oral motion to withdraw its petition, stating that it wanted instead an adjudication of paternity and placement of the child with the natural father. The guardian ad litem responded that the maternal parental rights should be terminated. The natural father, intervenor in this action, stated that he also wanted M.T.'s parental rights terminated but that he would be willing to permit visitation at some point in the future. He asked that the court determine him to be the father of the child.

The chancellor denied the motion of DHS to withdraw the petition, proceeded with the hearing, and granted the petition to terminate M.T.'s parental rights. He ordered legal custody of the child to continue with DHS and placement of the child with the biological father until such time as the paternity action could be adjudicated.

M.T. now appeals, raising three points. She contends that the chancellor erred by not allowing DHS to withdraw its petition, that termination of parental rights was not necessary to clear the child for permanent placement, and that the trial court erred in finding clear and convincing evidence supporting termination of appellant's parental rights. We affirm, addressing the last point first.

Grounds for termination of parental rights must be proven by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b) (Supp. 1995). When the burden of proving a disputed fact in chancery is by "clear and convincing" evidence, the question on appeal is whether the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of witnesses. *Beeson v. Arkansas Dep't of Human Servs.*, 37 Ark. App. 12, 823 S.W.2d 912 (1992). Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents, but parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Corley v. Arkansas Dep't of Human Servs.*, 46 Ark. App. 265, 878 S.W.2d 430 (1994).

Here, appellant's seven-week-old son had skull fractures when he was brought to Arkansas Children's Hospital in November 1993. Appellant said that he had been dropped by her boyfriend the night before while she was at work. SCAN filed a petition for emergency custody of the child, and he was released from the hospital to a foster home. At an adjudication hearing the next month, he was found to be a dependent neglected child. He was placed in foster care in the custody of the DHS and eventually placed in the home of his maternal grandmother. The boyfriend was ordered to have no contact with the child. After the first review hearing in March 1994, the child was returned to appellant's custody. A second emergency custody motion was filed in June 1994 alleging medical neglect of the child by appellant because of untreated and infected blisters on his feet as well as failure to thrive. The motion was granted, and the child was returned to his grandmother's custody. The grandmother notified the court several weeks later that she was not able to continue to

keep the child in her home, and he was placed in the custody of DHS.

SCAN noted that appellant was hostile and had failed to cooperate with the caseworker. Appellant visited her son only sporadically and allowed the boyfriend to move back into her home. In September 1994 appellant's therapist notified SCAN that appellant no longer wished to receive services and that custody of her son was not important enough to her for her to comply with SCAN's requirements and the court's orders. Appellant discontinued visits with her son for several months, resumed them briefly, and discontinued them again. At the review hearing in April 1995 the goal of the case was changed to allow DHS to pursue termination of appellant's parental rights rather than reunification with her child. In the summer of 1995 appellant resumed visits with the child.

In matters involving the welfare of young children, the appellate court gives great weight to the trial judge's personal observations. *In re Adoption of K.F.H. and K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993). Here, the chancellor credited the testimony of the SCAN worker and discredited the testimony of appellant, noting her false assertions that the child was not fathered by her husband. He noted that appellant had shown little interest in her child until the petition to terminate her parental rights was filed. Our own review of the evidence, coupled with our deference to the chancellor on the credibility of the witnesses, shows that the decision to terminate appellant's parental rights was not clearly erroneous.

The next point we address, that the chancellor erred in denying DHS's oral motion to dismiss the petition, is a procedural issue. Under Rule 41 of the Arkansas Rules of Civil Procedure, an action can be dismissed before final submission of a case without prejudice to the plaintiff. A plaintiff is a party who asserts a cause of action against another, and the right to dismiss an action rests only with the plaintiff. *See Walton v. Rucker*, 193 Ark. 40, 97 S.W.2d 442 (1936).

Under Arkansas Code Annotated section 9-27-341(a) (Supp. 1995), termination of parental rights is a remedy available

only to the Department of Human Services and not to private litigants.[1] Therefore, the right of dismissal accrues to DHS as the petitioner, and not to a parent. Though a parent has the right to appeal the termination of parental rights, she is not the proper party to appeal the trial court's refusal to allow the petitioner to withdraw its cause of action. DHS has not appealed the denial of its motion to withdraw. We will not consider any alleged error in the trial court's ruling on this issue because appellant has no standing to raise it.

The final point we consider is whether the chancellor erred in ordering termination of appellant's parental rights "when termination was not necessary to clear the child for permanent placement." Arkansas Code Annotated section 9-27-341(a) (Supp. 1995) reads in part as follows:

> [This section] shall be used only in such cases when the Department of Human Services is attempting to clear a juvenile for permanent placement. The intent of this section is to provide permanency in a juvenile's life in all instances where 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 return to the family home cannot be accomplished in a reasonable period of time.

The statute does not require that termination of parental rights be a predicate to permanent placement, but only that DHS be attempting to clear the juvenile for permanent placement when parental rights are terminated, which was the case here.

Though the disposition plan in this case had at one time been to reunify appellant and the child, the court had ordered the plan changed to terminate her parental rights. At the conclusion of the termination hearing, the court stated:

> [M.T. has] had a long period to try to do the things that would make her have a more significant relationship with this child. Having a few visits. . . on the eve of the termination hear-

[1] This remedy is now available under the juvenile code to both the Department of Human Services and a court-appointed guardian ad litem. *See* Act 1227 of 1997, section 13.

> ing, doesn't make it with the Court. When you look at the total history of the case, that's not enough. . . .
>
> This child needs permanency. It's the Court's opinion that it is in the best interest of this child to terminate the mother's parental rights. This child, I think, will do far better if he doesn't have to have an occasional visit from someone who really has not brought much to the quality of his life. I think the child would be much better off with [M.T.] out of his life.
>
> . . . .
>
> She may show love and concern when she visits the child, but a child needs something more than a visit every now and then where you stop in and show some concern. A child needs 24-hour parenting, 24-hour responsibility. This child has been abused in this home, and I think it's time to get the child on with his life and get him out of an abusive situation. Hopefully, he'll be into something that's much better and that will not cause this child injury.

Clearly, the court's determination to terminate appellant's parental rights was made pursuant to the authority of Arkansas Code Annotated section 9-27-341. Termination of appellant's parental rights was pursued because a return of the child to her home would have been contrary to the child's health, safety, or welfare and because it appeared that the return could not be accomplished within a reasonable period of time.

Affirmed.

ROBBINS, C.J., and BIRD, J., agree.

