HIGH CAPACITY PRODUCTS *v.* Gwendel L. MOORE

CA 97-880 962 S.W.2d 831

Court of Appeals of Arkansas
Division III
Opinion delivered February 25, 1998

Shackleford, Phillips, Wineland & Ratcliff, P.A., for appellant.

Denver L. Thornton, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant High Capacity Products appeals the Workers' Compensation Commission's award of benefits to appellee Gwendel Moore for a rapid repetitive injury she received while working for appellant's electrical meter-box manufacturing company. Appellant asserts there is no substantial evidence to support the Commission's findings. We disagree and affirm.

Moore, a thirty-eight-year-old woman, worked for appellant for approximately five years. She used an air gun to assemble blocks with a quota goal of one thousand units per day. She was

required to assemble each block by using an air-powered appliance to attach two nuts to each block. She would hold the parts of the unit with her left hand and work the air gun with her right hand. She averaged using the air gun to attach a nut every fifteen seconds, according to the testimony of her supervisor. The majority of her time was consumed in this quota assembly. Her job required three maneuvers to be repeated in succession all day: assembling the separate parts, using the air-compressed equipment to attach the parts together with nuts, and throwing the units into a box.

She testified she had experienced two prior injuries due to her employment with appellant and that it had accepted and paid for both instances. The injuries were strains in the same location. Neither past injury had left her debilitated to the point that she was unable to return to work at full capacity. With the more recent of those injuries, she saw the company doctor and her own doctor in August 1994 for left shoulder and neck pain. She received treatment for a cervical strain and was released to return to work. She admittedly experienced pain in her shoulder and neck between August 1994 and March 7, 1995. It was only the last incident, the one at issue before us, that appellant declined to accept.

On March 7, 1995, early on in her shift she reported neck and shoulder pain to her immediate supervisor. Her testimony reflected that she had experienced no other trauma or accident to her shoulder and neck other than the prior injury sustained at work for this employer. She testified that the routine of "just constantly working and lifting and pulling on the [air gun] machine and holding the parts" caused her shoulder and neck pain to recur to such a degree that she finally reported it on that day, March 7, 1995.

The immediate supervisor corroborated this testimony, recalling not a specific incident of injury, but only that Moore reported hurting in her left shoulder and neck. That supervisor told her to report this to the woman in higher command. That person told Moore to go to her family physician, not the company doctor.

Moore did see her physician, Dr. Pinkerton, on March 10th, and he diagnosed a cervical strain. He began conservative treatment of her injury, including physical therapy, and ordered an MRI for evaluation of her cervical problem. The MRI revealed spondylosis, a degenerative condition related to use and age, but no significant cervical findings for purposes of her complaints. He took her off work on April 7, 1995.

On April 20, 1995, she was referred to a neurosurgeon, whose examination revealed a two-thirds capacity in the range of motion of her neck. His opinion was that she suffered a cervical strain, and he too recommended physical therapy. By June 1995, she had seen an orthopedic surgeon. His evaluation was that she had a cervical muscular/ligamentous injury that could take weeks or months to resolve. Another physician evaluated her for potential trigger point injections for relief. When seen by Dr. Jacob Abraham at The Pain Clinic, he diagnosed chronic myofascial cervical pain. She continued to see Dr. Abraham off and on until September 6, 1995, when he no longer had any services to offer her.

To prove a rapid repetitive motion injury, Moore had the burden of proving by a preponderance of the evidence that the injury:

(1) arose out of and in the course of her employment;
(2) caused internal or external physical harm to the body requiring medical services;
(3) was caused by rapid repetitive motion;
(4) was the major cause of the disability or need for treatment.

See Ark. Code Ann. § 11-9-102(5) (Supp. 1997); *see also Lay v. United Parcel Serv.*, 58 Ark. App. 35, 944 S.W.2d 867 (1997). The injury must also be established by medical evidence, supported by objective findings. Ark. Code Ann. § 11-9-102(5)(D) (Supp. 1997). Objective findings are those findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16) (Supp. 1997).

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the

Commission's findings and affirm if the decision is supported by substantial evidence. *White v. Frolic Footwear*, 59 Ark. App. 12, 952 S.W.2d 190 (1997). Substantial evidence is that evidence a reasonable mind might accept as adequate to support a conclusion. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). A decision of the Commission is reversed only if we are convinced fair-minded persons using the same facts could not reach the conclusion reached by the Commission. *Id.* In our review, we recognize that this court defers to the Commission in determining the weight of the evidence and the credibility of the witnesses. *Id.* The issue is not whether we may have reached a different conclusion or whether the evidence might have supported a contrary finding. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). Furthermore, on appeal to this court, we review the decision of the Commission and not that of the administrative law judge. *Thornton v. Bruce*, 33 Ark. App. 31, 800 S.W.2d 723 (1990). In this case the ALJ denied benefits and the Commission reversed that decision. We have applied this standard of review and find there to be substantial evidence to support the Commission's findings.

Given the fact that Moore testified that she suffered no other injury or trauma to her left shoulder and neck, other than the earlier compensated injuries to the same location while in the same job, the Commission had substantial evidence to find she sustained a compensable injury arising out of and in the course of her employment for appellant. Objective measurable findings included the documented moderate spasms with "large palpable triggers" on at least two doctor visits in August 1995. This court and the Commission have accepted muscle spasms as objective findings. *University of Arkansas for Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997); *see also Daniel v. Firestone Bldg. Prods.*, 57 Ark. App. 123, 942 S.W.2d 277 (1997). "Spasm" is defined in *Stedman's Medical Dictionary* 1304 (23d ed. 1976) as: "(1) An involuntary muscular contraction . . . . (2) Increased muscular tension and shortness which cannot be released voluntarily and which prevent lengthening of the muscles involved; [spasm] is due to pain stimuli to the lower motor neuron." This constitutes an objective finding pursuant to § 11-9-102(16) for

purposes of this injury. *See University of Arkansas for Med. Sciences, supra.*

Rapid Repetitive Motion

This court has had the opportunity in recent cases, not available to the Commission at the time it rendered its opinion, to develop somewhat that area of the workers' compensation law concerning what constitutes rapid repetitive motion. We think the Commission correctly applied the statutory requirement and that there is substantial evidence to support the Commission's finding that Moore's injury was caused by rapid repetitive motion. None of the cases mirror the situation and circumstances of appellee herein. Nonetheless, we believe that this is the most compelling case demonstrating rapid repetitive motion presented to this court to date. We have stated that a claimant need not prove exact or almost exactly the same movement again and again to show "rapid repetitive motion." *Baysinger v. Air Sys., Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996). Multiple job tasks, when considered together, could satisfy the statutory requirements. *Id.* There was testimony presented that her assembly duties required her to ensure one nut to be in place on an average of every fifteen seconds during the majority of her shift. We find this to be substantial evidence to support the Commission's award of benefits.

Major Cause

"Major cause" means more than 50% of the cause of the disability or need for treatment and it is established by a preponderance of the evidence presented to the Commission. Ark. Code Ann. § 11-9-102(14)(A) (Repl. 1996). Appellant asserts that an expert, meaning a physician, must state what the major cause was. However, the legislature did not so limit the acceptable evidence that could be considered.

The Commission determined that Moore was a credible witness and believed that she had suffered no other injury to her left shoulder or neck other than due to her activities in her work for appellant. She consistently told medical providers of past injury to the same location. Appellant makes much of the fact

that her chiropractor, treating her for a subsequent automobile accident in November 1995, was unaware of her prior left shoulder and neck injury. This is irrelevant to her claim for benefits, though, since her benefits expired in September 1995.

The Commission observed that there was no evidence brought out to contradict the testimony that she suffered no other injury. Contrary to appellant, we do not believe that this observation shows an improper shifting of the burden of proof, though perhaps inartfully stated by the Commission in its opinion. The preponderance of the evidence indicated that the sole cause, therefore certainly the major cause of the disability or need for treatment, was the injury that resulted from her work activity. We cannot say the Commission erred in this respect for there is substantial evidence to support its finding.

Temporary Total Disability

Moore was awarded temporary total disability benefits from April 7, 1995, until September 6, 1995, when her healing period ended. When an injured employee is totally incapacitated from earning wages and remains in her healing period, she is entitled to temporary total disability benefits. *Arkansas State Highway & Transp. Dep't. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1991). The healing period ends when the employee is as far restored as the permanent character of the injury will permit. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The determination of when the healing period has ended is a factual one and will be upheld on appeal if there is substantial evidence to support it. *Id.* After undergoing months of physical therapy, medication, and injection treatments, no physician had any additional treatment to offer her after September 6, 1995. The Commission had evidence that the doctor who stated it could take weeks or months to recover from this cervical strain injury, orthopedist Dr. Giller, wrote this in a letter to her treating physician, Dr. Pinkerton, who had referred her to him.

She remained off work while she sought these medical treatments, so there was no need for any of the subsequent treating physicians to opine that she should be off work. Though there

was one small "RTW: 5-18-95" notation on a visit to Dr. Pinkerton, he subsequently continued to see Moore and treat her. Moore testified that she had never been released to return to work. We cannot say that Moore was not temporarily and totally disabled from the last day she worked in April 1995 until September 6, 1995, when no further treatment could help her.

Affirmed.

CRABTREE, J., agrees.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I concur in the affirmance of this case because I believe it is the province of the Commission, under the law, to decide if the appellee's injury was a gradual onset injury and the major cause of her current disability and need for treatment. However, I am disturbed by a few aspects of the Commission's opinion.

First, I am bothered by the dearth of findings of the ALJ and the Commission. But in reading the Commission's opinion, it appears to me that it is implicit in the decision that appellee's need for treatment was compensable. I am also concerned by the fact that the Commission did not state with more certainty appellee's recurrence of shoulder pain that had twice before been treated as compensable by the company and was caused by the motions of pulling and lifting the air gun.

In addition, I find the Commission's reliance on the lack of evidence that appellee had no other trauma or accident troubling. It appears that the Commission shifted the burden of proving a compensable injury from the claimant to the employer. However, the Commission found appellee's testimony credible and concluded that she sustained a gradual onset injury which was caused or aggravated by the physical tasks required in her job. I certainly cannot say that there is no substantial evidence to support the Commission's decision.

JOCON, INC. *v.* Paul HOOVER, Jr., and Dan Robinson, Jr.

CA 97-732 964 S.W.2d 213

Court of Appeals of Arkansas
Division III
Opinion delivered February 25, 1998

[redacted]

Floyd A. Healy, for appellant.

Cearley Law Firm, P.A., by: *Robert M. Cearley, Jr.*, for appellees.

JOHN B. ROBBINS, Chief Judge. This case involves an initial construction contract, a breach of that contract, a second contract concerning the repair of a parking lot that was built pursuant to the initial contract, the breach of the second contract, and the amount of money that the nonbreaching party is entitled to recover as damages. Appellant Jocon, Inc., a corporation engaged in the construction business as a contractor, appeals the Pulaski County Circuit Court's judgment in which the court awarded appellees, Paul Hoover, Jr., and Dan Robinson, Jr., damages of $7,611.71 and attorney's fees for the breach of a construction contract and as a consequence of appellant's breach of a subsequent contract to repair the damaged and deteriorated portions of a parking lot that appellant had previously constructed on commercial property owned by appellees. We affirm the circuit court's judgment as modified.

In February 1995, appellant and appellees entered into a contract whereby appellant agreed to construct a warehouse and parking lot on property owned by appellees in return for a payment of $108,491. After appellant completed construction of the warehouse and the parking lot, problems developed with the part of

the parking lot where a dumpster was situated. In this area, the asphalt used to construct the parking lot began to deteriorate, and this area was damaged by heavy trucks driving to and from the dumpster.

Because of these problems with the parking lot, appellees retained $2,519.10 of the $108,491 that was due to appellant under the original contract. On May 13, 1996, the parties entered into a second contract. This second contract had to do with repair of the deterioration and damage to the parking lot. Pursuant to the provisions of this agreement, appellant agreed to provide the equipment and labor necessary to repair the parking lot and appellees agreed to pay for all the materials necessary to complete the repairs. Appellant began repair of the parking lot by subcontracting with an excavation contractor, who used a bulldozer and backhoe to excavate to a depth of approximately two feet in the damaged areas of the parking lot. At this point, appellant was to fill in the excavated area with gravel and then pave over the gravel with asphalt. However, appellant did not do any further repair work on the damaged areas of the parking lot. Appellees completed the repair work and incurred $10,130.81 in expenses.

In January 1996, appellant filed suit against appellees in order to recover the payment that appellees owed on the initial construction contract, which appellant alleged was $5,000. Appellees filed an answer in which they denied that they owed appellant any money in connection with the initial contract. Appellees also filed a counterclaim in which they alleged that appellant had breached the February 1995 contract and that they were entitled to damages in an amount to be proven at trial. However, during pretrial discovery, appellees admitted, in response to appellant's request for admissions, that they had retained $5,000 of the payment they owed appellant on the initial construction contract.

Appellant brings four allegations of error. According to appellant, the circuit court erred in finding that appellees had retained $2,519.10 of the amount that they owed appellant pursuant to the initial contract and erred further in determining appellees' damages by subtracting this figure from appellees' total cost to repair the parking lot. Appellant also asserts that the circuit

court erred in finding that it breached the May 13, 1996, contract whereby it agreed to provide the equipment and labor to repair the deteriorated and damaged areas of the parking lot. Appellant also maintains that the circuit court erred in determining that the damages appellees were entitled to after they completed the repair of the parking lot included the cost of the materials used to make the repairs. Finally, appellant asserts that the circuit court erred in awarding appellees attorney's fees of $3,500.

For its first allegation of error, appellant asserts that the circuit court erred in determining the amount of damages to which appellees were entitled. The circuit court found that appellees were entitled to damages of $7,611.71. The court arrived at this figure by deducting from appellees' total expenditure to complete the repair of the damaged and deteriorated portions of the parking lot, which was $10,130.81, the amount of money that appellees retained from the payment they owed appellant on the initial construction contract, which the parties had entered into in February 1995. The circuit court found that the appellees had retained $2,519.10 of the amount that they owed appellant pursuant to the initial construction contract. The circuit court found that the appellee were entitled to damages of $7,611.71, which is the remainder of $10,130.81 minus $2,519.10.

Appellant asserts that the trial court's calculation of appellees' damages is in error in that the circuit court should have subtracted from $10,130.81, the appellees' total cost to repair the parking lot, $5,000, rather than $2,519.10. Appellant maintains that the circuit court should have determined appellees' damages by subtracting $5,000 because this was the amount that the appellees retained from the payment they owed appellant on the initial contract. Appellant asserts that the appellees retained $5,000, not $2,519.10, because appellees admitted, in their response to appellant's request for admissions made pursuant to Arkansas Rule of Civil Procedure 36(a), that they had withheld $5,000 of the amount they owed appellant on the initial construction contract. The request for admission and response that appellant relies on are as follows:

> Please admit that the [appellees] withheld the sum of $5,000.00 on the contract.

> Admitted, due to the fact that it appeared that parking areas were failing and that defective work and defective materials were causing the failure.

At trial, appellee Hoover testified that although appellees had admitted in pretrial discovery that they had retained $5,000 from the payment they owed appellant on the initial contract, this admission was a mistake and that they had retained only $2,519.10. However, Hoover acknowledged that he was "standing by that mistake."

Furthermore, during the trial appellees' counsel objected to a characterization by appellant's counsel that the parties had stipulated that the balance owed appellant by appellees on the original contract was $5,000. But after appellant's counsel read appellees' response to appellant's request for admission that $5,000 was withheld from the contract, appellees' counsel, Mr. Cearley, stated: "I withdraw my objection, I don't know how I can get around that. Our testimony, your Honor, will be that that was in error, and I wasn't aware there had been an admission, but we're bound by that." Appellant's position at trial, and on appeal, is that appellees were bound by their response to appellant's request for admissions that they had withheld $5,000 of the payment they owed appellant on the initial construction contract. Appellant bases this argument on the following provision of Arkansas Rule of Civil Procedure 36(b): "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

Appellant is correct in maintaining that this admission was conclusive because there was no motion seeking, or order granting, a withdrawal or amendment of the admission. Consequently, we conclude that the circuit court erred in crediting only $2,519.10 against appellees' damages, rather than $5,000. The judgment of the trial court should be modified accordingly.

Appellant also asserts that the circuit court erred in determining that it had breached the parties' May 13, 1996, contract to repair the deteriorated and damaged portions of the parking lot. Pursuant to this agreement, appellant was to provide the equipment and labor necessary to repair the parking lot, and

appellees were to pay for all materials that were used to complete the repairs. In essence, appellant maintains that the appellees breached the "repair" contract because they failed to have gravel delivered to the job site. Appellees, on the other hand, maintain that appellant breached the "repair" contract in that it failed to complete repairing the parking lot by having the excavated area filled in with gravel and by then paving over the gravel with asphalt. At trial, each party presented testimony that explained why appellant did not finish repairing the parking lot. This testimony was in conflict. Appellant's owner, Robert Jones, testified that appellee Hoover told him to contact a man named Manny Lassiter to make arrangements to have gravel delivered to the job site. Mr. Jones testified further:

> I got ahold of Manny Lassiter, and he told me that he would have to get back in touch with [Mr. Hoover] to verify it and he'd get back in touch with me, so he never got back in touch with me on that. I think I called Mr. Hoover a second couple of times [to] see if they could get the [gravel] out there and no one ever showed up with the [gravel] then and the next day, I called the man that was the manager out there [at the job site] and I asked him was the [gravel] out there and he said no, it was not there yet, so I continued to call and ask if the [gravel] was out there. After about two weeks . . . I finally decided they weren't going to be interested in putting [gravel] in there.

Appellees contradicted Jones's testimony with their own testimony and that of other witnesses, including Manny Lassiter, to the effect that they had tried to make contact with Jones concerning the delivery of gravel to the job site but were unable to do so. When asked on re-direct examination for how long had he tried to get in contact with Mr. Jones concerning delivery of gravel to the job site, Manny Lassiter replied, "I'd guess that I tried for a couple of weeks, three weeks or so, we tried to call and it got to the point where the tenant was about ready to leave . . . so we had to move in ourselves [to finish the repairs]." Given this conflicting testimony, whether appellant breached the "repair" contract was a matter of fact for the circuit court to determine. It is for the trial court, sitting as the trier-of-fact, not this court, to determine the credibility of witnesses and to resolve any conflicts in their testimony. *See Firstbank of Arkansas v. Keeling*, 312 Ark. 441, 445-46,

850 S.W.2d 310 (1993); *Fazeli v. Barnes*, 47 Ark. App. 99, 101, 885 S.W.2d 908 (1994). The trial court's finding on this issue was not clearly erroneous.

Appellant's third allegation of error also has to do with the circuit court's finding that it breached the May 13, 1996, contract between the parties pursuant to which it would provide the equipment and labor necessary to repair the damaged and deteriorated areas of the parking lot. According to appellant, the circuit court erred in determining the damages that appellees were entitled to recover as a consequence of its breach of the May 13, 1996, contract. According to appellant, even though it breached this contract, the appellees were bound by its provision requiring them to pay for the gravel, asphalt, and other material necessary to repair the parking lot. Appellant maintains that the circuit court erred in determining the damages appellees should recover by including appellees' expenditure for the materials necessary to repair the parking lot. According to appellant, even if it breached the May 13, 1996, contract, appellees were still obligated, pursuant to the contract, to pay for the materials necessary to repair the parking lot and, therefore, appellees should not recover, as damages, their expenditures for the materials.

Appellant's allegation of error is based on a faulty premise: that the appellees were bound by the provisions of the May 13, 1996, contract even though appellant had breached it. The May 13, 1996, letter agreement was in the nature of an accord, or agreement to substitute a new undertaking in settlement of the dispute over the original February 10, 1995, contract. The question that the trial court impliedly decided was whether there was satisfaction of the accord. The general rule is that if the consideration agreed upon in an accord is not performed then the whole accord fails and recovery may be had for breach of the original contract. *See General Air Conditioning Corp. v. Fullerton*, 227 Ark. 278, 282, 298 S.W.2d 61, 64 (1957); *Boone v. Armistead*, 48 Ark. App. 187, 191, 892 S.W.2d 531, 534 (1995). There are exceptions to this general rule where a *promise* to perform the accord is accepted in lieu of satisfaction, *Lyle v. Federal Union Ins. Co.*, 206 Ark. 1123, 1129-30, 178 S.W.2d 651, 654 (1944), and when a party has taken such action, or accepted such benefits, as

to place it out of his power to abandon the settlement/compromise agreement. *Boone v. Armistead, supra.* Although the trial court did not expressly find that these exceptions were not applicable, we indulge in the presumption that the trial court acted properly and made the findings necessary to support its judgment. *See Ingram v. Century 21 Caldwell Realty*, 52 Ark. App. 101, 103 n.1, 915 S.W.2d 308, 309 n.1 (1996).

After appellant breached the May 13, 1996, contract, appellees were free to undertake reasonable efforts to repair the deteriorated and damaged areas of the parking lot, which they did. Given that appellees repaired the parking lot, the appropriate measure of damages to which they were entitled as a result of appellant's breach of the original contract was the cost of the repairs. *See* Howard Brill, *Arkansas Law of Damages* 268 (3d ed. 1996).

Appellant also asserts that the circuit court erred in awarding appellees' counsel a fee of $3,500. This allegation of error is procedurally barred from our review. To preserve this allegation of error for our review, appellant should have objected at the circuit court level to the fee award. Because appellant failed to do so, we will not address this allegation of error. *Schueck v. Burris*, 330 Ark. 780, 787, 957 S.W.2d 702 (1997); *Farm Bureau Mut. Ins. Co. v. David*, 324 Ark. 387, 393-94, 921 S.W.2d 930 (1996); *Jamison v. Estate of Goodlett*, 56 Ark. App. 71, 84, 938 S.W.2d 865 (1997).

For the reasons set forth above, we affirm the judgment that the Pulaski County Circuit Court caused to be entered in the instant case in favor of appellees, but modify the amount of judgment from $7,611.71 to $5,130.81 and attorney's fees.

Affirmed as modified.

ROGERS and CRABTREE, JJ., agree.

AMERICAN GREETINGS CORPORATION, et al. *v.*
Pam GAREY

CA 97-590 963 S.W.2d 613

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered February 25, 1998

[redacted]

Rieves & Mayton, by: *W. Terry Smith, Jr.*, for appellants.

William Lee Fergus, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellee, who was born without any fingers on her right hand, filed a workers' compensation claim on December 6, 1993, alleging that she developed numbness and pain in her left hand while working for the appellant employer. The employer accepted the claim as compensable, but ultimately denied medical expenses and benefits associated with the evaluation and treatment of Dr. Phillip Wright, asserting that he was not an authorized physician and that his treatment was not reasonably necessary. After a hearing, the Commission found that appellee was properly referred to Dr. Wright, that the treatment provided by Dr. Wright was reasonable and necessary, and that appellee was entitled to temporary total disability benefits for the period during which Dr. Wright removed her from work. From that decision, comes this appeal.

For reversal, appellants contend that the evidence does not support the Commission's findings that Dr. Wright's treatment is reasonably necessary; that Dr. Wright's treatment resulted from a valid referral; or that appellee was entitled to temporary total disability benefits for the six-week period that Dr. Wright removed her from work. We affirm.

In determining the sufficiency of the evidence to support the findings of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we will affirm if those findings are supported by substantial evidence. *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Nelson v. Timberline International, Inc.*, 57 Ark. App. 34, 942 S.W.2d 260 (1997). The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Min-Ark Pallet Co. v. Lindsey*, 58 Ark. App. 309,

950 S.W.2d 468 (1997). 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. *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997).

Viewing the evidence, as we must, in the light most favorable to the Commission's findings, the record reflects that appellee, who was 37 years old at the time of the hearing, was employed by appellant employer for seven years filling orders. Although she was born without any fingers on her right hand, she was considered to be an exemplary worker and fulfilled her production quota without difficulty for the first five years of her employment. After working in this capacity for five years, however, she began experiencing numbness and pain in her left hand, which became progressively worse until she was taken completely off work for six weeks on the recommendation of Dr. Wright. This six-week cessation of all hand activity greatly improved appellee's condition.

■ ■ Arkansas Code Annotated § 11-9-508(a) (Repl. 1996) requires employers to provide such medical services as may be reasonably necessary in connection with the employee's injury. What constitutes reasonably necessary treatment under this section is a fact question for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984). In the case at bar there was evidence that Dr. Wright was a qualified specialist in whom appellee had confidence and that his recommendations greatly improved appellee's worsening condition. Given this evidence, we cannot say that the Commission erred in finding his services to be reasonably necessary in connection with appellee's compensable injury.

■ ■ Nor do we agree with appellants' argument that the Commission erred in finding that appellee was referred to Dr. Wright. Under Ark. Code Ann. § 11-9-514(b) (Repl. 1996), routine treatment by a physician other than the claimant's authorized treating physician shall be at the claimant's expense. However, this section is inapplicable if the authorized treating physician refers the claimant to another doctor for examination or treatment. *See Electro-Air v. Villines*, 16 Ark. App. 102, 697 S.W.2d

932 (1985). We held in *Electro-Air* that a referral had indeed occurred where the evidence showed that a claimant's treating physician had referred her to a psychiatrist, despite the fact that the Commission had improperly labeled it a change of physician. In *White v. Lair Oil Co.*, 20 Ark. App. 136, 725 S.W.2d 10 (1987), we again held that a treating physician referring his patient to a specialist constituted a valid referral rather than an unauthorized change of physicians. The situation in the case at bar is virtually identical. Appellee's treating physician, Dr. Woloszyn, recommended that appellee obtain continued care from a hand specialist, and provided her with the names of two qualified specialists in that field: Dr. Wright and Dr. Bourland. Appellee obtained treatment from Dr. Wright based on this recommendation. We hold that this constitutes substantial evidence to support the Commission's finding that appellee was referred to Dr. Wright.

Finally, appellants contend that the Commission erred in finding that appellee was entitled to temporary total disability benefits for the six weeks she was removed from work by Dr. Wright. 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). Arkansas Code Annotated § 11-9-102(13) (Repl. 1996) defines "healing period" as that period for healing of an injury resulting from an accident. The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Carroll General Hospital v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The determination of when the healing period has ended is a factual determination for the Commission which will be affirmed on appeal if supported by substantial evidence. *Id.* Here there was evidence that appellee suffered from overuse syndrome affecting her left hand, a condition that improved after she stopped using her hand altogether for six weeks on the recommendation of Dr. Wright. Although there was evidence to the

contrary,[1] questions of weight and credibility are within the sole province of the Workers' Compensation Commission, *Min-Ark Pallet Co. v. Lindsey*, *supra*, and we cannot say that there is no substantial evidence to support the Commission's finding.

Affirmed.

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

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I agree that the first two points on this appeal should be affirmed (i.e., that substantial evidence supports the Workers' Compensation Commission findings that: (1) medical treatment recommended and provided by Dr. Phillip Wright was reasonably necessary; and (2) that appellee was referred to Dr. Wright by Dr. John Woloszyn). However, I believe that the Commission should be reversed on the third point because the finding that appellee is entitled to temporary total disability (TTD) benefits for the six-week period following August 22, 1995, is not supported by substantial evidence.

Because of a birth defect, Pam Garey has no fingers on her right hand. She worked for American Greetings as an order filler in the Osceola plant for five-and-a-half years before she began experiencing numbness in her left hand. That condition worsened over time, and was diagnosed as an overuse syndrome of her left hand. Surgery is not indicated based upon repeated neurological examinations and tests, but job reassignment to work that does not require chronic repetitive use of the hand was recommended by Dr. Woloszyn. That approach worked until one of appellee's supervisors assigned her back to repetitive work which caused her symptoms to worsen. Her doctor directed that the job restrictions be followed, and that she remain off work for six weeks after appellee and her husband suggested that course of action to him.

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[1] There was evidence to support the narrative and conclusions presented by the dissent. However, the issue on appeal is not whether the evidence would have supported a contrary finding. *White v. Frolic Footwear*, 59 Ark. App. 12, 952 S.W.2d 190 (1997). The findings that the Commission actually made are supported by substantial evidence; consequently, we must affirm. *Id.*

We held in *Mad Butcher v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), that TTD benefits are awarded only for the period of time when a worker is within her healing period and is incapable of earning wages. The healing period is that time when the body is healing and an employee is unable to perform remunerative labor with reasonable consistency without pain and discomfort. In *Mad Butcher*, we stated that the mere persistence of pain does not prevent a finding that the healing period has ended so long as the underlying condition has stabilized. *Id.*

Mad Butcher requires us to reverse the Commission on two fronts. First, when Dr. Wright agreed that appellee could remain off work for six weeks beginning August 22, 1995, there was no evidence that the underlying character of her overuse condition had not stabilized. As early as February 15, 1995, Dr. Woloszyn confirmed that repeat neurological studies demonstrated no appreciable difference in appellee's condition from what it had been a year earlier, and that she simply needed retraining for work that did not require chronic repetitive use of her hand. In an April 5, 1995, letter, Dr. Woloszyn verified that appellee was not entitled to a permanent impairment rating because there were no objective findings to support it, and that appellee's symptoms diminish when she is assigned to different work. He then indicated that he had no additional treatment to offer. By letter dated May 21, 1995, Dr. Woloszyn agreed to work restrictions proposed by the employer and indicated that the restrictions were permanent. Thus, there is no proof that the underlying character of appellee's condition was not stable or was in the process of improving in August 1995 when Dr. Wright directed her to take six weeks away from work.

Secondly, there is no proof that appellee was totally incapacitated from earning wages during the six-week period after August 22, 1995. Aside from the previously referenced reports from Dr. Woloszyn, the record shows that appellee was working at a job that he approved when she suggested to Dr. Wright that she take six weeks off.

I would reverse the award.

William KIMBLE *v.* STATE of Arkansas

CA CR 97-821 965 S.W.2d 139

Court of Appeals of Arkansas
En Banc
Opinion delivered February 25, 1998

James Marschewski, Public Defender, Twelfth Judicial District, for appellant.

Didi Sallings, Executive Director, Public Defender Commission, for appellee.

JOHN MAUZY PITTMAN, Judge. Mr. James Marschewski, Public Defender for the Twelfth Judicial District and attorney for the appellant, has filed this motion seeking leave to withdraw as counsel. He seeks to have the recently created Capital, Conflicts, and Appellate Office of the Arkansas Public Defender Commission appointed as counsel for appellant. As grounds for his motion, Mr. Marschewski cites his office's heavy caseload and limited resources.

Mr. Marschewski failed to serve a copy of his motion on the Capital, Conflicts, and Appellate Office. Therefore, we ordered our Clerk to serve that office. The Executive Director of the Public Defender Commission has now responded. She denies that Mr. Marschewski's motion should be granted, asserting that the Capital, Conflicts, and Appellate Office is afflicted with its own substantial caseload and limited resources.

Our supreme court was recently faced with an identical motion from Mr. Marschewski's office in the case of *Efurd v. State*, CR97-1208. That motion was denied without comment on January 29, 1998. Inasmuch as the two motions are indistinguishable from one another, and in light of the circumstances faced by the

Capital, Conflicts, and Appellate Office, we are not persuaded that the motion before us should be granted.

Motion denied.

ROBBINS, C.J., and JENNINGS, BIRD, and STROUD, JJ., agree.

ROGERS, CRABTREE, and ROAF, JJ., concur and would deny the motion without comment.

AREY, NEAL, GRIFFEN, and MEADS, JJ., dissent.

D. FRANKLIN AREY, III, Judge, dissenting. The Sebastian County Public Defender requests permission to withdraw from this case, alleging that "it is impossible [for him] to provide representation that meets constitutional requirement." The public defender explains that his office is understaffed when compared to public defenders in other districts, due to an inequitable allocation of public defenders by the Public Defender Commission. For the reasons explained below, I believe this motion deserves greater attention than it receives from our court.

An analysis of our duty to act in this area should begin with the separation of powers provisions of the Arkansas Constitution.

> The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another.
>
> No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Ark. Const. art. 4, §§ 1, 2. The judicial power of Arkansas is vested in its appellate, trial, and inferior courts. *See* Ark. Const. art. 7, § 1. Our supreme court has the exclusive power to regulate the practice of law and the professional conduct of attorneys. Ark. Const. amend. 28.

The appointment of a public defender to represent indigent defendants is a power reserved to the judicial branch. *See Ball v.*

Roberts, 291 Ark. 84, 722 S.W.2d 829 (1987); *Mears v. Hall*, 263 Ark. 827, 569 S.W.2d 91 (1978). "The Constitution of the State of Arkansas requires *the court* to appoint counsel for indigent defendants." *State v. Post*, 311 Ark. 510, 520, 845 S.W.2d 487, 492 (1993)(emphasis supplied).

In *Ball*, our supreme court reviewed the constitutionality of a statute excluding certain attorneys from eligibility for court appointment to represent indigents. After reviewing the constitutional provisions cited above, our supreme court stated:

> The right to decide whether an attorney, who regularly practices before a court, can be appointed to represent an indigent in a criminal case is a judicial question, not a legislative one. Ark. Const. art. 4, §§ 1 and 2; Ark. Const. amend. 28; . . . . The legislature invaded the province of the judicial branch of government in declaring certain attorneys could not be appointed as counsel in a criminal case.

Ball, 291 Ark. at 86-87, 722 S.W.2d at 830 (citations omitted). Because of the procedural posture of the case, our supreme court denied relief to the attorney challenging his appointment. *Id.*

In *Mears*, our supreme court reviewed the propriety of the establishment of a public defender system in the Sixth Judicial District. The system was created when, acting pursuant to state statute, two circuit judges entered an order continuing the operation of the existing public defender system. Our supreme court quoted with approval an opinion of the Supreme Court of Colorado.

> The appointment of a public defender does not differ significantly from the appointment of private counsel in an individual criminal case. Indeed, the appointment of a public defender is of greater benefit to a defendant who is thereby provided counsel who is employed solely in criminal defense work.

Mears, 263 Ark. at 842, 569 S.W.2d at 99 (quoting verbatim from *People v. Mullins*, 188 Colo. 29, 532 P.2d 736 (1975)). Our supreme court rejected the argument that the appointment of a public defender is an executive function. "The appointment of a public defender is no more an executive function than is the appointment of an attorney to represent an indigent in an individual case." *Mears*, 263 Ark. at 843, 569 S.W.2d at 99.