MIN-ARK PALLET COMPANY, Inc. *v.* Michael LINDSEY

CA 96-1511 950 S.W.2d 468

Court of Appeals of Arkansas
Division II
Opinion delivered September 17, 1997

Pulliam Law Offices, P.A., for appellant.

No response.

JOHN F. STROUD, JR., Judge. This is a workers' compensation case. Appellant, Min-Ark Pallet Company, Inc., is the employer. Appellee, Michael Lindsey, is the claimant. Appellee's job involved lifting heavy wooden pallets. He sustained a hernia for which he filed a claim with the Commission, contending that the injury arose out of and in the course of his employment. Appellant opposed the claim, asserting that the injury did not happen on the job and that it did not satisfy the requirements of Arkansas Code Annotated section 11-9-523 (Repl. 1996), which deals specifically with hernias. The administrative law judge found that appellee did not sustain a compensable injury. The Commission reversed. We affirm.

In its first point of appeal, appellant argues that appellee did not give notice of an injury, that in failing to do so he failed to meet the requirement of seeking medical care within seventy-two (72) hours of the injury, and that without an "established incident" the claimant could not meet the strict requirements of Arkansas Code Annotated section 11-9-523 (Repl. 1996). We disagree.

In reviewing workers' compensation cases on appeal, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if those findings are supported by substantial evidence. *Southern Steel & Wire v. Kahler*, 54 Ark. App. 376, 927 S.W.2d 822 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* 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 its decision. *Id.*

Arkansas Code Annotated section 11-9-523 provides:

> (a) In all cases of claims for hernia, it shall be shown to the satisfaction of the . . . Commission:
>
> (1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
>
> (2) That there was severe pain in the hernial region;
>
> (3) That the pain caused the employee to cease work immediately;
>
> (4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter; and
>
> (5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

The Commission determined that all of the requirements of this statute were satisfied because appellee testified that he felt a burning pain in his side when he lifted a pallet ((a)(1)); because appellee said that the pain "almost brought me to my knees" and that he stopped working in order to call his mother ((a)(2) and (a)(3)); because appellee discussed his problem with a co-worker who was the wife of one of the company owners within forty-eight (48) hours of the onset of the pain ((a)(4)); and because "it is sufficient that the physical distress required the attendance of a physician within the amount of time required by subsection (a)(5), not that the physician was actually seen within the seventy-two hour time frame" ((a)(5)). We hold that there was substantial evidence to support the Commission's findings.

Here, appellee testified that he worked at Min-Ark Pallet Company, rebuilding wooden pallets. He explained that lifting was involved in his job because it was necessary to pull pallets off stacks, put them on the table, rebuild them, and then lift them back onto another stack for pick-up. He testified that on the day of the injury, Friday, September 23, 1994, he reached up, pulled a

pallet down, and felt a severe burning pain in his side. He thought it was appendicitis or something going wrong with his side. He stopped work and went to Maybelle Minick's office to call his mother. He said Ms. Minick was the secretary and that he used the phone on her desk, in her presence, to call his mother. He told his mother that his side "grabbed" him and "almost dropped me to my knees." He said he told Ms. Minick that he was having some really bad pains and did not know what was wrong. Appellee's mother, Susan Lindsey, testified that in response to appellee's phone call she made a doctor's appointment for him that afternoon, but that appellee told her he could not take off because they had a work order that had to be completed. Ms. Lindsey said she then made a doctor's appointment for appellee on Monday, September 26, 1994. She said she and Ms. Minick, whose husband is a part owner of Min-Ark Pallet Company, speculated that appellee might have appendicitis. Ms. Lindsey testified that appellee was still in a lot of pain when he got home that afternoon, that he "laid around" all weekend, and that he went to the doctor on Monday. The doctor ruled out appendicitis, but could not determine the source of the pain. Appellee testified that he was able to continue work by stopping when he needed to stop and working when he felt he could. He said he would go lie on the couch in Ms. Minick's office for a while or sit on his table until he could work again. Ms. Lindsey testified that appellee continued to work until October 13, 1994, when he called and asked her to meet him at the emergency room because "he couldn't take it any more." She said that eventually exploratory surgery was performed and revealed an inguinal hernia.

In reviewing the statutory requirements, the Commission found that the requirement of subsection (a)(1) was satisfied based upon appellee's testimony that he "felt a burning pain" in his side when he attempted to lift a pallet. Appellant argues that appellee never mentioned a "burning pain" until his testimony before the administrative law judge. The argument misses the point. Regardless of whether appellee initially described the pain as "burning" or not, there was substantial evidence presented to the Commission that appellee suffered severe pain when he attempted to lift a pallet.

[redacted] Similarly, the Commission found that the requirements of subsections (a)(2) and (a)(3) were satisfied by appellant's testimony that the pain almost brought him to his knees and that he stopped working in order to call his mother. Appellant argues that the cessation of work requirement under subsection (a)(3) was not supported by substantial evidence because appellee returned to work within moments of calling his mother. We disagree. Appellee testified that he continued to work because a work order had to be completed and that he worked when he could and stopped when he could not, resting on his table or lying down on the couch in Ms. Minick's office. Reasonable minds could accept this evidence as adequate to support the Commission's conclusion that there was a cessation of work under subsection (a)(3). *See also Osceola Foods, Inc. v. Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985) (explaining that claimant only stopped work for 15-20 minutes and continued to work both the day of the injury and the following morning).

[redacted] The Commission found that the notice requirement under subsection (a)(4) was satisfied because appellant discussed his problem with Ms. Minick within minutes of the onset of pain, even though he did not tell her what he had been doing when the pain started. Appellant argues that there was not substantial evidence to support the Commission's finding that the notice requirement under subsection (a)(4) was satisfied. In addition, appellant argues that the statute must be strictly construed, that it specifically provides that notice of the "occurrence" must be given, and that appellee "never once notified his employer of any occurrence in conjunction with his pain." In other words, appellant argues that the legislature intended for the word "occurrence" to describe a *work* event that caused the hernia. We disagree. Even when statutes are strictly construed, they must be construed in their entirety, harmonizing each subsection where possible. *Thomas v. Cornell*, 316 Ark. 366, 872 S.W.2d 370 (1994). The word "occurrence" appears four times within section 11-9-523, two of which are within the phrase "occurrence of the hernia." Ark. Code Ann. § 11-9-523(a)(1), (4) & (5). Clearly, when used within this phrase, "occurrence" means the happening of the hernia itself, not necessarily the work event resulting in the hernia.