In this regard, it is interesting to note Attorney General Opinion No. 97-106 (July 9, 1997). The executive director of the Public Defender Commission posed the following question: "Does the Capital, Conflicts, and Appellate Office have the authority to refuse appointment in capital murder cases?" The Attorney General first reviewed the provisions of Ark. Code Ann. § 16-87-205, which sets forth the situations in which the Office is to be appointed. He concluded as follows:

> If the provisions of . . . § 16-87-205 regarding the Capital, Conflicts, and Appellate Office were construed as allowing any entity other than the court to make the final determination regarding appointment of defense counsel, the statute would be unconstitutional under the holding of *Ball v. Roberts*. Statutory provisions are presumed to be constitutional and must be construed constitutionally if such a construction is possible. I must therefore construe. . . § 16-87-205 as allowing the court to make the final determination, having considered the information presented by the Capital, Conflicts, and Appellate Office regarding its ability to accept the case in question.

Ark. Op. Att'y Gen. 97-106 at 3 (July 9, 1997)(citation and footnote omitted).

In light of the foregoing, the Sebastian County Public Defender's motion deserves our serious consideration. The issue he raises — the provision of counsel for indigent defendants — is a question within the province of the judiciary. The fact that the legislature may have established a public defender system does not remove the ultimate control of this matter from the judicial branch of government. *See Ball, supra*; *Mears, supra.*

We should certify this motion to the supreme court, as involving an issue of substantial public interest. *See* Ark. R. Sup. Ct. 1-2(a)(17). Our supreme court has general superintending control over the administration of justice in all courts in this state. Ark. Code Ann. § 16-10-101(a) (Repl. 1994). Because this motion raises significant questions concerning the provision of counsel for indigent defendants and the allocation of public defenders among the various judicial districts, it should be submitted to the supreme court for its consideration.

We should not be deterred by the supreme court's denial of a similar motion. That denial could easily have been grounded on something other than a disposition on the merits.

Failing certification, the motion deserves a closer look than the prevailing disposition provides. The Sebastian County Public Defender complains that "inequity in the allocation of public defender positions" has caused his inability to maintain his workload, and to provide the representation that is constitutionally mandated. We do not have a sufficient factual basis to determine whether this is true. If we are not going to certify this matter to the supreme court, we should remand it to the trial court so that a record can be developed concerning the public defender's workload and his ability to serve on appeal as the counsel guaranteed by the United States and Arkansas Constitutions. *Cf. Sanders v. State*, 330 Ark. 851, 956 S.W.2d 868 (1997) (indicating that the supreme court remanded a case to a trial court to conduct a hearing concerning an attorney's obligation to represent a defendant on appeal; after the trial court made its findings, the supreme court disposed of the matter).

NEAL, GRIFFEN, and MEADS, JJ., join.

Wade LUCAS *v.* Tanya GRANT

CA 97-890 962 S.W.2d 388

Court of Appeals of Arkansas
Division IV
Opinion delivered February 25, 1998
[Petition for rehearing denied March 25, 1998.]

Michael Knollmeyer, for appellant.

Lovell & Nalley, by: *John Doyle Nalley*, for appellee.

JOHN MAUZY PITTMAN, Judge. Wade Lucas has appealed from an order of the Saline County Chancery Court denying his petition to establish a constructive trust or an equitable lien on real property held by the Estate of Myra Lucas. We affirm the chancellor's decision.

Appellant married Myra Lucas in January of 1989, after living with her for approximately eight months. On December 30, 1988, the real property in issue was conveyed by warranty deed to Myra, who gave a mortgage to Superior Federal Bank to secure a

$20,000.00 note of the same date. Myra signed the mortgage as an unmarried person and was the only person to sign the note. On August 17, 1989, Myra signed a quitclaim deed to the same property to herself and appellant as husband and wife. On December 6, 1989, Myra and appellant signed a quitclaim deed of the property to Myra.

Myra died intestate on February 26, 1994, survived by appellant and her two daughters, Linda Brown and Tanya Grant. Myra's estate sought authority from the probate court to sell the decedent's home. Appellant filed a counterclaim, contending that he was the equitable owner of the home and asking the court to impose a constructive or resulting trust or equitable lien. The probate court denied the counterclaim, and on appeal to this court, we held that the probate court lacked jurisdiction to decide the merits of the counterclaim. *See Lucas v. Brown*, No. CA95-634 (November 27, 1996).

On February 28, 1997, appellant filed a petition in the Saline County Chancery Court, asking the court to impose a constructive trust or equitable lien on the property. By agreement, the parties submitted the record from the probate court as the record in this case.

Appellant testified that he had provided $61,000.00 of the house's purchase price, which was $69,000 plus cancellation of a $2,000.00 debt that the sellers owed to Myra. Appellant testified that a portion of the $20,000.00 loan from the bank went toward the purchase price of the house. Appellant stated that he had caused the deed to be placed in Myra's name because he owed the Internal Revenue Service approximately $30,000.00 and because his ex-wife had recently obtained a $15,000.00 judgment against him. He said that he and Myra had a joint checking account, into which both deposited their income. The $300.00 monthly mortgage payments were made from this joint checking account. He stated that he had not intended to give the house to Myra and had caused it to be placed in her name "[b]ecause I didn't want the IRS or my ex-wife to have any part of it." He stated that the house had been placed in his and Myra's names in order to secure

a loan for $5,000.00; he signed the property back to Myra after they obtained the loan.

In his decision, the chancellor found:

> Mr. Lucas deeded the property to his deceased wife on two occasions for the purpose of avoiding a tax lien with the Internal Revenue Service and to avoid paying a judgment to his former wife. This decision is based upon the doctrine of estoppel, because Mr. Lucas knew exactly what he was doing and the ramifications of signing the deed and the doctrine of unclean hands.

On appeal, appellant argues that the chancellor abused his discretion in refusing to impose a constructive or resulting trust or an equitable lien on the property. Appellant contends that he and Myra were in a confidential relationship and, therefore, a presumption arose that appellant intended to purchase the property for his own benefit.

The burden of proof was upon appellant to establish the existence of a trust. *Waller v. Waller*, 15 Ark. App. 336, 693 S.W.2d 61 (1985). A chancellor's decision regarding whether to impose a constructive or resulting trust will not be reversed unless it is clearly erroneous or clearly against the preponderance of the evidence.

A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. *Horton v. Koner*, 12 Ark. App. 38, 671 S.W.2d 235 (1984). Relationships deemed to be confidential are not limited to those involving legal control; they also arise whenever there is a relation of dependence or confidence, especially confidence that springs from affection on one side and a trust in reciprocal affection on the other. *Jones v. Balentine*, 44 Ark. App. 62, 866 S.W.2d 829 (1993). A confidential relationship, however, is not established simply because parties are related or live in the same household. *Wright v. Union Nat'l Bank*, 307 Ark. 301, 819 S.W.2d 698 (1991). There is no set formula by which the existence of a confidential relationship may be determined, for each case is factually different and involves different

individuals. *Donaldson v. Johnson*, 235 Ark. 348, 359 S.W.2d 810 (1962). Whether two individuals have a confidential relationship is a question of fact. *See Savage v. McCain*, 21 Ark. App. 50, 728 S.W.2d 203 (1987). On this record, we cannot say that the chancellor erred in failing to find that appellant had a confidential relationship with Myra.

[redacted] In *Henry v. Goodwin*, 266 Ark. 95, 583 S.W.2d 29 (1979), the supreme court recognized that to determine whether to impose a constructive trust conflicting principles of public policy must be balanced:

> The appellants also contend that since Mrs. Goodwin apparently misrepresented her position to the Social Security agency, she is precluded by estoppel or the clean hands doctrine from claiming the land. In a similar situation, where the owner of property transfers it upon an intended trust which fails for illegality, "a resulting trust does not arise if the policy against permitting unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction." Restatement, [(Second) of Trusts] § 422. It is thus a matter of balancing conflicting principles of public policy. Among the factors to be considered are (1) whether the grantor's conduct involves moral turpitude, (2) the extent of the policy making the transaction illegal, (3) whether the enforcement of a trust would tend to prevent the accomplishment of the illegal purpose, (4) whether the transferee was more at fault than the transferor, and (5) whether the transferor was ignorant of the law or of the facts making the trust illegal. *Id.*, Comment *b*.

266 Ark. at 98-99, 583 S.W.2d at 31.

[redacted] It has long been recognized that the clean-hands maxim bars relief to those guilty of improper conduct in the matter to which they seek relief. The purpose of invoking the clean-hands doctrine is to protect the interest of the public on the grounds of public policy and to protect the integrity of the court. *Id.* It is within the chancellor's discretion to determine whether the interests of equity and justice require application of the doctrine. *Id.*; *Reid v. Reid*, 57 Ark. App. 289, 944 S.W.2d 559 (1997); *Laroe v. Laroe*, 48 Ark. App. 192, 893 S.W.2d 344 (1995).

We cannot say the chancellor erred in applying the clean-hands doctrine in the case at bar. Appellant freely admitted at trial that the conveyance of the property to Myra was his idea, and we note that appellant saw to it that a deed to the property was placed in Myra's name on two occasions. Additionally, Myra signed a note for $20,000.00 and a mortgage securing the same in her own name. Money from the parties' joint checking account, into which both parties deposited their income, paid this note. Appellant admits that he was simply attempting to avoid a tax lien and the enforcement of a judgment by his ex-wife. At trial, appellant testified that he had not yet paid either debt. Certainly, there is no dispute that appellant was guilty of improper conduct and that his actions have been unconscientious and unjust in this matter. Obviously, the chancellor believed that, in this case, the policy against permitting possible unjust enrichment of the estate was outweighed by the policy against giving relief to a person who has entered a transaction for an improper purpose. *See Henry v. Goodwin, supra.* As the chancellor was in the better position to determine the facts and weigh the competing interests in this case, we cannot say that he abused his discretion in applying the clean-hands doctrine against appellant.

Finally, appellant argues that the probate judge erred in failing to admit parol evidence concerning Myra's and appellant's intent. Although appellant testified at length about his intent in having the deed placed in Myra's name, the chancellor refused on the ground of hearsay to consider appellant's or Ohma Adair's testimony about Myra's statements regarding the house. It is true that parol evidence of an oral promise is admissible to establish the existence of a constructive trust. *Bramlett v. Selman, supra.* Nevertheless, even if the chancellor had admitted this testimony, we could not say that the outcome would have been different, because the chancellor was not required to believe appellant or Ms. Adair. Further, even if taken as true, these statements are not germane to the question of whether the chancellor acted appropriately in applying the clean-hands doctrine. Error is no longer presumed to be prejudicial; unless the appellant demonstrates prejudice, we do not reverse. *Abernathy v. Weldon, Williams, & Lick,*

Inc., 54 Ark. App. 108, 923 S.W.2d 893 (1996); *Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993).

Affirmed.

JENNINGS and STROUD, JJ., agree.

Richard SPRINGSTON *v.* STATE of Arkansas

CA CR 97-539 962 S.W.2d 836

Court of Appeals of Arkansas
Division III
Opinion delivered February 25, 1998

Chet Dunlap, for appellant.

Winston Bryant, Att'y Gen., by: *Mac Golden*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Richard Springston brings this appeal from his first-offense conviction of driving while intoxicated for which he was sentenced to fourteen days in jail, fined

$500, and his driver's license was suspended for thirty days. For reversal, he contends that there is no substantial evidence to support the jury's verdict of guilt and that the trial court erred in allowing the admission of a videotape into evidence. We find no merit in the issues raised and affirm.

First, appellant challenges the sufficiency of the evidence. Arkansas Code Annotated § 5-65-103(a) (Repl. 1993) provides that it is unlawful for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.

In reviewing the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *Brown v. State*, 54 Ark. App. 44, 924 S.W.2d 251 (1996). Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996). We need consider only that testimony that supports the verdict of guilt. *Ricks v. State*, 316 Ark. 604, 873 S.W.2d 808 (1994).

Greene County Deputy John Purcell testified that he was employed by the Arkansas State Police on May 21, 1995, and that at around 3:10 p.m. he was called upon to investigate an accident at the intersection of Highways 351 and 358. About three-quarters of a mile away from the intersection, he observed a man, the appellant, attempting to walk on the shoulder of the road. Deputy Purcell testified that appellant "wasn't doing too good," and that he was staggering, stumbling and "lurching around," meaning that he was walking sideways as if he might fall onto the roadway. Purcell stopped to determine what the problem might be, and as he came close to the appellant, he smelled the strong odor of an alcoholic beverage about the appellant's person. At around 3:20 p.m., he placed appellant under arrest for public intoxication, handcuffed him, read him his rights, and placed him in the patrol car. Purcell then proceeded to the intersection where he found a pick-up truck nosed off into a ditch. He said that it crossed his mind that appellant might have been the driver of the truck, so he ran a check on the vehicle's license plate and learned

that the truck belonged to the appellant. Keys found in appellant's pocket fit the ignition of the truck.

Later, Purcell took appellant to the Paragould Police Department for a breathalyzer test. Purcell testified that appellant was obnoxious, a bit threatening, and uncooperative. He said that appellant was firm in his conviction that he would take a test for public intoxication, but not for DWI.

On cross-examination, Purcell further testified that appellant had told him that a man named Phil Vincent had been driving the truck at the time of the accident, and that Vincent had climbed a fence and had walked in the other direction across a field. Purcell said that he made his way up and down the road looking for this person. He checked with passers-by to see if they had met anyone on foot and spoke with a farmer who had not seen anyone in his field. He said that his investigation produced no evidence, other than appellant's word, that Phil Vincent had been with appellant in the truck.

Dewayne Johnson of the Paragould Police Department testified that appellant was brought to him for a breathalyzer test. He said that appellant was uncooperative and refused to acknowledge that he understood his rights under the implied consent law. Johnson testified that appellant kept stressing the point that he was not driving a vehicle and thus would not state that he understood the obligation to take the test. He said that appellant told him that he would take a test if charged with public intoxication, but not if the charge was DWI. A videotape of these discussions was introduced and played for the jury over the appellant's objection.

The State also presented the testimony of Kenneth Wilburn, appellant's neighbor. He testified that he saw appellant and another man get into separate vehicles that afternoon at around 2:00 p.m. He said that they left in a hurry, that the wheels of both vehicles were spinning, and that they drove erratically up a hill. Wilburn testified that this was not too unusual because there was loose gravel on the hill but that he had, nevertheless, been concerned. He later noticed that several young trees to the side of the road had been run over.

Appellant's argument is that the State failed to prove that he either operated or was in actual physical control of a vehicle. He relies chiefly on our decision in *Cook v. State*, 37 Ark. App. 27, 823 S.W.2d 916 (1992). There, the appellant was one of a group of individuals associated with a vehicle that had struck a tree. The officer had not seen the appellant driving the vehicle, and we concluded that the evidence was not sufficient to sustain a finding that appellant operated or was in physical control of the vehicle. The State maintains that the facts of this case compare more favorably with those found in our decision in *Neble v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988). In that case, witnesses heard an accident near their home, and they went to the scene where they discovered a vehicle that had come to rest in a ditch after tearing down some fifty to sixty feet of a fence. The vehicle was unoccupied, and the witnesses contacted a deputy who lived nearby when they were unable to locate the driver. The deputy and other law enforcement officers arrived and began looking for the driver. During the search, the officers learned that the vehicle was registered in the appellant's name, and they received a report that a man, later identified as the appellant, had come to the deputy's home and had told the deputy's wife that his car had broken down. The appellant had left by the time the deputy arrived at his home, but he was eventually found lying face down in a ditch three hundred feet from the wrecked vehicle. When questioned, the appellant told an officer that he had not been driving the vehicle but that the driver was a man named "Bill," whom he had met at a tavern. On this evidence, we held that the jury, without speculating, could have concluded that the appellant was driving the vehicle when the accident occurred.

Turning to the case at hand, we first observe that the statute does not require law enforcement officers to actually witness an intoxicated person driving or exercising control of a vehicle. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994); *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989). It is well-settled that the State may prove by circumstantial evidence that a person operated or was in actual physical control of a vehicle. *Wetherington v. State*, *supra*; *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985). Circumstantial evidence may constitute sub-

stantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996). The question of whether the circumstantial evidence excludes any other hypothesis consistent with innocence is for the jury to decide. *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996). Our responsibility, as the reviewing court, is to determine whether the jury verdict is supported by substantial evidence. *Wetherington v. State, supra.*

We hold that the verdict is so supported. Appellant was discovered walking away from a one-vehicle accident involving his own truck for which he possessed the keys in his pocket. There was testimony that appellant had been driving his truck not long before his encounter with the police. And, the jury was entitled to disregard appellant's story that someone else had been driving the truck, particularly in light of Deputy Purcell's testimony concerning his efforts to locate that person, who was nowhere to be found. A jury is not required to believe the accused's version of events because he is the person most interested in the outcome of the trial. *Reams v. State*, 45 Ark. App. 7, 870 S.W.2d 404 (1994). *See also Altes v. State*, 286 Ark. 94, 689 S.W.2d 541 (1985); *Neble v. State, supra.* In addition, a jury may consider and give weight to any false and improbable statements made by an accused in explaining suspicious circumstances. *Reams v. State, supra.* We think there is sufficient evidence from which the jury could properly infer that appellant was operating the vehicle at the time the accident occurred.

In his next point, appellant contends that the trial court abused its discretion in allowing the jury to view the videotape filmed at the Paragould Police Department. He argues, in reference to Rule 403 of the Arkansas Rules of Evidence, that the probative value of the tape was substantially outweighed by the danger of unfair prejudice. He contends that the tape was overly prejudicial in that he was shown in handcuffs and because it depicted him as being angry and argumentative, using profanity, and refusing the breathalyzer test. We cannot agree.

It has repeatedly been held that the balancing of probative value against prejudice is a matter left to the sound dis-

cretion of the trial court, and this decision will not be reversed absent a showing of manifest abuse. *Hill v. State*, 325 Ark. 419, 931 S.W.2d 64 (1996). The prejudice referred to in Rule 403 denotes the effect of the evidence on the jury, not the party opposed to it. *Sasser v. State*, 321 Ark. 438, 902 S.W.2d 773 (1995). Since intoxication is an essential element of the crime in this case, evidence that shows the demeanor of the accused at or near the time of the offense is highly relevant to that issue. The fact that the evidence may have also portrayed the appellant in an unfavorable light does not constitute the kind of *unfair* prejudice that would require its exclusion at trial. We also have some difficulty in accepting appellant's claim of prejudice when we consider that appellant contended that the tape was favorable to his defense in his arguments before the court in his motion for a directed verdict and before the jury in his closing statement. We find no abuse of discretion.

Affirmed.

ROBBINS, C.J., and CRABTREE, J., agree.

JONESBORO HUMAN DEVELOPMENT CENTER *v.* Mary Jo TAYLOR

CA 97-800 963 S.W.2d 617

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered February 25, 1998

Nathan C. Culp, for appellants.

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

ANDREE LAYTON ROAF, Judge. The Workers' Compensation Commission (Commission) ordered appellant Jonesboro Human Development Center (Center) to pay one-half the attorney's fees awarded to appellee Mary Jo Taylor, for controverting her change-of-physician request. The Center appeals from the finding that it controverted Taylor's request and from the award of attorney's fees. We agree that there is not sufficient evidence to support the Commission's finding and reverse.

Taylor, an employee of the Center, suffered a compensable injury on February 14, 1996, and the Center paid benefits. On March 15, 1996, the Center apparently refused to pay certain medicals bills because they were not from the original treating physician. On March 20, 1996, Taylor requested a change of physician. The Center received a letter from the Workers' Compensation Commission notifying it of Taylor's request. The Center responded by letter dated April 1, 1996, to the Commission and Taylor's attorney stating that there was no objection to her request provided that she gave the name of the new physician and the Commission approved the change. The Center received no response to this letter.

On May 6, 1996, Taylor requested a hearing before the administrative law judge (ALJ) regarding her change-of-physician request. On May 31st, the Center sent another letter to Taylor's attorney, again stating that there was no objection to the change and again requesting the name of the physician. There was again no response to the letter. Finally, on June 10, 1996, the Center's attorney telephoned Taylor's attorney and, for the third time, requested the name of the physician. The Center's attorney was informed that the new physician was Dr. James Robinette, and on the same day sent a letter to the ALJ stating that there was no objection to the new physician. The ALJ conducted a pre-hearing telephone conference on June 14, 1996, regarding Taylor's request for a new physician. In this conference, the ALJ approved the change and awarded Taylor attorney's fees of $200, one-half to be paid by the Center because it had controverted the request. The ALJ's decision was affirmed by the Commission. In its opinion, the Commission stated that the Center "knew, or should have known that [Taylor] requested an official change to Dr. Robinette." The Center appeals from the award of a fee.

The sole issue on appeal is whether the Commission's finding that the Center controverted Taylor's change-of-physician request is supported by substantial evidence.

The Center contends that it never controverted Taylor's request, but instead requested the name of the new physician three times before it was informed that Dr. Robinette was the new phy-

sician. The Center further states that the day it received this information, Taylor was sent a letter stating that there was no objection to the change.

In response, Taylor asserts that the Center was aware that Dr. Robinette was the new doctor because it completed an AR-E form, which listed Dr. Robinette as the physician she visited a few days after her accident. Furthermore, the Center had received bills since March 1996 from only two providers, Dr. Robinette and Mediquik, the company provider.

This court reviews decisions of the Workers' Compensation Commission to determine 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 that 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, the court must affirm the decision. *Id.*

An award of attorney's fees is proper where a claimant's request for a change of physician is controverted by the employer. Ark. Code Ann. § 11-9-715(c)(1) (Repl. 1996). If there is substantial evidence to support a finding that a claim is controverted, there is no abuse of the Commission's discretion to award attorney's fees, and this court cannot reverse the Commission's finding in the absence of a gross abuse of discretion. *Moro, Inc. v. Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982). Controversion is a question of fact to be determined from the circumstances of the particular case by the Commission. *New Hampshire Ins. Co. v. Logan*, 13 Ark. App. 116, 680 S.W.2d 720 (1984). The Commission's finding should not be reversed if there is substantial evidence to support it, or unless it is clear that there has been a gross abuse of discretion. *Id.*

In the present case, the Commission considered the following facts. Two letters from the Center were quoted in the opin-

ion. The April 1st letter, written by Otis Palmer, a claims manager, acknowledged the compensability of the claim and stated that,

> [c]oncerning the change of physician request, we do not object to a change to the desired physician provided we know the name of the desired physician and provided the Workers' Compensation Commission approves the change.

The May 31st letter from the Center's attorney stated:

> Respondents are not denying the claimant's petition for a change of physician *if the selected physician is acceptable* and it is treated as claimant's one time petition for a change of physician per Ark[.] Code Ann. [§] 11-9-514. Please advise the name of the physician to whom the claimant wants to change.

(Emphasis in original.)

On May 6, 1996, Taylor requested an immediate hearing before an ALJ regarding her change of physician. The Commission also noted that prior to this request, the Center had refused to pay medical bills from Dr. Robinette. Based on these facts, the Commission found that the Center knew or should have known that Taylor wanted to change to Dr. Robinette, and therefore sufficiently controverted her request so as to warrant an award of fees.

We do not agree that reasonable minds could reach this conclusion based on the evidence before the Commission. Neither the April 1st or May 31st letter from the Center objected to Taylor's request for a change of physician. On the contrary, both letters specifically stated that there was no objection to the request and asked for the name of the new physician. Moreover, Ark. Code Ann. § 11-9-514(e) (Repl. 1996) encourages both the employer and the employee-claimant to cooperate in an effort to select another physician. Here, there was no cooperation on Taylor's part. Instead of simply providing the name of the doctor (after three requests), she opted to go forward with a hearing.

Moreover, the Center was within its rights to refuse payment of Dr. Robinette's bills submitted before Taylor requested a change of physician on March 20, 1996. The procedure for

obtaining a change of physician is contained in Ark. Code Ann. § 11-9-514, and provides in pertinent part:

> the claimant may petition the commission one (1) time only for a change of physician, and, if the commission approves the change, with or without a hearing, the commission shall determine the second physician and shall not be bound by the recommendations of the claimant or respondent.

It is clear from the Center's letters that it was merely seeking to insure that Taylor follow the statutory procedure for obtaining a one-time change of physician, and it is unreasonable to find that the Center should know, from bills sent prior to the request for change, who that new physician was to be. It is not uncommon for claimants to obtain medical services from several physicians and medical providers for treatment of their injuries. Moreover, referrals to specialists by the treating physician are authorized without making a change of physician. *See Department of Parks and Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998). Finally, neither the bills in question, the AR-E form, nor the letter of March 15, 1996, denying payment for Dr. Robinette's bills referred to in Taylor's argument, were made part of the record. Consequently, we determine that the Commission's finding is not supported by substantial evidence, and that it could not reasonably conclude from the evidence of record that the Center controverted the change of physician. We therefore reverse the award of attorney's fee to Taylor.

Reversed.

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

PITTMAN, J., dissents.

JOHN MAUZY PITTMAN, Judge, dissenting. I respectfully dissent. The appellant in this case is a state agency. The appellant argues that it did not controvert appellee's request for a change of physicians, and that it merely wanted to know the name of the new doctor. The Commission found that the agency knew or should have known who the new doctor was, and concluded that the agency had in fact controverted the request for change of physicians.

Whether or not a claim has been controverted is a question of fact, *Electro-Air v. Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985), and it is not a question to be determined mechanically. *Ridgeway Pulpwood v. Baker*, 7 Ark. App. 214, 646 S.W.2d 711 (1983). To my mind, the real issue in the case at bar is whether the state agency has used its vastly superior resources to confront the injured employee with formally correct but practically pointless legal obstacles to overcome in order to obtain medical care.

Reduced to its essential terms, we have before us a case where the employee was required to retain an attorney to obtain a routine change of physician. The Commission, finding that the agency has been needlessly obstructionist, awarded the employee attorney's fees in the amount of $100.00. The Public Employee Claims Division, apparently intent on demonstrating that it was neither underfunded nor reasonable, filed this appeal.

I think that the Commission should be praised for its sensitivity to the potential for abuse that arises when the legitimate requests of an injured employee are opposed by the overwhelming resources of a state agency, and I would affirm.

Terry HUMPHREY *v.* FAULKNER NURSING CENTER

CA 97-791 964 S.W.2d 224

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered March 4, 1998

Dodds, Kidd, Ryan & Moore, by: *Donald S. Ryan*, for appellant.

Friday, Eldredge & Clark, by: *Betty J. Demory*, for appellee.

SAM BIRD, Judge. This is an appeal from a decision of the Workers' Compensation Commission. Terry Humphrey, the appellant, was employed by Faulkner Nursing Center, appellee/cross-appellant, on December 18, 1992, when she attempted to lift a patient back into a wheelchair. The patient was sliding to the floor, and the restraint on the wheelchair was choking her. As appellant attempted to lift the patient, she and a coworker, who was also lifting the patient, heard a loud pop in appellant's right shoulder. Appellant states that her hand became numb and her arm and hand began turning blue and became cold.

As a result of this injury, the appellant had a diskectomy and spinal fusion with bone graft at the C5-6 level of her spine. Her surgeon, Dr. Richard Peek, assigned her a thirty-five percent permanent physical impairment to the body as a whole. However, Dr. Earl Peeples also examined the appellant and gave her a permanent anatomical impairment of ten percent to the body as a whole based upon her neck injury and the fusion procedure.

The administrative law judge found that the appellant had proven by a preponderance of the evidence that she is permanently and totally disabled as a result of impairments to her right arm, right shoulder, and neck. However, after a de novo review

of the record, the full Commission found that the appellant was not permanently and totally disabled but that the appellant was entitled to a thirty-five percent permanent physical impairment to the body as a whole based upon the combination of impairments to her neck, right shoulder, and right arm. On April 8, 1997, the Commission entered an order and remanded this case to the law judge to receive additional evidence in order to determine what portion of the appellant's thirty-five percent impairment rating is attributable to the scheduled arm impairment. In addition, the Commission directed the law judge to determine the degree of impairment to the appellant's earning capacity related to her neck and shoulder impairments without regard to the scheduled arm impairment.

On April 21, 1997, the appellant filed a notice of appeal contending that the Commission erred in finding that she was not permanently and totally disabled and that her arm impairment was a scheduled injury. On May 2, 1997, the appellee filed a cross-appeal arguing that the Commission's finding that the appellant has a thirty-five percent physical impairment is not supported by substantial evidence. However, this court cannot reach the merits of this case and must dismiss the appeal for lack of a final order.

It is a well-established rule that in order for this court to review a decision of the Workers' Compensation Commission, the order from which the parties appeal must be final. *Rogers v. Wood Mfg.*, 46 Ark. App. 43, 877 S.W.2d 43 (1994); *Adams v. Southern Steel & Wire*, 44 Ark. App. 108, 866 S.W.2d 432 (1993); *TEC v. Falkner*, 38 Ark. App. 13, 827 S.W.2d 661 (1992); *American Mut. Ins. Co. v. Argonaut Ins. Co.*, 33 Ark. App. 82, 801 S.W.2d 55 (1991); *St. Paul Ins. Co. v. DeSota*, 30 Ark. App. 45, 782 S.W.2d 374 (1990). For an order to be final, the order must dismiss the parties from the court, discharge them from the action or conclude their rights as to the cause of action. *Baldor Electric Co. v. Jones*, 29 Ark. App. 80, 777 S.W.2d 586 (1989). Further, an order that is remanded to the law judge for the taking of additional evidence and one that does not award compensation for monetary benefits is not a final order. *Baldor Electric Co. v. Jones, supra*; *Adams v. Southern Steel & Wire, supra.* This court is obliged to raise on its own motion the finality of an order because it goes

to our own jurisdiction. *Rogers v. Wood Mfg., supra. See also TEC v. Falkner, supra; Baldor Electric Co. v. Jones, supra.*

This appeal is dismissed because the order from which the parties appeal and cross-appeal is not a final order.

ROBBINS, C.J., JENNINGS, CRABTREE, and MEADS, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I do not agree with the decision to dismiss this appeal because no part of the Commission's decision that was remanded to the administrative law judge is involved in appellant's appeal. The first issue that appellant has raised is that the Commission's decision that she was not permanently and totally disabled is not supported by substantial evidence. Nothing concerning permanent total disability was remanded to the administrative law judge for adjudication. No additional evidence will be taken regarding permanent total disability. No part of the issues that have been remanded (i.e., whether appellant's right arm impairment contributed to the 35% anatomical impairment rating to the body as a whole assessed by Dr. Richard Peek, and the extent of wage-loss disability, if any, attributable to that impairment to the body as a whole) are encompassed in appellant's challenge to the Commission's decision to deny her claim for permanent total disability benefits. In fact, if the Commission erred by denying the permanent total disability claim based on the odd-lot doctrine, then there is nothing to remand.

However, the majority holds that the appeal must be dismissed because the Commission's decision lacked finality to the extent that matters were remanded to the administrative law judge. In doing so, the majority relies upon the general rule that orders of remand are not final, appealable orders. *See Lloyd v. Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986). In our per curiam decision in *Gina Marie Farms v. Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989), we reviewed the way that the law has developed concerning the appealability of workers' compensation cases, and we noted the general principle that for an order to be

appealable, it must be a final order, meaning one which dismisses the parties from the court, discharges them from the action, or concludes their rights as to the subject matter in controversy. *Epperson v. Biggs*, 17 Ark. App. 212, 705 S.W.2d 901 (1986). We also observed that the general rule applies to workers' compensation appeals. *See H.E. McConnell & Sons v. Sadle*, 248 Ark. 1182, 455 S.W.2d 880 (1970), and *Cooper Indus. Prod. v. Meadows*, 269 Ark. 966, 601 S.W.2d 275 (Ark. App. 1980).

However, in *Gina Marie Farms* our court also recognized and expressly embraced what it termed a "less restrictive rule" drawn from *Festinger v. Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978), as "a better definition of a final, appealable order in a workers' compensation case" than the one set out in *McConnell*, or at least an extension of the *McConnell* rule. The *Festinger* definition of a final, appealable order was taken from the decision in *Davie v. Davie*, 52 Ark. 224, 12 S.W. 558 (1889), and provides that to be final a decision "must also put the court's directive into execution, ending the litigation *or a separable part of it*." *Festinger*, 264 Ark. at 277, 571 S.W.2d at 84 (emphasis added). Our per curiam opinion in *Gina Marie Farms* reviewed cases decided by our court from its origin in 1979, indicated that the *Festinger* definition would be applied to resolve future questions about whether an appeal is taken from a final, appealable order, and concluded that we will dismiss appeals on our own motion where we realize that the decision challenged is not a final, appealable order.

We have not abandoned or narrowed the *Festinger* definition, at least openly, in the ensuing years. However, we are certainly refusing to follow it by dismissing this appeal. Aside from the fact that the permanent total disability issue raised as appellant's first allegation of error does not involve a matter that has been remanded by the Commission to its administrative law judge, that issue plainly and squarely meets the *Festinger* standard of being a separable branch of the litigation that has been ended by the decision appealed. The majority does not suggest and cannot demonstrate that appellant will be able to prove anything concerning permanent total disability when the administrative law judge considers the issues that have been remanded by the Commission.

Our reasonable aversion to piecemeal appeals should not cloud our understanding about the discrete differences between permanent total disability, permanent partial disability to the body as a whole, and permanent partial disability based upon scheduled injuries. The Commission has simply remanded to its administrative law judge for additional evidence that part of appellant's claim related to its determination that she is *not* permanently totally disabled. Indeed, if appellant eventually prosecutes an appeal following adjudication of the remanded issues and successfully argues that the Commission's decision denying her claim for permanent total disability is not supported by substantial evidence, there is no plausible reason to believe that the record on that appeal will include anything arising from the proceedings on remand. If appellant is permanently and totally disabled, her scheduled injury and the injury to the body as a whole are merged into the permanent and total disability so that there is no reason to treat them separately on remand. It is a long-settled principle of law in Arkansas that a scheduled injury such as that appellant has apparently suffered to her right arm cannot be apportioned to the body as a whole absent a finding of permanent and total disability. *See Anchor Constr. Co. v. Rice*, 252 Ark. 460, 479 S.W.2d 573 (1972). It is equally settled law that no wage-loss disability benefits are paid for scheduled injuries absent a finding of permanent and total disability. *Id.* Given that we have a quarter-century of case law to this effect and that Arkansas appellate courts have expressly embraced the view that a decision that ends a separable part of a workers' compensation case is a final order for appealability purposes, one must wonder what part of the Commission's decision denying appellant's claim for permanent total disability benefits she will be able to present evidence about on remand, particularly when nothing concerning permanent total disability has been remanded.