Our construction is buttressed by the fact that subsection (a)(1) addresses the work event causing the hernia: "[t]hat the occurrence of the hernia immediately followed as the *result of sudden effort, severe strain, or the application of force directly to the abdominal wall*[.]" Appellant's argument would have us give two different meanings to the same word, "occurrence," within the same statute, totally ignoring its use in the phrase "occurrence of the hernia." Rules of strict construction do not require such a strained application of the words of the statute.

In making its argument with respect to subsection (a)(4), appellant also relies upon *Price v. Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993), and *Siders v. Southern Mattress Co.*, 240 Ark. 267, 398 S.W.2d 901 (1966). In both cases, the appellate courts reversed the Commission's denial of benefits to employees who had suffered hernias. In *Siders*, the supreme court noted:

> The commission imposed a heavier burden on appellant than the law calls for. Just as the Act does not require an immediate diagnosis, it also does not require that the claimant insist that the doctor's history contain the gory details of the occurrence.
>
> . . . .
>
> Appellant has established a prima facie case. From all the circumstances, there is no question but that the employer had timely and proper notice of the occurrence that caused the hernia. There is no substantial evidence to the contrary. Appellant is not required to give notice that he has a hernia—he is not a doctor—the statute merely requires that appellant give notice of the occurrence which results in a hernia. *Clark v. Ottenheimer Bros.*, 229 Ark. 383, 314 S.W.2d 497; *McMurtry v. Marshall Model Market*, 237 Ark. 11, 371 S.W.2d 4.
>
> On the case as a whole, "if the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award." *Hall v. Pittman Constr. Co.*, 235 Ark. 104, 357 S.W.2d 263.

That decision is based upon the court's review of the total circumstances of the case, and its resulting conclusion that those circumstances did not support the Commission's denial of benefits under subsection (a)(4).

Here, our examination of the evidence shows that there was substantial evidence to support the Commission's finding that the notice requirement of subsection (a)(4) was satisfied. That is, appellee's discussion of his problem with Ms. Minick, her knowledge that he had been lifting heavy pallets, and his statement during the phone call to his mother in front of Ms. Minick that his side "grabbed" him provided sufficient "notice of the occurrence" under the circumstances of this case to affirm the Commission's finding. As we have explained in a previous case with respect to the "cessation of work" requirement under subsection (a)(3), there is no mathematical formula where these findings of fact are concerned. See *Osceola Foods, Inc. v. Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985). Rather, determinations regarding the requirements of these subsections "should be based on evidence which satisfies the finder of fact" that the requirements have been met. *Id.* Indeed, Arkansas Code Annotated section 11-9-523, the statute at issue here, begins, "In all cases of claims for hernia, *it shall be shown to the satisfaction of the Workers' Compensation Commission*: . . . ." Our task on appeal is to determine whether reasonable minds could reach the Commission's conclusion that appellee gave notice of the occurrence to the employer within forty-eight hours thereafter. We hold that reasonable minds could reach such a conclusion.

The Commission found that the final subsection, (a)(5), was satisfied "because it is sufficient that the physical distress required the attendance of a physician within the amount of time required by the subsection, not that the physician was actually seen within the seventy-two-hour time frame." Appellant argues that there is no substantial evidence to support this finding because the date of the injury cannot be determined, and therefore it is impossible to determine the seventy-two-hour time frame. We disagree. For all of the reasons discussed previously, the seventy-two hour time frame began on Friday, September 23, 1994. Appellee did not see his doctor on that date because he was working on an

order that had to be completed. He did see his doctor on Monday, September 26, 1994, which was still within the seventy-two-hour time frame.

Under its second point of appeal, appellant argues that the Commission violated the legislative directive to strictly construe the statute because the Commission relaxed the burden of proof by excusing appellee's inconsistent statements. We disagree. Appellant sprinkles several challenges to credibility throughout its arguments under both points of appeal, including testimony of a coworker that his injury might have been caused by an accident on a "wet bike." The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Osceola Foods, Inc. v. Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985). Moreover, the determination of credibility has nothing to do with statutory construction.

Affirmed.

ROBBINS, C.J., and BIRD, J., agree.

Byron McKIMMEY and Jack Mobbs *v.* Randall FIELDER, et al.

CA 96-1449 951 S.W.2d 566

Court of Appeals of Arkansas
Division IV
Opinion delivered September 24, 1997

Michael T. Sherwood, P.A., by: *Michael T. Sherwood,* for appellant.

Graddy and Adkisson, P.A., by: *William C. Adkisson,* for appellee.

JUDITH ROGERS, Judge. The appellants, Byron McKimmey and Jack Mobbs, appeal from an order of summary judgment in favor of appellees Randall Fielder, individually and as executor of the Estate of Ruby Fielder, Charles Munnerlyn, and Eddie Garrett. For reversal, appellants advance several issues in which they argue that the trial court erred in granting summary judgment against them. On cross-appeal, Randall Fielder contends that the trial court erred in denying his motion for an attorney's fee. Because the abstract of this case is flagrantly deficient, we affirm the decision of the chancellor in all respects.

Rule 4-2(a)(6) of the Rules of the Supreme Court and Court of Appeals provides that the appellant's abstract or abridgement of the record should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented

to this court for decision. As far as we can tell, this case involves a failed real estate transaction. The abstract of this two-volume record consists of a single paragraph, three and one half pages long. It is a narrative which only describes the course of the proceedings below with only vague references to the pleadings, documents and other filings contained in the record. While nearly all of the required pleadings and orders are noted in the abstract, their essential components are missing. The abstract, such as it is, is confusing and leaves us with no clear understanding of the record.

More importantly, the abstract is by no means an impartial condensation of the record, without comment or emphasis, as is required by the rule. It represents appellants' own version of events, and it is interspersed with argument in such a manner that it is difficult to distinguish between what the record would show and what may appear to be only argument. As one example, the abstract states, "A hearing was scheduled on various motions, but attorneys Brazil and Adkisson entered an Ex Parte discussion with Judge Baker the day before the hearing was scheduled. As a result the hearing was canceled." No reference to any page in the transcript is given to support this statement.

When an abstract is flagrantly deficient, we may affirm for noncompliance with the abstracting requirements. Ark. R. Sup. Ct. 4-2(b)(2). The abstract here is totally inadequate for an understanding of the issues raised in this appeal. Therefore, we affirm based on appellants' failure to submit a proper abstract. *See Carmical v. City of Beebe*, 316 Ark. 208, 871 S.W.2d 386 (1994); *4-Way Tire & Battery, Inc. v. Int'l Buyers Corp.*, 263 Ark. 561, 566 S.W.2d 143 (1978). We do note that appellants have attached verbatim copies of the order of summary judgment and an option agreement, among other things, as an appendix to their brief. However, that procedure does not meet the requirements of the abstracting rules. *Jackson v. Kinark Corp.*, 282 Ark. 548, 669 S.W.2d 898 (1984). We also see no reason why these matters could not have been abstracted in words rather than included as an appendix to the brief.