As Justice Conley Byrd of the Arkansas Supreme Court wrote in *Luker v. Reynolds Metals Co.*, 244 Ark. 1088, 428 S.W.2d 45 (1968), the appealability of the Commission's order in a workers' compensation claim "is not limited to the final disposition of the matter before the Commission." *Id.* at 1090. The beneficial and benevolent purposes intended by the workers' compensation

laws, enacted to make reasonably necessary medical benefits and living income quickly available to injured workers, would be completely nullified if contested claims regarding entitlement to indemnity and medical benefits were forced to await complete resolution of every dispute and dismissal of every litigant as is true for other types of litigation. This is one reason why the Arkansas General Assembly enacted Ark. Code Ann. § 11-9-711(b)(2) (Repl. 1996), which states that appeals from the Workers' Compensation Commission "shall take precedence over all other civil cases appealed to the court."

It is regrettable that the sense of urgency recognized by the General Assembly and experienced with pressing force by injured workers is not matched by judicial resolve, especially after we have explicitly created a special exception to the general rule of appealability based on the *Festinger* principle that we embraced in *Gina Marie Farms*. I respectfully dissent.

STATE of Arkansas OFFICE OF CHILD SUPPORT ENFORCEMENT *v.* Jeremy MITCHELL

CA 97-426 964 S.W.2d 218

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered March 4, 1998

William F. Cavenaugh, for appellant.

One-brief appeal.

OLLY NEAL, Judge. This one-brief case involves a petition for paternity and child support brought by the appellant in 1992. After he failed to appear at the paternity hearing, the appellee was found to be father of the child, had a judgment for past support

entered against him and was ordered to pay future support. Subsequently, a judgment for arrearage was entered against him. A DNA test was ordered on March 18, 1996, and based upon the results, the trial court entered an order that had the effect of excluding Mr. Mitchell as the father of the child. The chancellor vacated the judgment of paternity on equitable grounds and laches, equitable estoppel and for fraud practiced by the mother in obtaining the judgment. All orders predicated upon the original finding of paternity were deemed unenforceable. On appeal, the appellant, to which the mother assigned her support rights, argues that the chancellor had no authority to invalidate the original order of paternity because the appellee failed to present sufficient proof that the child's mother practiced extrinsic fraud upon the trial court in procuring the judgment. We agree that the appellee failed to present sufficient proof on the fraud question.

On September 21, 1992, the Arkansas Human Services Department, on behalf of Cheryl Mauldin filed a petition for paternity and child support in which it alleged that appellee was the father of Ms. Mauldin's minor child born May 26, 1992. The appellant requested both a "prospective and retrospective" order for support, lying-in expenses, and that appellee be required to reimburse the State for its expenditures and attorney's fees. On March 15, 1993, after appellee failed to appear for the January 25, 1993, hearing, the chancellor entered a judgment of paternity by default, and ordered $25 per week withheld from Mr. Mitchell's wages and twenty-five percent withheld from any unemployment compensation to which he was entitled. The chancellor also directed the bureau of vital statistics to "correct" the child's birth certificate to reflect that appellant was the child's father.

Upon the State's motion, the chancellor entered an order on February 24, 1994, directing Mr. Mitchell to appear on April 25, 1994, and show cause why he should not be held in contempt for failure to comply with the existing order of support. Mr. Mitchell failed to appear for the show-cause hearing, and the chancellor found him to be in contempt of court, remanded him to the cus-

tody of the county sheriff,[1] entered a judgment affirming the previous support order, and granted the appellant an additional judgment in the amount of $1,308 plus $200 as costs. The order of contempt also directed the parties to submit to paternity testing, and ordered Mr. Mitchell to prepay for the necessary testing.

Appellant filed a second motion for citation on February 9, 1996, requesting that appellee be held in contempt for failure to pay $1,975 accrued arrearages, and that he be detained in the county jail. The parties later reached an agreement which was honored by the chancellor, who entered an order on March 29, 1996, requiring appellee to pay $200 for his release. Mr. Mitchell submitted to the paternity test on June 10, 1996, and was excluded as the father of Ms. Mauldin's minor child. The chancellor relied on the test results in his order of August 28, 1996, in which he reversed the finding of paternity.

Mr. Mitchell was again summoned to court on November 8, 1996, after the State filed its third petition for citation against him, this time alleging that he failed to pay the support that accrued between May 10, 1994, and September 6, 1996. The chancellor entered the final decree from which this appeal is taken on February 24, 1997. The court acknowledged the prior judgment of $5,739, but found that at least $2,375 of the accrued arrearages should not be collectable.

For its first argument, appellant correctly contends that the chancellor erred in setting aside the judgment of paternity for fraud practiced on the court in obtaining the judgment. A court may not set aside a judgment after ninety days unless there was some fraud extrinsic to the questions presented for decision, such as where a party is kept away from trial or when a party is corruptly betrayed by his own attorney. *Tanbal v. Hall*, 317 Ark. 506, 878 S.W.2d 724 (1994). Here, the only "fraud" was the mother's failure to state in her affidavit that appellee was not the only possible father of the child. Although this was arguably a

[1] The May 10, 1994, judgment provided that Mr. Mitchell could "purge himself of contempt of court" by paying all outstanding arrearages and the $200 costs and attorney's fees to the county sheriff. It is unclear from the record when appellee was released from custody or whether he paid the sums stated in the order.

fraudulent instrument or perjured evidence, it is not extrinsic to the questions decided and does not constitute ground for setting aside the judgment after ninety days.

[redacted] Appellant next contends that the chancellor erred in denying its request for a judgment of child-support arrearages on the basis of the equitable defenses raised by appellee. It argues that equitable defenses are inapplicable under Ark. Code Ann. § 9-14-234 (Supp. 1995), which provides that:

> (b) Any decree, judgment, or order which contains a provision for the payment of money for the support and care of any child or children through the registry of the court shall be final judgment subject to writ of garnishment or execution as to any installment or payment of money which has accrued until the time either party moves through proper motion filed with the court and served on the other party to set aside, alter, or modify the decree, judgment, or order.
> (c) The court may not set aside, alter, or modify any decree, judgment, or order which has accrued unpaid support prior to the filing of the motion.

However, it has been held that, in a proper case, equitable defenses such as estoppel may apply so as to prevent the collection of past-due child-support payments. *Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993); *Ramsey v. Ramsey*, 43 Ark. App. 91, 861 S.W.2d 313 (1993). These holdings have not been affected by *State v. Phillippe*, 323 Ark. 434, 914 S.W.2d 752 (1996), because *Phillippe* was decided on different grounds. The judgment in that case, had been fully executed by payment, no equitable defenses were raised and the appellee therein never attempted to estop enforcement, but instead sought a refund of payments which had already been made.

[redacted] Although the chancellor in the case at bar mentioned appellee's equitable defenses in his order, we are reluctant to affirm on that basis because it is clear from the record as a whole that the chancellor believed that the fact that appellee was not the child's father was itself outcome determinative. This is evinced by the chancellor's refusal to permit appellant to elicit testimony bearing directly on the equities, such as appellee's reasons for failure to comply with court orders. Such matters bear heavily on whether

equity should intervene in a case such as this. *See Grable v. Grable*, 307 Ark. 410, 821 S.W.2d 16 (1991).

Although we have the authority to decide chancery cases *de novo*, we may remand where the record is not fully developed and additional evidence may be required to determine where the equities lie. *See Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994); *McLain v. McLain*, 36 Ark. App. 197, 820 S.W.2d 295 (1991). In the case at bar, because the chancellor erroneously relied on Ark. R. Civ. P. 60 (C) (4), and failed to make the necessary findings to support his decision on purely equitable grounds, we think that justice would be better served by remanding the outstanding equitable issues to the chancellor, who may take such additional evidence as is necessary to resolve them.

Reversed and remanded.

PITTMAN, GRIFFEN, AREY, and STROUD, JJ., agree.

JENNINGS, J., dissents.

JOHN E. JENNINGS, Judge, dissenting. At about the time this child was conceived, Cheryl Mauldin had sexual relations with two men, one of whom was the appellee, Jeremy Mitchell. Based on her belief that Mitchell was the father of the child, the Office of Child Support Enforcement filed a petition to establish paternity and sought child support. When Mitchell did not file a response, a default judgment was entered.

Later, a DNA test showed that Mitchell was not the father of the child.

The chancellor held that the judgment for child-support arrearages was unenforceable because of laches, estoppel, and unclean hands, and should be vacated and set aside based on fraud practiced by Ms. Mauldin.

The majority's decision not to uphold the chancellor's order on the basis of fraud is undoubtedly correct. There is no evidence of the extrinsic fraud required to set aside a judgment. *See generally* 46 AM. JUR. 2d *Judgments* § 601.

If the judgment for accrued arrearages could be set aside on equitable grounds, a matter I am not willing to concede, there is insufficient basis in the record for doing so here. The majority does not hold otherwise, but instead remands the case to the chancellor, on the grounds that the record is not fully developed. Because I cannot agree that there is any basis for concluding that the record is not fully developed, I would reverse without remand.

Charles FRESHOUR *v.* Brenda WEST and
State of Arkansas ex rel. Office of
Child Support Enforcement

CA 97-612 962 S.W.2d 840

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered March 4, 1998
[Petition for rehearing denied April 8, 1998.]

Mildred Havard Hansen, for appellant.

Gary L. Sullivan, for appellee.

WENDELL L. GRIFFEN, Judge. Charles Freshour has appealed the decision of the Pulaski County Chancery Court that denied his motion to change custody of his minor child from her maternal grandmother. Appellant contends that the chancellor erred in maintaining custody of his child, born out of wedlock, with her legal guardian and maternal grandmother, appellee Brenda West, despite a finding that appellant was not unfit to have custody of the child. We find no error and affirm.

Appellant and the noncustodial mother, Tera West ("West"), conceived a child together when they were both 17 years old. West gave birth to Victoria West on May 11, 1993. Appellant was unsure whether he was the father of the child, and after initially visiting Victoria in the hospital at her birth, followed the advice of legal counsel who advised him against visiting the child. West lived with her mother, appellee, so after Victoria was born, West and Victoria returned home to live with appellee. Some time afterwards, appellee directed West to leave the residence because she refused to follow house rules. Victoria has remained with appellee since that time. Appellant eventually moved to Texas, studied to be a mechanic, married, and established a family life in Houston, Texas.

Meanwhile, appellee became Victoria's legal guardian pursuant to Ark. Code Ann. § 9-10-113 (Repl. 1993). She applied for and received AFDC and Medicaid benefits for Victoria. As a result, the Pulaski County Office of Child Support Enforcement (OCSE), filed a paternity action to determine whether appellant was Victoria's father. After paternity testing confirmed that appellant was Victoria's biological father, appellant filed a petition for change of custody in which he sought custody of Victoria, who was three years old when the petition was filed.

After hearings on September 27, 1996, and October 4, 1996, the chancellor ruled that although she could not find appellant either unfit or incompetent, it would be in the best interest of Victoria for her to remain in the custody of appellee. Appellant challenges that decision on appeal and argues that a decree should have been entered awarding custody to him because he is the biological parent and, therefore, preferred in the eyes of the law over all other persons, including a grandparent, unless found unfit or incompetent. *See Feight v. Feight*, 253 Ark. 950, 490 S.W.2d 140 (1973)(as between a parent and a grandparent, the law prefers the former unless the parent is incompetent or unfit); *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997)(there is a preference for the parent above all other custodians); *Ideker v. Short*, 48 Ark. App. 118, 892 S.W.2d 278 (1995); *McKee v. Bates*, 10 Ark. App. 51, 661 S.W.2d 415 (1983).

In child-custody cases, a chancellor's findings will not be reversed unless they are clearly erroneous or clearly against a preponderance of the evidence. Ark. R. Civ. P. 52(a); *Ideker v. Short, supra.* We give due regard to the opportunity of the trial court to judge the credibility of the witnesses, and to the chancellor's superior position to determine the facts. *Id.* The primary consideration in child-custody cases is the welfare and best interest of the children involved; all other considerations are secondary. *Id.* The welfare of the child is the polestar in every child-custody case. *Id.*

The flaw in appellant's reasoning arises from his failure to appreciate the factors involved when a change-of-custody petition is considered. Appellant plainly sought a decision that changed custody from appellee. In deciding whether a change of custody is warranted, a chancellor must first determine whether there has been a material change in circumstances of the parties since the most recent custody decree; if material changes have occurred, the chancellor must then determine custodial placement, with the primary consideration being the best interest of the child. *Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997). The party seeking modification of a child-custody order has the burden of showing a material change in circumstances. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996).

We have no difficulty affirming the chancellor's decision because appellant failed to show a material change of circumstances to justify a change in custody. Appellee has exercised custody of Victoria most of her life since the child was born on May 11, 1993. After appellee assigned her rights to child support to the Pulaski County Child Support Enforcement Unit and alleged in a June 6, 1995, affidavit that appellant was the child's biological father, appellant denied paternity. His May 14, 1996, motion for change of custody was filed only after DNA testing had established paternity.

More important, however, is the clear evidence that appellant took virtually no interest in and provided no support, care, supervision, and protection for Victoria until the paternity action aimed at recovering the money that had been paid on Vic-

toria's behalf had been filed by the Office of Child Support Enforcement. In that regard, we note that Ark. Code Ann. § 9-10-113(c) (Repl. 1993) provides that a court may award custody of a child born out of wedlock to a biological father upon a showing that: (1) he is a fit parent to raise the child; (2) *he has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child*; and (3) it is in the best interest of the child to award custody to the biological father. The chancellor was clearly justified in denying appellant's motion to change custody where the proof established that he had not assumed the responsibilities specified at section 9-10-113(c)(2), even if appellant was deemed a fit parent in other respects.

We also affirm the chancellor because her finding that it is in Victoria's best interest to remain in the custody of appellee is not clearly erroneous. Aside from the fact that appellant failed to establish a material change of circumstances to justify modifying the custody arrangement, it is fundamental that the primary consideration in child-custody cases is the welfare and best interest of the children involved; all other considerations, including the legal preference favoring biological parents over third persons, are secondary. Our appellate decisions have consistently recognized that a heavier burden is placed on a chancellor in child-custody cases to utilize, to the fullest extent, all of her powers of perception in evaluating the witnesses, their testimony, and the child's best interests, and that we know of no cases in which the superior ability, position, and opportunity of the chancellor to observe the parties carries as great a weight as those involving child custody. *Turner v. Benson, supra.*

These controlling principles clearly lead us to affirm the chancellor's finding that it is in Victoria's best interest that she remain in the custody of appellee. The proof shows that Victoria has lived with appellee for practically her entire life, and that she has known no other parent figure. She also has grown up with an older half-sister, unrelated to appellant, with whom she enjoys a familial bond and from whom she would be separated if appellant is granted custody. Appellee has given Victoria a home, nurture, and a sense of stability that the chancellor was entitled to consider in evaluating whether her best interest would be served by grant-

ing appellant's motion to change custody based only on his status as biological father, particularly where appellant had failed to provide those vital elements for the child's life. We decline appellant's invitation to reverse the chancellor and to hold, in effect, that his status as a biological parent trumps what is in the best interest of his four-year-old daughter.

Finally, we note that appellant emphasizes the chancellor's assessment that he is a fit person to take custody if appellee's circumstances change, and characterizes that assessment as an almost impossible hurdle that will prevent him from ever having custody of his daughter. We do not know whether appellee's circumstances will change, and neither did the chancellor. However, the chancellor was well informed about what Victoria's circumstances had been insofar as appellant was concerned. Between appellant and appellee, the proof concerning who had acted to protect and advance Victoria's best interest was clear and uncontradicted. If appellant views the chancellor's decision as a hurdle, he can remember that the chancellor decided what was in Victoria's best interest based upon proof that appellant had acted without apparent regard for her interest as long as it appeared convenient and/or financially advantageous to do so. The principle that the best interest of the child is the polestar in determining child custody disputes not only allowed the chancellor to rule as she did, it practically dictated the result that she reached when one considers how appellant had behaved concerning Victoria's best interest.

The fact that appellant was but seventeen years old when Victoria was conceived, while remarkable, is legally insignificant. Victoria was his responsibility. He left her. He cannot fault the chancellor for correctly observing that appellee has provided the care that he was obligated but refused to provide. Nor can he use his biological status as father to erase his disregard for the child's best interest by his demonstrated failure and refusal to provide for her for most of her life.

Appellee was Victoria's legal guardian, and appellant only moved for custody after OCSE sought reimbursement for public benefits paid to support Victoria. There had been no material change in circumstances that would prompt a change of custody,

as appellant had virtually abandoned the minor child until he was sought out by OCSE. However, even if a change in circumstances had been shown, the chancellor's decision that it was in the best interest of the minor child to be placed with the maternal grandmother was not clearly erroneous.