The abstracting requirements also apply to cross-appellants. *McPeek v. White River Lodge Enterprises*, 325 Ark. 68, 924

S.W.2d 456 (1996). While Mr. Fielder argues on cross-appeal that the trial court erred in denying his motion for an attorney's fee, he did not provide a supplemental abstract, and appellant's abstract does not reference such a motion or any ruling made by the trial court. Both the motion and the trial court's ruling are material components of the record necessary for a resolution of the issue raised. As it stands, we are in no position to say that this issue was even raised or considered by the trial court. Consequently, we cannot decide this point on appeal. *Wallace v. State*, 326 Ark. 376, 931 S.W.2d 113 (1996).

Affirmed.

BIRD and ROAF, JJ., agree.

Mark TRAVIS *v.* STATE of Arkansas

CA CR 96-1344 954 S.W.2d 277

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered September 24, 1997

[redacted]

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[redacted]

[redacted]

Val P. Price, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Senior Asst. Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge.

An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more time each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. . . .

> *[P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.*
>
> —JUSTICE BYRON R. WHITE, WRITING FOR THE SUPREME COURT OF THE UNITED STATES IN *DELAWARE V. PROUSE*, 440 U.S. 648, 662 (1979).

Mark Travis has appealed a trial judge's decision denying his motion to suppress a .22 caliber rifle upon which appellant's conditional guilty plea to the charge of being a felon in possession of a firearm was based. We hold that the decision by the trial judge must be reversed because the police officer who stopped appellant's vehicle lacked a reasonable basis for doing so pursuant to the Fourth Amendment to the Constitution of the United States, court decisions pertaining to unreasonable seizures, and Rules 2.1, 3.1, and 4.1 of the Arkansas Rules of Criminal Procedure.

Appellant was charged by information with being a felon in possession of a firearm in violation of Ark. Code Ann. § 5-73-103 (Repl. 1993) after Deputy Glen Smith of the Lawrence County Sheriff's Department stopped the pickup truck in which he was a passenger and noticed a .22 caliber rifle barrel sticking out from behind the seat of the pickup. Deputy Smith testified at the hearing on appellant's motion to suppress that he noticed the pickup truck traveling northbound on U.S. Highway 67 at Minturn (Lawrence County), Arkansas, and observed that the Texas license plate on the truck did not have an expiration decal. The truck was driven by appellant's nephew, James E. Travis, whose driver's license had been suspended, but the truck belonged to appellant. Under Texas motor-vehicle laws, the registration and inspection sticker is displayed on the windshield of the vehicle, not the license plate. Appellant's vehicle did have the required sticker on the windshield. Alleging that Deputy Smith lacked reasonable suspicion to stop the vehicle, appellant moved to suppress the rifle. After the trial court denied the motion, appellant entered a conditional plea of guilty pursuant to Ark. R. Crim. P. 24.3(b), and this appeal followed.

[redacted] The Fourth Amendment to the Constitution of the United States was ratified in 1791 by a new nation with a vivid memory about the evils of unbridled and random governmental intrusion into the private affairs of its people. That concern

included sensitivity about the interference into individual freedom and the intrusion into privacy posed when law enforcement officers stop a vehicle and detain its occupants. Although the Supreme Court of the United States held in *Terry v. Ohio*, 392 U.S. 1 (1968), that police may stop persons without probable cause under limited circumstances, it has also held that stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Prouse*, the Court considered whether police officers acting under a police regulation permitting officers to stop vehicles at random to check driver's licenses and registrations in Delaware violated the Fourth Amendment's guarantee against unreasonable seizures. The Court concluded as follows:

> [W]e hold that except in those situations in which there is at least articulable and *reasonable* suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other states from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. *We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.*

Prouse, 440 U.S. at 663 (emphasis added). Although the Court recognized the legitimate interest of government in promoting highway safety, it determined that the intrusion on Fourth Amendment rights to travel and be left alone posed by the unbridled discretion of the police officer during a random stop in the field outweighed that governmental interest. *Id.* The Court also reasoned that there are methods of promoting the governmental interest in highway safety that are less intrusive to the rights protected by the Fourth Amendment. *Id.*

[redacted] In *Brown v. Texas*, 443 U.S. 47 (1979), the Supreme Court again discussed the seizures caused when police officers stop motorists and reached the following conclusion:

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. [Citations omitted.]
>
> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely by the unfettered discretion of officers in the field. [Citations omitted.] To this end *the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.*

Id. at 50-51 (emphasis added). Furthermore, the Supreme Court has recently reiterated that an automobile stop is subject to the constitutional imperative that it not be unreasonable under the circumstances, but that the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. *Whren v. United States*, 135 L.Ed.2d 89, 116 S.Ct. 1769 (1996).

In *Hill v. State*, 275 Ark. 71, 628 S.W.2d 285, *cert. denied*, 459 U.S. 882 (1982), the Arkansas Supreme Court upheld the constitutionality of an investigatory stop of the appellant's vehicle that exhibited an Oklahoma license plate because the late model maroon Ford Thunderbird matched the description of a car driven by an armed man who had robbed a Montgomery County service station and a Game and Fish Commission officer, kidnapped the proprietor of the station along with the officer, shot and killed the station proprietor, and wounded the officer before driving away. The wounded officer gave the police a description of his assailant and the car he was driving before being rushed to a hospital. Law enforcement offices in the surrounding area began receiving radio dispatches from the National Crime Information Center (NCIC) regarding the crimes, and the Hot Springs Police Department had broadcast a description of the assailant and the late model Ford

Thunderbird, maroon in color, with blue or black lettering on a white license plate. A Hot Springs police officer observed and stopped a vehicle matching that description traveling in Hot Springs, ultimately resulting in the arrest of the appellant who was convicted and sentenced for capital felony murder (death), kidnapping (50 years), and aggravated robbery (50 years) in connection with the offenses against the store proprietor, and for attempted capital murder (life), kidnapping (50 years), and aggravated robbery (50 years) in connection with the offenses against the Game and Fish Commission officer. The supreme court reasoned that the police had reasonable suspicion to make an investigatory stop of appellant's car because it matched the description of the police broadcast, because it was unlikely that another vehicle with that description was in the Montgomery-Garland County area at that time, and because the crimes had only recently been committed in the small community of Pencil Bluff in neighboring Montgomery County. *Id.* at 80, 628 S.W.2d at 288.

In *Cooper v. State*, 297 Ark. 478, 763 S.W.2d 645 (1989), the Arkansas Supreme Court cited the *Hill* case in holding that the initial stop of appellant's vehicle was valid based upon testimony at a hearing on the appellant's motion to suppress evidence seized from his vehicle in connection with prosecutions for attempted capital murder, possession of methamphetamine with intent to deliver, possession of marijuana with intent to deliver, possession of drug paraphernalia, and felon in possession of a firearm. The appellant had been stopped by a Fort Smith police detective who noticed a 1969 Oldsmobile traveling in Fort Smith with what appeared to be out-of-state handwritten paper car tags. However, the officer could not determine the expiration date of the tags nor the state where they had been issued, and considered the presence of temporary tags suspicious given the age of the vehicle. When the officer pulled alongside the vehicle, its driver looked directly at him and soon made a sudden left-hand turn without giving a signal. The supreme court reasoned that the stop was valid under the Fourth Amendment because the paper tags, impossibility of verifying the state of their issuance or expiration date, age of the vehicle, and the "obviously evasive actions of the driver" gave the

officer sufficient cause to stop the vehicle. *Id.* at 481, 763 S.W.2d at 646.

[redacted] Arkansas Rule of Criminal Procedure 3.1 states:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects *is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.*

(Emphasis added.) Ark. R. Crim. P. 2.1 defines "reasonable suspicion" as a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. Reasonable suspicion entails a consideration of the total circumstances and the existence of particularized specific reasons for a belief that the person may be engaged in criminal activity. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

[redacted] The facts in *Hill* and *Cooper* and the reasonable-suspicion standard prescribed by Rules 3.1 and 2.1 are dramatically different from the facts in this case. This case does not involve evidence that a crime had been committed, was about to be committed, or had been observed being committed involving the vehicle that Deputy Smith stopped. Deputy Smith admitted that his sole reason for stopping appellant's vehicle was because he did not see an expiration tag on the Texas license plate. Under Texas motor-vehicle laws, the registration and inspection sticker is displayed on the windshield of the vehicle, not the license plate. Thus, the fact that Deputy Smith did not observe an expiration sticker did not constitute and could not have constituted a reasonable basis for suspecting that the vehicle or its occupants may have been engaged in criminal activity, not to mention crimes within the scope of Rule 3.1. Put differently, the totality of the circumstances does not support the conclusion that Deputy Smith had a reasonable suspicion justifying the stop.

The dissenting opinion tacitly concedes that appellant's seizure cannot be sustained against Fourth Amendment challenge based upon the "reasonable suspicion" assertion advanced by the State. Both parties briefed the case based upon the reasonable-suspicion ground in Ark. R. Crim. P. 3.1. However, our dissenting colleagues argue that Deputy Smith's stop was valid because he supposedly had reasonable cause to arrest appellant without a warrant. We respectfully disagree because Arkansas law clearly does not countenance that conclusion.

Arkansas Rule of Criminal Procedure 4.1(a) provides that a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony; a traffic offense involving (A) death or physical injury to a person, or (B) damage to property, or (C) driving a vehicle while under the influence of any intoxicating liquor or drug; or any violation of law in the officer's presence. Aside from the fact that no one has ever claimed that Rule 4.1(a) applies to this case, there is no evidence demonstrating that Deputy Smith had "reasonable cause" to believe that any of the rule's provisions applied to appellant when he stopped the pickup. Deputy Smith testified that he did not observe any unsafe or improper movement of appellant's vehicle. There is neither proof nor allegation that the pickup was being operated in violation of Arkansas law. There is no proof that Deputy Smith had facts indicating how long appellant's vehicle had been in Arkansas, not to mention information that the truck had displayed the Texas tags for longer than Arkansas permits an out-of-state licensed vehicle to be operated on our highways. Because the only proof is that Deputy Smith saw appellant's vehicle being lawfully operated on a U.S. highway displaying permanent Texas license plates, the Arkansas statutes making the failure to display a license plate, operating an out-of-state licensed vehicle in Arkansas for more than ninety days, or displaying a fictitious license (the grounds suggested in the dissenting opinion) are patently inapposite.

It is certainly true that probable cause does not require the degree of proof sufficient to sustain a conviction; however, there must be more than a strong suspicion that an offense has been committed. *Friend v. State*, 315 Ark. 143, 865 S.W.2d

275 (1993). Our supreme court has long held that probable cause to arrest without a warrant exists when the facts and circumstances within the collective knowledge of the officers, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. *Id.* Reasonable cause for effecting a warrantless arrest under Rule 4.1(a) requires *facts* that suggest to the police that the law has been broken, and that the person to be arrested has broken it. Yet, the dissenting opinion would condone the warrantless arrest by Deputy Smith based upon undisputed proof that he had no information that justified even the vaguest suspicion that any law was being broken, let alone that appellant should have been arrested because he was riding in a pickup truck with Texas license plates on a U.S. highway in northeast Arkansas. If Deputy Smith lacked enough information to constitute grounds for reasonable suspicion for an investigatory stop, he manifestly lacked reasonable cause for a warrantless arrest. Idle curiosity or baseless speculation by law enforcement officials is antithetical to reasonable suspicion and reasonable cause under any analysis.

[redacted] The relevant inquiry concerning probable cause is not whether appellant was eventually charged with violating Ark. Code Ann. § 27-14-704(a) (Repl. 1994) for operating a motor vehicle registered in another state more than ninety days. Instead, the proper question is whether Deputy Smith had specific and objective facts that justified a belief that appellant had engaged in conduct deserving arrest before he stopped the pickup. Deputy Smith was not acting under the authority of an arrest warrant, so the Fourth Amendment's probable-cause requirement demanded that he possess specific and articulable information based upon objective factors which reasonably justified the belief that appellant was committing, had committed, or was attempting to commit a crime. To say that Deputy Smith lacked probable cause to arrest appellant is not to resort to hindsight. Rather, it is to acknowledge what Smith admitted; namely, that he lacked any information that justified arresting appellant when he stopped the pickup. It makes no difference that appellant was not charged for violating Ark. Code Ann. § 27-14-704(a). What is important and

controlling is that Deputy Smith had no factual basis for arresting appellant *on any charge* when he stopped the pickup.