Affirmed.

AREY, STROUD, and NEAL, JJ., agree.

PITTMAN and JENNINGS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. The question to be decided in this case is whether the circumstances were so exceptional that interests of humanity justify departure from the general rule that, as between a parent and a grandparent, the law prefers the parent unless the parent is incompetent or unfit. *See Perkins v. Perkins*, 266 Ark. 957, 589 S.W.2d 588 (1979); *compare Tidwell v. Tidwell*, 224 Ark. 819, 276 S.W.2d 697 (1955).

The majority affirms the chancellor's decision to deny appellant custody of his child by holding that there was no material change in circumstances upon which to base a change of custody. However, no change in circumstances is required when facts are presented which, although existing at the time of the original custody determination, were not then presented or considered. *Perkins v. Perkins, supra.* In the present case, the child's father was unknown at the time that appellee assumed custody.

Nor do I agree with the majority's conclusion that appellant voluntarily relinquished custody of the child to appellee by failing to perform parental duties before his paternity was established. This was an unusual case. When the child's mother and father, themselves only children, first met, the mother was pregnant with her first child. The mother was then fifteen years old. She did not know who was the father of her first child. She filed an action to establish paternity of her first child, but it was proven that the man she accused was not that child's father. The child involved in the case at bar was this teenage mother's second child. She testified that she began dating appellant on July 21, 1992, and got pregnant in August. Her relationship with appellant ended in November. I think that appellant was fully justified in having genuine doubt

about who fathered the child; consequently, the case at bar is to be distinguished from cases in which a parent voluntarily relinquished custody of his child, as was the case in *Tidwell v. Tidwell, supra*, and in *Verser v. Ford*, 37 Ark. 27 (1881). As our supreme court said in *Payne v. Jones*, 242 Ark. 686, 688-89, 415 S.W.2d 57, 58 (1967):

> To take a parent's child away from him and give it to strangers is an extreme measure — a step which the courts should and do take only when the evidence clearly justifies such a course. Here, as a practical matter, the award of custody to the appellees would in all probability deprive Kale of his child just as permanently and just as effectively as if the boy had been adopted by the Joneses. In *Woodson v. Lee*, 221 Ark. 517, 254 S.W.2d 326 (1953), we said that the right of natural parents to the custody of their children, as against strangers is "one of the highest of natural rights, and the state cannot interfere with this right simply to better the moral and temporal welfare of the child as against an unoffending parent." We also said that "abandonment by a parent, to justify in law the adoption of his child by a stranger without his consent, is conduct which evinces a settled purpose to forego all parental duties continued for a prescribed period of time when the statute so provides. Merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment."

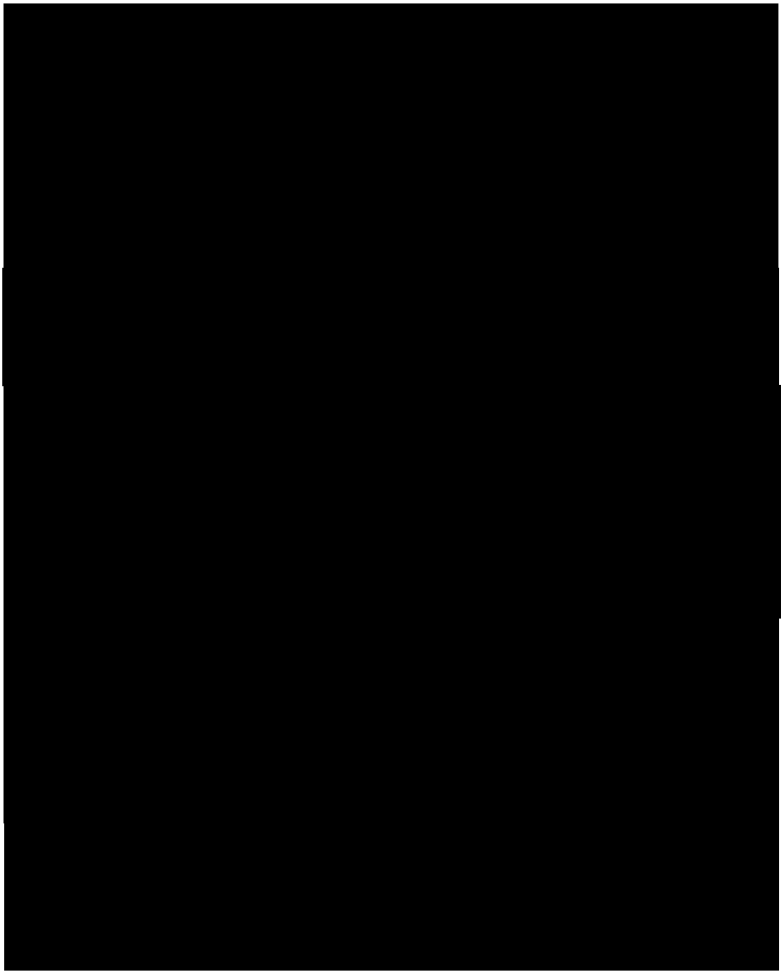
Because there is no sound basis in the case at bar for finding that appellant knowingly abandoned his child, I respectfully dissent.

JENNINGS, J., joins in this dissent.

STATE OF CALIFORNIA, Stanislaus County *v.* James F. WEST

CA 97-604 964 S.W.2d 221

Court of Appeals of Arkansas
Division II
Opinion delivered March 4, 1998



Charles Dirden, for appellant.

Tripcony Law Firm, P.A., by: *James L. Tripcony*, for appellee.

ANDREE LAYTON ROAF, Judge. The State of California, which was assigned child support as a condition for providing AFDC and Medicaid benefits, appeals a Pulaski County Chancery Court order finding that appellee James F. West had fully satisfied his past-due child-support obligation, enjoining future collection attempts, and ordering that monies collected through the interception of West's income tax refund and through a wage assignment be refunded. On appeal, California argues that the chancellor erred in finding that West did not owe any child-support arrearages and enjoining its collection attempts. We affirm.

On September 7, 1979, an order was entered in Stanislaus County, California, granting custody of West's daughter to the birth mother. The order also granted to West "reasonable visitation" and required that, commencing September 15, 1979, he pay child support in the amount of $75 per month for his four-year-old daughter Melissa, born August 12, 1975. In addition, the order specified that the support payments be made to the office of the Stanislaus County District Attorney so long as Melissa's mother remained on AFDC. On November 7, 1979, the order was modified to deny West visitation rights. The amount of support, however, was not changed.

West was not diligent in making his support payments. Pursuant to a UIFSA petition filed in California on April 16, 1991, a motion for judgment on arrears was filed in Pulaski County Chancery Court, alleging that an arrearage of $4,310.18 had accrued from September 15, 1979, through April 30, 1990, and praying for judgment in that amount. At that time, California did

not seek interest on the arrearage. On the same day, a consent judgment was filed in which West agreed to the amount of the arrearage and a payment of $50 per month.

On August 17, 1992, a second UIFSA petition was filed in California alleging an arrearage of $3,485.18 as of July 31, 1992, and asking that Pulaski County Chancery Court reduce it to judgment. The petition reflected that the total was calculated by subtracting the $825 West had paid from the previous consent judgment of $4,310.18. Again, interest was not mentioned in the petition. On November 3, 1993, a second order was entered in Pulaski Chancery granting judgment to the State of California in the amount of $4,094, and stating that West agreed to amortize the arrearage through payments of $100 per month, effective November 1, 1993. The order also stated that no current support was due because Melissa had become emancipated. Melissa's eighteenth birthday was August 12, 1993. West subsequently paid the judgment and a "Satisfaction of Judgment" was filed for record on January 9, 1996.

Subsequent to West's satisfaction of the judgment, California caused to be filed in Stanislaus County Superior Court a wage-assignment order alleging that West owed $7,546.23 as of January 31, 1996. The order required that West's employer pay over to Stanislaus County $125 per month. California also intercepted West's $220 income tax refund.

On August 2, 1996, West filed in Pulaski County Chancery Court a motion for declaratory and injunctive relief, alleging that he had completely satisfied the judgment against him and praying that the court find that he owed no additional child support, enjoin California and his ex-wife from collecting any further monies, and order California to disgorge his tax refund and the money it had collected pursuant to the wage assignment.

California opposed West's motion in a responsive pleading and enlisted the Arkansas Office of Child Support Enforcement (OCSE) to represent it at a January 14, 1997, hearing. After filing responsive pleadings, however, according to OCSE's trial counsel, California was not very forthcoming with regard to specific information upon which OCSE could offer a defense, and OCSE did

little on its own to oppose West's motion. The following exchange between OCSE's trial counsel, Ann Dodson, and the chancellor at the hearing is illustrative:

> THE COURT: All right, explain to me again.
> Ms. DODSON: Well, we believe that California is claiming an interest, which is how they arrived at the Seven Thousand —
> THE COURT: (Interposing) But you don't know. Is that right?
> Ms. DODSON: They have not sent us a transmittal.
> THE COURT: Have you requested one from them?
> Ms. DODSON: Yes, they got notice of Mr. Tripcony's Motion, and Mr. Dirden was in touch with them about giving us a transmittal, and we haven't heard from them. We believe they're relying on those cases, *Tannebaugh (sic) versus Hall* and *Troxell*, Arkansas Supreme Court cases saying that Arkansas Orders don't nullify another state's Order, and, therefore, they have the right to enforce it.
> THE COURT: Yeah, but they're not here today. What about that?
> Ms. DODSON: They don't have the information to us (sic) and I believe — I'm just here to offer those cases on their behalf. That's it, Your Honor.

OCSE nonetheless attempted to explain how California arrived at the arrearage it alleged in its 1996 order, without success. The chancellor subsequently entered an order finding that West had satisfied in full his child-support obligations and that no further support was owed. Additionally, the court ordered California to pay over all monies confiscated from West since January 9, 1996, and enjoined West's employer from paying any further money pursuant to the wage assignment.

On appeal, California argues that the chancery court was clearly erroneous in ruling that West did not owe any child-support arrearages or reimbursement for government assistance, and erred in enjoining appellant from collecting the 1996 arrearage pursuant to a wage-withholding order issued to West's employer. California acknowledges that a Satisfaction of Judgment was entered in this case, but argues that it pertained only to the 1993 order entered by Pulaski County Chancery Court and that the arrearage not affected by the Satisfaction of Judgment remains

valid until it is paid in full. Relying on *Jefferson County Child Support Enforcement Unit v. Hollands*, 327 Ark. 456, 939 S.W.2d 784 (1997), which it says stands for the proposition that, absent express words of nullification, underlying support orders are unaffected by the orders entered pursuant to URESA or UIFSA relating to the enforcement of the support obligation, California contends that the two Arkansas orders did not impair California's right to collect interest on the arrearage in accordance with California law. These arguments fail to persuade.

First, California's reliance on *Jefferson County Child Support Enforcement Unit v. Hollands*, is clearly misplaced as this authority addresses an issue not now before us. Unlike the court in *Hollands*, the Pulaski County Chancery Court did not enter a support order or adjust West's current support obligation; it merely reduced the arrearage to judgment and ordered a monthly payment to amortize the judgment. The fact that an additional arrearage might or might not exist was not argued in Arkansas pursuant to either the 1991 or 1992 UIFSA petitions.

Regarding California's arguments concerning the imposition of interest on the arrearage, it is not disputed that California could have asked for interest at the time it transmitted its UIFSA petitions to Arkansas; indeed the form that California transmitted to Arkansas had a section for claiming interest payments that had not been filled in. In *Wells v. Arkansas Pub. Serv. Comm'n*, 272 Ark. 481, 616 S.W.2d 718 (1981), our supreme court defined the doctrine of *res judicata* as a final adjudication on the merits, without fraud or collusion, by a court of competent jurisdiction on a matter litigated or which might have been litigated. Accordingly, we find the issue of whether interest is owed on the arrearage encompassed by the 1993 order is *res judicata*.

Finally, as to California's argument that the chancellor was clearly erroneous in ruling that West owed no additional child support, we note from the transcript of the hearing that OCSE was unable to tell the trial court how California had calculated the arrearage, what portion of the arrearage was interest, and how that interest was calculated. Although we may surmise from the abstracted comments of the chancellor and trial counsel that the

record of West's child-support payments were before the trial court, California has failed to abstract any of those records.

It is axiomatic that the record on appeal is limited to what is abstracted and the burden is clearly placed on the appealing party to provide an abstract sufficient for appellate review. *Oliver v. Washington County*, 328 Ark. 61, 940 S.W.2d 884 (1997). Arkansas appellate courts will not examine the transcript of a trial to reverse a trial court. *Id.*

Although this court reviews chancery cases *de novo*, it will not disturb a chancellor's findings unless they are clearly against the preponderance of the evidence. *Harrington v. Harrington*, 55 Ark. App. 22, 928 S.W.2d 806 (1996). Absent clear evidence of how California calculated the alleged arrearage, it is impossible to say that the chancellor's finding was clearly against the preponderance of the evidence.

Affirmed.

BIRD and MEADS, JJ., agree.

Claude RILEY, Jr. *v.* Christine RILEY

CA 97-1018 964 S.W.2d 400

Court of Appeals of Arkansas
Division III
Opinion delivered March 11, 1998

James W. Haddock, for appellant.

Gibson & Hashem, by: *Hani W. Hashem*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Claude Riley appeals the decision of the Ashley County Chancery Court that held him in contempt for failure to pay certain obligations provided for under the terms of a property settlement agreement

that was incorporated into the parties' divorce decree in 1983. His ex-wife, appellee Christine Riley, filed a motion for contempt on December 12, 1996, alleging that appellant had failed to pay numerous debts that he had agreed to pay in their property settlement agreement. After considering the case, the chancellor found that appellant was in contempt for failure to abide by the agreement as to payments that he should have paid within the applicable five-year statute of limitations. The debts left unpaid were mortgage payments on the house where appellee and the children lived, life insurance premiums, and health insurance premiums. Burial insurance premiums were also delinquent, but they were found to be outside the statute of limitations. This appeal resulted. Though we review chancery cases de novo on appeal, we will not reverse the findings of fact of a chancellor unless the decision was clearly erroneous. *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997). We affirm.

When the parties divorced in 1983, appellant conveyed to appellee by warranty deed their residence in Hamburg, Arkansas, and agreed to pay all monthly mortgage payments on that property. He further agreed to pay certain life insurance premiums and all hospital and medical insurance premiums so long as the children were entitled to support and as long as appellee lives, provided she does not remarry.

Payments on the house ceased when appellant filed bankruptcy in 1989. The house was subject to foreclosure, and to save her home appellee was forced to refinance the mortgage through a credit union and make payments of $300 per month. Appellant had failed to pay more than $19,000 of monthly mortgage payments and property taxes at the time of the hearing.

Both parties agree that since the property settlement agreement is an independent contract, a five-year statute of limitations applies to the monthly mortgage installments. Ark. Code Ann. § 16-56-111 (1987). Because appellee filed her motion for contempt on December 12, 1996, any payments due prior to December 12, 1991, were barred by the statute of limitations. The chancellor so found, and appellee does not contest this finding.

Appellant asserts, though, that since he discontinued payments as early as 1989, and perhaps even in 1988, appellee's cause of action is barred because she did not bring her cause of action until later than five years after his initial failure to pay. Appellee responds by stating that failure to pay each monthly mortgage payment as it became due was a cause of action unto itself. The chancellor determined that when an obligation is made payable by installments, the statute of limitations runs against each installment as it became due and unpaid. *See Karnes v. Marrow*, 315 Ark. 37, 864 S.W.2d 848 (1993); *Wilson v. Wilson*, 231 Ark. 416, 329 S.W.2d 557 (1959). The chancellor's decision was not clearly erroneous, and appellant's argument on this point fails for that reason.

Appellant next argues that the chancellor erred when he ordered appellant to pay the monthly mortgage installments because the debt had been refinanced and was serviced by a new lender. His argument is that this constitutes rewriting the property settlement agreement. This argument is not well founded. The settlement agreement did not specify to whom the payment would be made or on what terms; the parties agreed that appellant would pay the mortgage and taxes on the house, period. Furthermore, it was due to appellant's failure to perform his obligations under the terms of this agreement that a new mortgage was obtained by appellee so that she would not lose her home. Enforcement of the agreement was proper. We cannot say that the chancellor's decision was clearly against the preponderance of the evidence.

We do not address appellant's argument that this debt should be extinguished by bankruptcy. While obligations for alimony, support, and child support are not dischargeable, obligations that are in the nature of a property settlement are. *In re Ramey*, 59 B.R. 527 (Bankr. E.D. Ark. 1986). In determining how to characterize a debt from a divorce situation, the question is what was the intent of the parties at the time of the divorce. *See Boyle v. Donovan*, 724 F.2d 681 (8th Cir. 1984). However, this determination is for the bankruptcy court, not this court, to decide. *Ramey, supra.* We note that as of the date this case was filed in our court, appellant was seeking a determination of the

dischargeability issue in the bankruptcy court, the proper forum for that determination. *In re Williams*, 703 F.2d 1055 (8th Cir. 1983); *In re Pierce*, 142 B.R. 308 (Bankr. E.D. Ark. 1992). Furthermore, the order appealed from did not address dischargeability, and the chancellor's findings noted that the bankruptcy discharge "is not considered."

The other two obligations at issue on appeal are the life and medical insurance premiums that appellant obligated himself to pay. These were also subject to the five-year statute of limitations. Appellee does not quarrel with this finding. Appellant asserts the same arguments concerning dischargeability as he posited with regard to the mortgage payments, and we dispose of this argument in the same fashion.

Affirmed.

ROGERS and CRABTREE, JJ., agree.

TRI-STATE INSURANCE COMPANY *v.* B & L PRODUCTS, INC., d/b/a Bycin Industries, Inc.

CA 97-389 964 S.W.2d 402

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered March 11, 1998

Wright, Lindsey & Jennings, by: *James M. Moody, Jr.*, and *J. Charles Dougherty*, for appellant.

Bachelor, Newell & Oliver, by: *C. Burt Newell*, for appellee.

JOHN F. STROUD, JR., Judge. This appeal arises from a summary judgment entered in a declaratory judgment action in Garland County, Arkansas, in favor of appellee, B&L Products, Inc., against appellant, Tri-State Insurance Company. We attempted to certify this appeal to the supreme court, but certification was refused. We affirm.

Appellant issued a commercial general liability (CGL) insurance policy to appellee in 1994. The policy provides coverage for any "'[a]dvertising injury' caused by an offense committed in the course of advertising [appellee's] goods, products, or services." In 1995, a company called Geographics, Inc., filed the underlying copyright-infringement action against appellee in federal court in the State of Washington. The copyright action involves paper products produced by appellee that are known as "Koolnotes" and paper products produced by Geographics that are known as "GeoNotes." Geographics learned that OfficeMax, a large retailer of office and school supplies, was selling appellee's Koolnotes, which according to Geographics were virtually identical to its GeoNotes.

Appellant refused to defend the underlying lawsuit on behalf of appellee, contending that the claim did not arise out of "advertising" as provided in the insurance policy. On March 8, 1996, appellee filed a complaint for declaratory judgment in the circuit court of Garland County, Arkansas, asking that the court declare that appellant must provide a full defense in the underlying copyright-infringement case and that appellant must fully indemnify appellee with respect to the underlying action, including costs, attorney's fees, expenses, and any judgment that might issue in the underlying action.

On October 7, 1996, appellant filed its motion for summary judgment, asserting that there were no genuine issues of material fact and that it was entitled to summary judgment as a matter of law. Appellee responded to the motion for summary judgment and filed its own countermotion for the same, agreeing that there were no genuine issues of material fact but asserting that it, rather than appellant, was entitled to summary judgment. The trial judge entered summary judgment in favor of appellee.

Appellant raises three points of appeal: (1) appellee failed to introduce in the declaratory judgment action the insurance policy and underlying copyright-infringement complaint as required by Rules 10(d) and 56(c) of the Arkansas Rules of Civil Procedure; (2) the underlying copyright-infringement complaint contains no allegation that appellee engaged in advertising activities; and (3) the underlying copyright-infringement complaint contains no allegation that appellee's copyright infringement was caused by advertising activities.

Under the first point, appellant argues that Rule 10(d) of the Arkansas Rules of Civil Procedure requires that a copy of the written instrument be attached as an exhibit to the pleading that asserts a claim or defense based upon the written instrument. Since appellee failed to attach the insurance policy and the underlying copyright-infringement complaint to its complaint for declaratory judgment, appellant argues that the trial court erred in granting summary judgment pursuant to Rule 56(c) of the Arkansas Rules of Civil Procedure. We disagree.

Neither party argued to the trial court that any pertinent language from the policy or the underlying complaint was missing. Moreover, in oral arguments before this court appellant's counsel was candid in responding to our questions on this point and acknowledged that the pertinent language from the policy and the underlying complaint was before us. In short, both parties moved for summary judgment in this case, alleging that there were no genuine issues of material fact, and both have acknowledged to this court that all pertinent provisions of the underlying complaint and insurance policy are before this court. We find no prejudicial error that would require us to reverse on this point. *See Jefferson v. State*, 328 Ark. 23, 941 S.W.2d 404 (1997).

Under the second point, appellant argues that the term "advertising" includes only promotional activities that are directed to the public at large; that it does not include a salesperson's one-on-one solicitation for sales; and that the underlying complaint in the Washington case did not allege that appellee engaged in "advertising" activities. We disagree.

The pertinent policy language provided coverage against any "'[a]dvertising injury' caused by an offense committed in the course of advertising [appellee's] goods, products, or services." The term "advertising injury" is defined in the policy as:

> [an] injury arising out of one or more of the following offenses: (a) Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; (b) Oral or written publication of material that violates a person's right of privacy; (c) Misappropriation of advertising ideas or style of doing business; or (d) Infringement of copyright, title or slogan.

The term "advertising" is not defined in the policy, and we have found no Arkansas cases defining the term in the context of a CGL policy.

Appellee's product promotion was not aimed at the general public, but rather at a small, targeted market of large retailers. Appellant contends that appellee's one-on-one sales solicitation cannot constitute "advertising" because it is not aimed at the public at large. Appellant acknowledges in its reply brief, however, that "some dictionaries include definitions of 'advertising' that require public dissemination and other definitions that do not." In attempting to give this term its plain, ordinary, and popular meaning in the context of this case, members of this court have also viewed the term differently. We therefore regard the term as ambiguous in the context of this case and construe it against the appellant as the drafter of the policy. *Hartford Fire Ins. Co. v. Carolina Cas. Ins.*, 52 Ark. App. 35, 914 S.W.2d 324 (1996). Construing the term "advertising" in the manner urged by the dissent would mean that appellee could never recover under this provision of the insurance policy because its product market is a relatively small group of large retailers, not the public at large. Accordingly, under the circumstances presented in this case, we find no error in the trial court's finding that the manner in which appellee promoted its product falls within the meaning of the term "advertising" under the policy, even though the product advertising was not aimed at the public at large.

Moreover, appellant acknowledges that the pleadings in the underlying action generally determine an insurance company's duty to defend. *Madden v. Continental Cas. Co.*, 53 Ark. App. 250, 922 S.W.2d 731 (1996). An insurer must defend the case if there is any possibility that the injury or damage may fall within the policy coverage. *Id.* It is the allegations made against the insured, however groundless, false, or fraudulent such allegations may be, that determine the duty of the insurer to defend the litigation against its insured. *Id.*

Paragraph nine of the underlying copyright-infringement complaint provided in pertinent part:

> On information and belief, since at least as early as July 13, 1995, B&L, with full knowledge of Geographics' rights, has been infringing Geographics' copyrights in and relating to the Subject Works by using, reproducing, displaying, distributing, marketing, and offering for sale unauthorized copies of each of the Subject Works. Among other things, B&L has been manufacturing, distributing, and offering to sell memo pads under the mark KOOLNOTES which are copies of the Subject Works . . . .

The prayer for relief in the underlying complaint provided in pertinent part:

> [That appellee] be enjoined from . . . marketing, offering, selling, disposing of, licensing, leasing, transferring, displaying, advertising, reproducing, developing, or manufacturing any work derived or copied from any of the Subject Works . . . .

We find no error in the trial court's finding that the underlying complaint contained sufficient allegations of appellee engaging in "advertising" activities.

Under its last point, appellant argues that the underlying complaint contains no allegation that appellee's copyright infringement was *caused by* advertising activities. Appellant argues that coverage only extends to an advertising injury that is "caused by an offense committed in the course of advertising [the insured's] goods, products or services," and that the policy's causation requirement was not satisfied in this case because the in-person sales talk, even if regarded as "advertising," was not the cause of the alleged copyright infringement.

Paragraph nine of the underlying complaint alleges that appellee "has been infringing Geographics' copyrights in and relating to the Subject Works *by* using, reproducing, displaying, distributing, marketing, and offering for sale unauthorized copies of each of the Subject Works." (Emphasis added.) The prayer for relief asks that appellee "be enjoined from . . . marketing, offering, selling, disposing of, licensing, leasing, transferring, displaying, advertising, reproducing, developing, or manufacturing any work derived or copied from any of the Subject Works . . . ."

Once again, we find no error in the trial court's finding that the underlying complaint contained sufficient allegations that appellee's copyright infringement was caused by its advertising activities.

Affirmed.

MEADS, J., agrees.

ROBBINS, C.J., and AREY, J., concur.

JENNINGS and ROAF, JJ., dissent.

D. FRANKLIN AREY, III, Judge, concurring. I agree that this matter should be affirmed. This court is not empowered to ignore the rules of construction established by the supreme court. We should therefore affirm on the basis that we cannot construe the insurance policy since it is not in the record before us.

The commercial general liability insurance policy at issue has not been abstracted, nor does the policy appear in the record. As the prevailing opinion indicates, apparently the policy was not even produced before the trial court.

The applicable rules of construction set out by our supreme court require us to examine the insurance policy as a whole, in order to construe any part of it.

> [I]t may be said to be a settled rule in the construction of contracts that the interpretation must be upon the *entire instrument* and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated cause.

Fowler v. Unionaid Life Ins. Co., 180 Ark. 140, 145, 20 S.W.2d 611, 613 (1929)(emphasis supplied). Our supreme court has "consistently adhered" to the notion that the entire contract should be before it, in order to construe any part of the contract. *See First National Bank v. Griffin*, 310 Ark. 164, 170, 832 S.W.2d 816, 819 (1992).

This court adhered to the requirement that we review the entire contract in *Hartford Ins. Co. v. Brewer*, 54 Ark. App. 1, 922 S.W.2d 360 (1996).

> It is axiomatic that, to determine the rights and duties under a contract, we must determine the intent of the parties . . . . It is well settled that the intent of the parties is to be determined *from the whole context of the agreement*; the court must consider the instrument in its entirety. Clearly, it is an appellant's burden to bring up a record sufficient to demonstrate error. Without the contract in question, which may have spoken in any number of ways to the issue of the person or persons entitled to the policy proceeds, we cannot determine whether the trial court erred.

Id. at 3, 922 S.W.2d at 362 (citations omitted)(emphasis supplied). In *Hartford*, the insurance contract did not appear in the abstract or the record. Based upon the rules quoted, we concluded that the appellant had failed in its burden to produce a record sufficient to demonstrate error, and we affirmed. *Id.*

In the instant case, we cannot construe the term "advertising," because the entire policy is not before us. "The rights and liabilities of the parties to an insurance contract must be determined by considering the language of the entire policy . . . . Whatever the construction of a particular clause standing alone may be, it must be read in connection with other clauses limiting or extending the insurer's liability." *Continental Casualty Co. v. Davidson*, 250 Ark. 35, 41-42, 463 S.W.2d 652, 655 (1971)(citations omitted). The prevailing opinion neither cites authority for the proposition that we can ignore this mandate nor cites any authority for the proposition that these rules can somehow be "waived" by the parties. Since the appellant failed to bring up a record sufficient to demonstrate error, the judgment should be affirmed.

ROBBINS, C.J., joins.

JOHN E. JENNINGS, Judge, dissenting. While I agree with Judges Stroud and Meads that the absence of the insurance policy itself from the record does not preclude our reaching the merits in this case, I cannot agree to affirm. The issue posed is whether one-on-one sales solicitations may constitute advertising under the terms of a commercial general liability insurance policy. This was precisely the question for decision in *Monumental Life Ins. Co. v. United States Fidelity and Guar. Co.*, 617 A.2d 1163 (Md. Ct. Spec. App. 1993). There, the court held that a reasonable lay person would not construe "advertising activity" in the context of the CGL policies to include the one-on-one sales activity of Monumental's agents. The court held that "advertising" means *advertising*, i.e., "widespread distribution or announcements to the public." *Monumental Life Ins. Co.*, 617 A.2d at 1173.

The Supreme Court of Vermont has reached the same conclusion. *Select Design, Ltd v. Union Mut. Fire Ins. Co.*, 674 A.2d 798 (Vt. 1996). *See also Tschimperle v. Aetna Casualty & Surety Co.*, 529 N.W.2d 421 (Minn. Ct. App. 1995); *Bank of the West v. Superior Court*, 833 P.2d 545 (Cal. 1992); *International Ins. Co. v. Florists' Mut. Ins. Co.*, 559 N.E.2d 7 (Ill. App. Ct. 1990); *Playboy Enter., Inc. v. St. Paul Fire & Marine Ins. Co.*, 769 F.2d 425 (7th Cir. 1985); *MGM, Inc. v. Liberty Mut. Ins. Co.*, 839 P.2d 537 (Kan. Ct. App. 1992), *aff'd* 855 P.2d 77 (Kan. 1993); *Smartfoods, Inc. v. Northbrook Property & Casualty Co.*, 618 N.E.2d 1365 (Mass. App. Ct. 1993); *Fox Chem. Co., Inc. v. Great Am. Ins. Co.*, 264 N.W.2d 385 (Minn. 1978).

There are cases to the contrary: *New Hampshire Ins. Co. v. Foxfire, Inc.*, 820 F.Supp. 489 (N.D. Cal. 1993); *Merchants Co. v. American Motorists Ins. Co.*, 794 F.Supp. 611 (S.D. Miss. 1992); *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 696 F.Supp. 434 (D. Minn. 1988), *aff'd* 929 F.2d 413 (8th Cir. 1991).

In rejecting the view taken in the three federal cases and adopting what it described as the "majority view," the Vermont Supreme Court said:

> Although we strictly construe the policy provisions against the insurer, we must read the policy provisions according to their

> plain, ordinary meaning. The majority view does so. Our conclusion is not undercut by the fact that there is some disagreement among courts as to the proper meaning of advertising.

Select Design, 674 A.2d at 802 (citations omitted). I agree with both the reasoning of and the conclusion reached by the Supreme Court of Vermont and therefore respectfully dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I agree with the majority and the concurring judge that the absence of the insurance policy from the record does not prevent us from reaching the merits of this case. We have in the record, and properly abstracted, everything the trial judge had before him when he determined that summary judgment should be granted to B & L Products, Inc. The issue is thus whether the trial court properly granted summary judgment based on the information available to him at the time. I do not believe that he did, and would reverse and remand for entry of summary judgment in favor of the appellant, Tri-State Insurance Company.

It is abundantly clear that B & L Products was being sued for copyright infringement — the willful appropriation of the product design of Geographics, Inc. Had the object allegedly copied by B & L Products been a device rather than a notepad, the action against it would have been for patent infringement rather than copyright infringement. In the context of the litigation against B & L Products, the two terms are thus synonymous, and the act complained of clearly falls outside the definition of "advertising injury."

The trial court, in granting summary judgment, found that "the infringing activities of B & L Products, Inc., arose out of advertising activities of B & L Products." This is certainly not correct, for advertising did not and could not cause this copyright infringement. The injury to Geographics arose from the sales of products bearing its copyrighted designs, however, those products might have found their way onto the shelves of the Office Max stores. Consequently, it is irrelevant how advertising is defined, for it is not an advertising offense that is complained of.

Moreover, although I agree that the term advertising should be construed broadly and given its plain, ordinary and popular

meaning, this is precisely what the trial court failed to do. *See, e.g., Columbia Mut. Cas. Ins. Co. v. Coger*, 3 Ark. App. 85, 811 S.W.2d 345 (1991). Here, the offense complained of was not committed in the course of advertising B & L Product's goods, products or services, it was committed when the goods were manufactured. I cannot read the language setting forth as a covered offense, the "[i]nfringement of copyright, title or slogan," to extend beyond an advertising campaign or scheme to the product itself.

For the foregoing reasons, I would reverse and remand for entry of summary judgment in favor of Tri-State Insurance Company.

Jack C. MITCHELL *v.* Martha MITCHELL

CA 97-936 964 S.W.2d 411

Court of Appeals of Arkansas
Division IV
Opinion delivered March 18, 1998

Burke & Eldridge, P.A., by: *Thomas J. Olmstead*, for appellant.

Mashburn & Taylor, by: *Michael H. Mashburn*, for appellee.

JOHN E. JENNINGS, Judge. The only issue raised on appeal in this divorce case is whether the award of alimony was excessive. We hold that it was and modify the award.

Appellant Jack Mitchell and the appellee, Martha Mitchell, married in 1972. A daughter was born in 1989. By October 1996, Mr. Mitchell had become romantically involved with another woman and moved from the parties' home. Mrs. Mitchell sued for divorce.

The parties entered into a property settlement agreement, dividing their property equally. After a hearing the court granted Mrs. Mitchell the divorce, approved the property settlement agreement, awarded $897.00 per month as child support, and awarded $3,000.00 per month as alimony.

An award of alimony is not mandatory, but is solely within the trial court's discretion. *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997). If alimony is awarded, it should be set at an amount that is reasonable under the circumstances. *Mulling v. Mulling*, 323 Ark. 88, 912 S.W.2d 934 (1996). The amount of alimony awarded lies within the sound discretion of the chancellor. *See Ducharme v. Ducharme*, 316 Ark. 482, 872 S.W.2d 392 (1994). It follows that in setting the amount of alimony, the chancellor may consider a range of acceptable alternatives.