Unlike the facts in *Hill v. California*, 401 U.S. 797 (1971), this case does not involve a good-faith error by the police involving the arrest of the wrong person for what is plainly criminal conduct. The Supreme Court upheld the arrest in *Hill* because there were facts showing that the police had probable cause to arrest a person for possession of narcotics despite having misidentified the appellant as the suspect. At least the officers in that case had a reasonable basis for believing that somebody had committed a crime. Deputy Smith had no reason to believe that any crime had occurred, let alone that appellant or anybody else associated with the pickup truck had violated the law.

The Arkansas cases cited in the dissenting opinion do not support a finding of reasonable suspicion to stop, let alone reasonable cause to arrest, because they all obviously involved the failure of *Arkansas* drivers to display a proper license plate, and the arresting officers in every instance knew this before the stops. *See State v. Storey*, 272 Ark. 191, 613 S.W.2d 382 (1981) (motion to suppress erroneously granted; appellee's truck lacked license plate); *Williams v. State*, 23 Ark. App. 121, 743 S.W.2d 402 (1988) (appellant's car lacked a license plate); *Wilburn v. State*, 317 Ark. 73, 876 S.W.2d 555 (1994) (arresting officer determined by police radio check, *before stopping appellant*, that license was issued to another vehicle); *Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 364 (1997) (arresting officer determined that license plate was registered to a different vehicle before stopping appellant.)

Had this been a case where the evidence supporting either reasonable suspicion to make an investigatory stop or reasonable cause for a warrantless arrest had been conflicting on the issue of whether Deputy Smith possessed information suggesting that the law had somehow been violated, then the trial court's decision could be affirmed based on the standard of review that requires that we review the record pertaining to appellant's motion to suppress and affirm the trial court if the totality of the circumstances support a finding that the result reached was not clearly against the preponderance of the evidence. However, the

"clearly erroneous" standard of review cannot be the reason for *affirming* the trial court where there is no evidence showing that the totality of the circumstances surrounding the stop or arrest supports a finding of either reasonable suspicion or reasonable cause. If anything, the "clearly erroneous" standard of review mandates reversal.

The dissenting opinion also cites a California Court of Appeals case, *People v. Glick*, 250 Cal. Rptr. 315 (Cal. App. 1988), involving a New Jersey vehicle that was stopped because the license plate displayed no current registration decals. New Jersey, like Texas, utilized reinspection stickers to be placed on the front windshield. The court in *Glick* held that the officer's "mistaken" interpretation of a foreign law was not unreasonable. *Id.* at 319. The *Glick* opinion cited *Delaware v. Prouse, supra,* in which the United States Supreme Court upheld the *granting* of a motion to suppress evidence obtained after Prouse's vehicle was stopped only to check his driver's license and registration. Although the *Prouse* opinion stated that states have a vital safety interest in ensuring that vehicle licensing, registration, and inspection requirements are being observed, the Supreme Court held that the discretionary stopping of vehicles to *ascertain* compliance with registration requirements violated the Fourth Amendment, stating:

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations — or *other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered* — we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. (Citations omitted.)

Id. at 661 (emphasis added). In view of the Supreme Court's plain statement, we are unable to reconcile the *Glick* holding and result with the Supreme Court's holding and result in *Prouse.*

At most, the fact that Deputy Smith did not see an expiration sticker on the license plate justified some other and less intrusive

method of investigation than seizing the vehicle and its occupants and interfering with their Fourth Amendment freedom to be left alone. And it is self-evident that less intrusive means of ascertaining whether the vehicle was properly registered were available to Deputy Smith. Automobile vehicle-registration information is available to police agencies through a national motor-vehicle-registration information system that can be accessed by computer. Deputy Smith could have radioed for that information without interfering with appellant's Fourth Amendment rights. He could have radioed his headquarters and learned that Texas does not require display of the registration-expiration certificate on the license plate of pickup trucks registered in that state. Deputy Smith did not observe the vehicle being operated unsafely or in violation of any laws, and he testified that he noticed nothing suspicious about its occupants before he stopped it. Nobody has ever deemed that to be suggestive of conduct outside the Fourth Amendment guarantee against unreasonable seizure, not to mention a basis for being arrested for committing a crime.

[redacted] Arkansas lies in the heartland of the United States, a land of forty-eight contiguous sovereign state governments joined together by a fascinating complex of highways. Hence, the result advanced by the State would mean that vacationers from Canada and Mexico, business travelers from Louisiana, college students on school break from Idaho, and people relocating their households and families from one state to another would be at the constant mercy of the ignorance or whim of every law enforcement officer who does not know what the registration requirements are for automobiles from their respective states. Of course, even children riding the Arkansas roadways know that automobile license plates vary from state to state. If we were to adopt the State's position, every police officer could stop any vehicle at any time and anywhere the officer sees the vehicle along the roads, streets, and highways of Arkansas even if there is no rational basis for suspecting that the law is being broken. The Fourth Amendment guarantee against unreasonable seizures protects all persons, including motorists, from such baseless interference with their right to be left alone.

These and similar concerns underlie the reason for the Fourth Amendment and the analysis that the United States Supreme Court articulated in *Brown v. Texas*, *supra*, of weighing the gravity of the public concern in highway safety served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. The record contains no evidence that this balancing analysis was performed by the trial court. Instead, the State urges us to uphold a vehicular stop prompted by ignorance on the part of a law enforcement officer regarding the proper location for a vehicle-registration decal. The record does not show how this result is consistent with the Fourth Amendment's guarantee that motorists traveling the open highways will be free from unreasonable seizure. It also fails to show how the unbridled and random discretion of a police officer in the field in this context outweighs the protection from unreasonable seizure that the Fourth Amendment guarantees every motorist. Furthermore, the State does not explain why it is necessary for us to uphold this unbridled discretion by police officers to make random stops of motorists who travel the highways of Arkansas in similar situations when less intrusive methods of ascertaining whether a vehicle is properly registered exist that are equally effective in addressing the officers' concern for highway safety, pose no unreasonable threat to the legitimate privacy interests of motorists, and expose the officers to no risk of danger.

Deputy Smith's candid admission that appellant's vehicle was not operating unsafely and that he observed nothing suspicious about its occupants proves that the *Brown* balancing process should have been resolved in appellant's favor had the trial court employed it. Moreover, that explanation clearly shows the unsoundness of justifying the stop as an arrest under Ark. R. Crim. P. 4.1(a)(iii). Whatever else probable cause for a warrantless arrest has been understood to mean, no one has ever persuaded an Arkansas court that probable cause to make an arrest is established without proof that the law has been broken.

[redacted] Law enforcement officials can fulfill their legitimate highway-safety responsibilities without abusing the freedom that we cherish in being left alone. The result below is not consistent

with the Fourth Amendment, does not comport with case law dealing with the subject, violates Rules 2.1 and 3.1 of the Arkansas Rules of Criminal Procedure, and would render the reasonable-cause standard contained in Rule 4.1 for upholding warrantless arrests meaningless.

Reversed and remanded.

ROBBINS, C.J., AREY and ROAF, JJ., agree.

PITTMAN and MEADS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I respectfully dissent because I believe Deputy Smith's stop of the appellant's vehicle was reasonable under the facts of this case.

Arkansas law concerning probable cause for arrest is well established. "Probable cause" to make an arrest without a warrant exists when the facts and circumstances within the knowledge of the officer are sufficient to warrant a man of reasonable caution to believe that an offense has been committed by the person to be arrested. *Friend v. State*, 315 Ark. 143, 865 S.W.2d 275 (1993). Such probable cause does not require the degree of proof sufficient to sustain a conviction; however, there must be more than a strong suspicion. *Id.* In assessing whether probable cause exists, our review is liberal rather than strict. *Baxter v. State*, 324 Ark. 440, 992 S.W.2d 682 (1996). The court looks to the officer's knowledge at the moment of arrest to determine whether probable cause exists. *Id.*; *Friend v. State, supra.*

Therefore, the only facts pertinent to the existence of probable cause were those known to Deputy Smith at the time that he stopped the vehicle in which appellant was a passenger. Deputy Smith testified that he did not see a license-registration decal on the vehicle, and particularly on the license plate as required under Arkansas law. Ark. Code Ann. §§ 27-14-1005 and 27-14-1018 (Repl. 1994). In addition, Arkansas law provides that a nonresident's vehicle represented to be licensed and registered in another state may be driven in Arkansas only if the vehicle's licensing and registration does, in fact, comply with the out-of-state's applicable licensing law. Ark. Code Ann. § 27-14-704(a) (Repl. 1994). Given the circumstances of this case, I submit that Deputy Smith's mistake of a foreign jurisdiction's law concerning the display of a

motor-vehicle-registration decal was reasonable. Deputy Smith is a county law enforcement officer in a rural area, Lawrence County. Lawrence County is not located near the Arkansas-Texas border.[1] Moreover, when Deputy Smith stopped appellant's vehicle it was not traveling along a major interstate highway, and nothing in the record suggests that Texas motorists commonly drive through Lawrence County. In a remarkably similar case, the California Court of Appeals stated that:

> [Law enforcement officers have] a duty to insure that the vehicles which operate on our state highways are fit for operation and that the license and vehicle registration requirements are met. *See Delaware v. Prouse*, [440 U.S. 648, 658 (1979)]. The registration requirement and the reinspection sticker are designed to keep dangerous cars off the highway. Moreover, it is unlawful to operate an out-of-state vehicle on our streets which is not registered in the foreign state . . . or if properly registered in that state, is not re-registered in [our state] within twenty days of the owner . . . establishing his residency. . . . An officer cannot reasonably be expected to know the different vehicle registration laws of all the sister states. A proportionately few persons from New Jersey regularly visit this state by vehicle. . . . We conclude that the New Jersey Vehicle Code is not something the officer is reasonably expected to know or has an opportunity to routinely enforce.

People v. Glick, 250 Cal. Rptr. 315, 319 (Cal. App. 1988); *see also State v. Baer*, 776 P.2d 876 (Or. App. 1989) (Oregon police officer who stopped automobile displaying only one South Dakota license plate had probable cause to do so notwithstanding his admission that he had no knowledge of South Dakota law; South Dakota required that vehicles display two license plates, one on the front of the vehicle and one on the rear).

I believe that the above-cited cases fit the circumstances of appellant's stop more precisely than do those cited by the majority and for this reason I respectfully dissent.

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[1] This court may take judicial notice of the map of the State and of distances between places on the map. *Van Dalsen v. Inman*, 238 Ark. 237, 239, n.1, 379 S.W.2d 261 (1964).

MEADS, J., joins in this dissent.

Rebecca and Michael GREGG *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 97-22 952 S.W.2d 183

Court of Appeals of Arkansas
Division III
Opinion delivered September 24, 1997

Osmon, Chism & Ethredge, P.A., by: *Kerry D. Chism*, for appellant.

No response.

MARGARET MEADS, Judge. This is an appeal from an order of the Baxter County Juvenile Court granting appellee's petition for termination of parental rights. Appellant Rebecca Gregg is the natural mother of L.G., a male minor child, born August 2, 1995. Appellant Michael Gregg is the husband of Rebecca Gregg and the child's legal father.

Initially, we note with chagrin that appellee did not file a brief in this case; thus, we must rely solely on appellant's abstract and brief. In a matter of such importance as the termination of parental rights, for which the Department of Human Services has exclusive authority, we find it unconscionable that DHS elected not to file an appellee's brief.

Appellant's brief reveals that on October 3, 1995, Mrs. Gregg took L.G. to Baxter County Regional Hospital where a skeletal survey revealed multiple fractures of the collarbones, legs, forearms, and ribs. Appellee filed a petition for emergency custody which alleged that L.G. was at imminent risk and should be removed from appellants' custody. At an ex parte hearing held October 5, the court found probable cause to believe the child was dependent-neglected, ordered his immediate removal from appellants' custody, and placed him in appellee's custody. After an adjudication hearing held November 6, 1995, the court entered an order finding L.G. to be dependent-neglected and further find-

ing that L.G.'s injuries were severe and consistent with Child Maltreatment Syndrome.

On December 4, 1995, appellee filed a Petition for Termination of Parental Rights alleging that L.G. was the victim of neglect or abuse perpetrated by appellants that endangered his life. On May 10, 1996, appellee filed a Court Report for Hearing which stated in part:

> Despite their dependability and appropriate demeanor, there is still strong concern for L. G. or any child in the care of Michael and Rebecca because it was this same conduct that took place while L. G. was subjected to 18 fractures between 08/25/95 and 10/03/95. This was a period of time that Rebecca and Michael were receiving supportive services and seemed very appropriate to all workers that they had contact with and yet extreme severe physical abuse was being inflicted on a very young infant.
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> . . . .
>
> Rebecca and Michael's attorney had advised the couple not to submit to psychiatric evaluations so our knowledge of this couples' mental makeup is limited. We do know that they present a very "normal" behavior to our workers. However, some very abnormal violent behavior took place in their home behind closed doors, with little L. G. as the victim.

After a hearing held June 17, 1996, the trial court entered an order finding appellee had proved, by clear and convincing evidence, that L.G. was a victim of neglect or abuse that could endanger his life; that L.G. sustained multiple fractures over a period of two to three weeks evidencing Battered Child Syndrome; and that these injuries were perpetrated by Rebecca "and/or" Michael Gregg. Appellants' parental rights were terminated, and appellee was authorized to consent to the adoption of the minor child without notice to or consent of appellants.

■ ■ Grounds for termination of parental rights must be proved by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b) (Supp. 1995). Clear and convincing evidence is that degree of proof which will produce in the factfinder a firm conviction as to the allegation to be established. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). When the burden of proving a disputed fact is by "clear and convincing" evidence, the

question on appeal is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Freeman v. Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987). In resolving this question we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Beeson v. Arkansas Dep't of Human Servs.*, 37 Ark. App. 12, 823 S.W.2d 912 (1992). 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. *Hardison v. Jackson*, 45 Ark. App. 49, 871 S.W.2d 410 (1994). Our case law is clear that termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents; however, parental rights will not be enforced to the detriment or destruction of the health and well being of the child. *Corley v. Arkansas Dep't of Human Servs.*, 46 Ark. App. 265, 878 S.W.2d 430 (1996).

Appellants argue the chancellor's finding that appellee proved by clear and convincing evidence that L.G. was the victim of neglect or abuse perpetrated by appellants is clearly erroneous. Appellants do not argue that the child was not abused, but only that there were other persons who had access to the child who could have inflicted the abuse.

At the June 17, 1996, hearing on appellee's petition, Dr. Perry Wilber, a pediatrician, testified that L.G. was brought into the emergency room on October 3, 1995, because he was inconsolable and would not stop crying. A skeletal survey revealed multiple fractures of the collarbones, legs, arms, and ribs that were in various stages of healing. A physical examination revealed some dime-sized brownish bruises on the lower back to the right of the spine.

Dr. Wilber testified there was no medical problem that could have caused the fractures; the history related by the mother was the child had been crying and fussy, irritable, and inconsolable unless held upright; and the emergency room record stated that the mother said "he" fell with the child two weeks prior, but the child did not start crying until Sunday. Dr. Wilber testified in detail about the fractures. He testified that the left forearm bones

were completely separated in an acute fracture, and the bones would have required a forceful injury to be cleanly broken like that; that it is unusual to find fractures above and below the knee because those are non-weight-bearing areas in a baby, and also unusual to find fractures around the ankle in non-ambulatory children; and that the blow which caused the rib injuries had to be "pretty hard," harder than the force used in doing CPR.

Dr. Wilber testified further that the injuries had occurred within the past month, since they were not present on a skeletal survey done a month previously, when L.G. was hospitalized with hemorrhages in his eyes and some peculiar hemorrhages on his fingers. Rebecca's explanation for those injuries was that L.G. rolled off the couch while in Michael's care. Dr. Wilber testified that he did not see how that could have happened, because a month-old baby does not project himself off a couch.

Based on the unexplained crying, the x-rays, and the various ages of the fractures, Dr. Wilber believed L.G. had been physically abused. He testified that he was and still is concerned about L.G., because his injuries were severe and potentially life threatening.

Dr. Robert Foster, an orthopedic surgeon, testified that L.G.'s injuries presented a classic case of child abuse, which can be life threatening; that the injuries could not have been caused accidentally; and that L.G has had no new fractures since he has been out of appellants' home.

Cheryl Munson, a caseworker for appellee, testified that she recommended terminating appellants' parental rights even though the Greggs had complied with everything she told them to do. She had a problem leaving L.G. with appellants because he had suffered over thirteen fractures during the period they were receiving services from appellee, during which time their behavior always seemed appropriate. Ms. Munson testified it was her opinion that appellants had injured the infant because Michael admitted grabbing him by the leg to keep him from dropping, tripping in the bedroom and falling on the floor with him, and leaving him on the sofa just before he fell off. She also believed appellants had injured L.G. because the health-care professionals believed that the nature of his injuries presented a classic case of child abuse. Ms.

Munson testified that L.G. was subjected to severe physical abuse while in appellants' care which was perpetrated by "one of two" people. She did not believe that Angela Rowden, a babysitter, inflicted the injuries.

Appellant Rebecca Gregg testified that L.G. had been watched by her in-laws, and by Angela Rowden and Angie Gibson. She could not say that the babysitters could not have injured L.G. She stated she had never harmed L.G.; that she did not believe Michael would intentionally hurt L.G.; and that she believed Michael accidently hurt L.G.

However, Rebecca also testified that Michael dropped L.G. and caught him by the leg, bumped L.G.'s head on the bedroom wall, and fell with L.G. She said she had told the police that she was never around when Michael had anything happen to L.G.; that she would come home sometimes and find a bruise on L.G. which neither she nor Michael could explain; and whenever anything bad happened with L.G., she was either asleep or not at home. She said Michael is "clumsy." Rebecca testified further that she continued using Angela Rowden as a babysitter even though she thought Angela Rowden might have dropped L.G.

Appellant Michael Gregg testified that he had accidently injured L.G. when the infant "got loose from my arm" and he caught L.G.'s leg before the infant hit the floor; when he bumped L.G.'s head against the wall after picking him up to go out the door; and when he fell forward while holding L.G. He said he did not go to the hospital after falling with L.G. because the infant was able to move his arms and legs, and he did not call the doctor when he hit L.G.'s head even though it was bruised. He also testified that L.G. rolled off the couch while in his care when he left him unattended for two to four minutes. Michael had no other explanation for the fractures.

At the conclusion of the hearing, the chancellor stated that Michael Gregg had indicated four instances where something had happened to L.G. while in his custody, and the incident in which Michael fell forward could not have accounted for all of L.G.'s broken bones. It might have accounted for some of the broken ribs or leg fractures, but did not account for the difference in the

age of the injuries or for the extremities that were injured. He had never seen that kind of damage done to a child in that earliest period of its life. In terminating appellants' parental rights, the chancellor said there "has never been a decision that this Court made that the Court makes with more confidence than this one," and he could not in good conscience ever allow L.G. to return and be subjected to "this kind of unbelievable situation."

After a thorough review of the record we are not left with a definite and firm conviction that a mistake has been made. On the evidence before us, we cannot say the chancellor's findings are clearly erroneous.

Affirmed.

ROBBINS, C.J., and CRABTREE, J., agree.

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