The purpose of alimony is to rectify, insofar as is reasonably possible, the frequent economic imbalance in the earning power and standard of living of the divorced husband and wife. *Drummond v. Drummond*, 267 Ark. 449, 590 S.W.2d 658 (1979). The primary factors to be considered are the need of one spouse and the ability of the other spouse to pay. *Bolan v. Bolan*, 32 Ark. App. 65, 796 S.W.2d 358 (1990). Many factors are considered in setting the amount of alimony. *Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980). Ordinarily, fault or marital misconduct is not a factor in an award of alimony. *Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982). The chancellor's award of alimony will not be reversed absent an abuse of discretion. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993).

In the case at bar, the parties had been married for twenty-four years and both are in good health. The parties equally divided almost $400,000.00 in total assets.

Mr. Mitchell has a master's degree in hospital administration and works as a hospital administrator. His gross income at the time of trial was approximately $129,000.00 per year with a net take-home pay of $83,000.00. Mrs. Mitchell has a master's degree in food and nutrition and has worked as a hospital dietician. Since the birth of the parties' daughter, Mrs. Mitchell has stayed at home and earned approximately $1,300.00 per year. At the time of the divorce she was not employed.

During the pendency of the divorce, Mrs. Mitchell received $3,000.00 per month as support for herself and her daughter. At trial she submitted a list of expenses totaling $3,700.00 per month. This included anticipated future expenses which the chancellor

declined to consider, leaving a total of $2,800.00 as the monthly expenses for Mrs. Mitchell and the child.

Neither this court nor the supreme court has ever attempted to reduce the amount of alimony to a mathematical formula. Presumably, it has been thought that the need for flexibility outweighs the corresponding need for relative certainty.

After considering all the appropriate factors, we conclude that the amount of alimony awarded was excessive. Under these circumstances, and on de novo review, we may set the amount of alimony. *See Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982); *Dingledine v. Dingledine*, 258 Ark. 204, 523 S.W.2d 189 (1975). In the case at bar we find that alimony should be set at $2,100.00 per month.

Affirmed as modified.

PITTMAN and STROUD, JJ., agree.

Eugene ESTER *v.* NATIONAL HOME CENTERS, INC.

CA 97-1081 967 S.W.2d 565

Court of Appeals of Arkansas
Division II
Opinion delivered March 18, 1998

Walker, Campbell & Dunklin, by: *Sheila F. Campbell*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Robert L. Henry* and *R. Kenny McCulloch*, for appellee.

SAM BIRD, Judge. Eugene Ester appeals a decision of the Workers' Compensation Commission holding that he was not entitled to benefits for his work-related injury because he failed to prove by a preponderance of the credible evidence that his injury was not substantially occasioned by the use of illegal drugs. Appellant argues that the Commission's decision is not supported by substantial evidence and that Ark. Code Ann. § 11-9-102(5)(B)(iv) (Repl. 1996) violates his constitutional rights to equal protection and due process.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Crossett Sch. Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996); *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993).

Arkansas Code Annotated section 11-9-102(5)(B)(iv) (Repl. 1996) provides:

> "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.

In the instant case, the evidence showed that appellant drove a truck delivering materials for appellee National Home Centers. On Tuesday, March 28, 1995, early in the afternoon, the truck appellant was driving failed to negotiate a curve on an exit ramp of I-40 and turned over. Lumber littered the highway. The police officer who investigated the accident testified that there were no adverse weather conditions; that he smelled no alcohol on appellant; that there were 150 feet of "scuff" marks on the road but no skid marks; and that appellant was going too fast for conditions.

Appellant sustained a broken leg and was taken by ambulance to Arkansas Baptist Medical Center where they performed a "rapid urine drug screen" for alcohol, illegal drugs, and prescription drugs used in contravention of a physician's order. There was evidence that appellant had been given morphine before the urine for the drug screen was obtained. The drug screen was positive for opiates and cocaine metabolites.

Appellant testified that, for the first time in several years, he had smoked cocaine the Friday night before the Tuesday accident. He had worked all day on Monday, and he had gone to work at six a.m. the day of the accident. He said he had made several deliveries and driven approximately 300 miles without mishap before the accident. He had then gone to Quality Lumber and picked up the load he was carrying when the accident happened. Appellant claimed that the lumber had been loaded improperly and had shifted, causing his truck to turn over. However, appellant admitted that he and a fork-lift driver had strapped the load down themselves.

The administrative law judge noted that the positive drug screen raised 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 a physician's order. However, he found that, "other than the positive drug screen, there is simply no other evidence to show that the accident was substantially caused by the use of illegal drugs." The Commission reversed and held that appellant had failed to rebut the presumption that the injury was caused by illegal drugs. The Commission also considered and rejected appellant's argument that Ark. Code Ann. § 11-9-102(5)(B)(iv) violated his constitutional rights of due process and equal protection. Therefore, benefits were denied.

On appeal, appellant first argues that the Commission's decision is not supported by substantial evidence because the Commission improperly disregarded his testimony, and because a cocaine metabolite is not cocaine. Appellant's brief contains a great deal of technical information about cocaine, its psychoactive component, its metabolites and their significance. However, there is no indication in the record that this evidence was ever presented to the Commission. Arkansas Code Annotated section 11-9-705(c)(1)(A) (Repl. 1996) requires all oral evidence or documentary evidence to be presented to the Commission at the initial hearing on a controverted claim. *See Chambers v. Int'l Paper Co.*, 56 Ark. App. 90, 938 S.W.2d 861 (1997); *Death & Permanent Total Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (1992). All legal and factual issues should be developed at the hearing before the administrative law judge. *American Trans. Co. v. Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983); *Walker v. J & J Pest Control*, 6 Ark. App. 171, 639 S.W.2d 748 (1982). Consequently, we do not consider the technical evidence in appellant's brief.

Neither can we agree with appellant's assertion that the evidence was not sufficient to raise the statutory presumption or deny benefits on that basis. On January 21, 1998, we handed down two opinions affirming the Commission's conclusion that marijuana metabolites in a person's urine was sufficient to invoke the rebuttable presumption that the injury or accident was substantially occasioned by the use of the drug. *Graham v. Turnage*

Employment Group, 60 Ark. App. 150, 960 S.W.2d 453 (1998); *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998).[1] In the instant case the Commission held:

> After weighing the claimant's uncorroborated testimony regarding the nature and extent of his drug use and his uncorroborated [testimony] regarding his interpretation of the cause of his accident, as well as Officer Nunn's testimony regarding the accident scene, and all other evidence properly in the record, we find that the claimant failed to prove by a preponderance of the credible evidence that his accident and injury were not substantially occasioned by the use of cocaine.

After noting that it gave appellant's testimony little weight, and that neither the weather nor mechanical failure played any part in appellant's single-vehicle accident, the Commission stated further:

> Consequently, we find that the greater weight of the credible evidence establishes that the claimant's accident was attributable to impaired judgment (either through excessive speed under the conditions or inattentiveness), and we find that the greater weight of the credible evidence in the record indicates that the claimant's impairment was caused by the use of cocaine.

Whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996). *See also Eagle Safe Corp. v. Egan*, 39 Ark. App. 79, 842 S.W.2d 438 (1992). We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 941 S.W.2d 434 (1997); *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992). We find the Commission's decision to be supported by substantial evidence.

Appellant also argues that the statute is unconstitutional because the presence of drug metabolites is not rationally related to intoxication or impairment since it bears no relationship to the effect of the drug on the body, and therefore, it is an arbitrary

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[1] These two cases have been accepted for review by the Arkansas Supreme Court. [*Reporter's note*: *See* 334 Ark. 32 and 334 Ark. 35 (1998).]

classification. Appellant cites case law that holds that under these circumstances the statute violates equal protection. It appears that no medical evidence was presented to the Commission explaining the effect of cocaine on the body, what its psychoactive agent is, how long the psychoactive effect lasts, how it is metabolized, how long it takes to be metabolized, in what form it is excreted, or how long traces of it are excreted.

A statute is presumed to be constitutional, and all doubts about constitutionality must be resolved in favor of constitutionality. *Holland v. Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987). The party challenging the legislation has the burden of proving that the act is not rationally related to achieving any legitimate objective of state government under any reasonably conceivable state of facts. *Arkansas Hosp. Ass'n v. Arkansas State Bd. of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989); *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). On an equal protection challenge to a statute, it is not the appellate court's role to discover the actual basis for the legislation. Instead, we are merely 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 and void of any hint of deliberate and lawful purpose. *Id.* The Commission is required to rule on constitutional questions that are properly before it in order to provide the appeals court with fact-findings sufficient to decide the constitutional issue. *Green v. Smith & Scott Logging*, 54 Ark. App. 53, 922 S.W.2d 746 (1996).

The Commission resolved the equal protection and due process challenge by pointing out that (1) the rebuttable presumption is consistent with, and rationally related to, the legitimate purpose of placing the burden of production on the party with greater access to relevant evidence since the claimant is generally in a better position to know in advance whether drug testing will indicate the presence of illegal drugs in his body at the time of the injury, and (2) a positive test for marijuana and cocaine metabolites in urine samples creates a sufficiently reasonable inference of impairment so as to support the presumption that the injury was caused by drug use. Another potential reason for the

presumption that provides a rational basis of a deliberate nexus with state objectives is to promote a drug-free workplace. Therefore, the Commission's conclusion that the statute is constitutional is correct.

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

FARMERS INSURANCE COMPANY, Inc. *v.*
Buddy SUITER

CA 97-887 964 S.W.2d 408

Court of Appeals of Arkansas
Division II
Opinion delivered March 18, 1998

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Julia L. Busfield*, for appellant.

No response.

SAM BIRD, Judge. Farmers Insurance Company, Inc., appeals from a decision of the Crittenden County Circuit Court, which granted a partial summary judgment to appellee, Buddy Suiter, finding that appellant had a duty to defend appellee under a policy of homeowner's insurance. We reverse.

On June 5, 1992, Vera Simonetti filed a complaint against appellee Suiter alleging that appellee had placed numerous anonymous telephone calls to her for the purpose of harassing, threatening, and frightening her, and seeking damages for causing humiliation, mental anguish, and emotional and physical distress. At the time of the alleged telephone calls, appellee was the insured under a policy of homeowner's insurance issued by appellant. By

virtue of that insurance policy, the appellant initially hired the Blytheville law firm of Reid, Burge, Prevallet & Coleman (hereinafter Reid law firm) to provide appellee with a defense to Simonetti's claims, but reserved the right to terminate its defense if it determined that, under the policy, no coverage existed to Simonetti's claims. Appellant later contended that, based upon the allegations of Simonetti's complaint, no possibility of coverage existed for those claims and it had no duty to defend appellee against Simonetti's claims or to pay any judgment that might be rendered against appellee. Thereafter, Reid law firm attempted to withdraw as attorneys for appellee, alleging that appellant had no duty to defend. The court at first entered an order that permitted the withdrawal, but it later set aside that order after learning that Simonetti had filed an amended complaint alleging that even though appellee's conduct in making the telephone calls was intentional, appellee "may not have intended the results," and that in the alternative, Simonetti's damages were "negligently inflicted, should the jury find that they were not intentionally inflicted."

On May 20, 1993, appellee filed a third-party complaint against appellant seeking to establish that his homeowner's policy provided coverage for Simonetti's claims and that appellant had a duty to defend him against those claims.[1] Appellant denied that its policy imposed upon it a duty to provide either. On July 7, 1996, appellant filed a motion for summary judgment on the third-party complaint, arguing that based upon the definition of the word "occurrence" contained in the policy and the language of the policy stating that it provided no coverage for intentional acts, it had neither a duty to defend nor a duty to pay damages. Appellee responded that there were questions of fact as to whether the policy provided coverage, and he also filed a motion for partial summary judgment on the issue of appellant's duty to defend. The court entered an order granting appellee's motion for partial summary judgment and denying the appellant's motion for summary judgment. The court severed the issues of the duty to defend and

[1] Because of the obvious conflict of interest created for the Reid law firm as a result of the filing of this third-party complaint, the court allowed Reid law firm to withdraw as attorneys of record for appellee without prejudice to appellee's claims that appellant owed him a defense and the duty to pay damages under his homeowner's policy.

the duty to pay damages, ordering that appellant had a duty to provide a defense, but holding in abeyance the issue of appellant's duty to pay damages until the resolution of Simonetti's claim against appellee. The court ordered that appellee's own personal attorney be paid by the appellant.

On October 14, 1995, a jury returned a verdict in favor of Simonetti and against appellee and awarded compensatory damages of $1,000 and punitive damages of $10,000. On November 18, 1996, the appellant renewed its motion for summary judgment, contending that there was no duty to pay damages in the amount of the judgment against appellee, and for reconsideration of the court's order granting partial summary judgment in favor of appellee on the issue of whether appellant had a duty to defend. On April 28, 1997, the court granted the appellant's summary judgment motion on the issue of duty to pay damages but denied the appellant's motion for reconsideration of his previous order finding that appellant owed a duty to defend.

Appellant filed its notice of appeal from the April 28 order, alleging that the court erred in finding that the appellant had a duty to defend because the insurance policy did not cover intentional torts. Further, appellant contends that "This amendment to [the] complaint occurred after it was apparent there was no coverage and would be no defense and was clearly intended to attempt to trigger coverage."

It is a well-settled rule that summary judgment is an extreme remedy and is only proper when the pleadings and proof show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Ark. R. Civ. P. 56; *Talley v. MFA Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981). The standard of review for appealing the grant of summary judgment is well-established: this court need only decide if the granting of the summary judgment was appropriate based upon whether the evidentiary items presented by the moving party left a material question of fact unanswered. The moving party has the burden of sustaining the motion for summary judgment. All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts

and inferences must be resolved against the moving party. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997). *See also Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997); *Renfro v. Adkins*, 323 Ark. 288, 914 S.W.2d 306 (1996).

The general rule is that the pleadings against the insured determine the insurance company's duty to defend. *Madden v. Continental Cas. Co.*, 53 Ark. App. 250, 922 S.W.2d 731 (1996). The duty to defend is broader than the duty to pay damages, and the duty to defend arises if there is a possibility that the damage may fall within the policy coverage. *Id.* This court construes the language of an insurance policy in its clear, ordinary, and popular sense. *Tri-State Ins. Co. v. Sing*, 41 Ark. App. 142, 850 S.W.2d 6 (1993).

Simonetti first alleged that the appellee intentionally made harassing phone calls with the intent to cause her to suffer humiliation, mental anguish, and emotional and physical distress. Further, she alleged "such calls were made with knowledge that Simonetti would become emotionally and physically distressed and with the intent to harass, disturb, annoy, and molest Simonetti. Such calls were made with a wanton and reckless disregard of the consequences to Simonetti." She later amended her complaint to state that appellee intended to make the calls but may not have intended the results that the calls produced.

The language of the policy in question reads: "We shall pay all damages from an occurrence which the insured is legally liable to pay because of bodily injury or property damage covered by this policy." Occurrence is defined in the policy as "a sudden event, including repeated or continuous exposure to the same conditions, resulting in bodily injury or property damage neither expected nor intended by the insured."

This issue has been presented to the courts before; however, the factual basis has been different. In *Talley v. MFA Mutual Ins. Co., supra*, three teenagers were attending a party when a fight ensued. One of the teenagers, who had been drinking, left the party and procured a shotgun. He came back and shot out the windows of one of the cars in the driveway. Then he drove around the block, and during that time, the two other teenagers

came outside and hid behind the cars. The teenager with the shotgun fired again, hitting the others, but claiming that he did not know they were outside and, because it was at night, he could not see them hiding behind the cars. The supreme court held that the trial court erred in granting summary judgment because "a fact issue exists as to whether he intended to hit or injure [the victims]. Many acts are intentional in one sense or another; however, unintentional results often flow from intentional acts." *Id.* at 274, 620 S.W.2d at 263. The court distinguished unintentional acts from intentional acts and stated, "we see no violation of public policy in allowing recovery in circumstances in which it is shown that results were accidental or unintended." *Id.* The court also held that the trial court had erred in granting summary judgment against the insureds, the parents of the teenager firing the shots, because the result of the act was not expected or intended when looked at from the standpoint of the insureds. *Id.*

In *CNA Ins. Co. v. McGinnis*, 282 Ark. 90, 666 S.W.2d 689 (1984), the court reversed a court of appeals decision that affirmed a ruling by the trial court that there was coverage under a homeowner's insurance policy where even though the acts of sexual assaults and abuse inflicted by a man against his stepdaughter were intentional, the results of such abuse were not intentional. The court wrote that the test is "what a plain ordinary person would expect and intend to result from a mature man's deliberately debauching his six-year-old stepdaughter and continuing to do so for years," and concluded that "it flies in the face of all reason, common sense, and experience" for the perpetrator to claim that he did not intend by his actions to cause injury to the child. *Id.* at 93, 666 S.W.2d at 691.

Talley and *McGinnis* are clearly distinguishable from each other. In *Talley v. MFA Mutual Ins. Co.*, *supra*, the supreme court upheld a trial court's determination that there was a fact question as to whether the injury to the two teenagers was the unintentional result of an intentional act where the teenager firing the shots contended that he could not see that the victims were outside since it was dark and they were hiding behind the car. However, in *CNA Ins. Co. v. McGinnis*, *supra*, the insured clearly intended the results of his actions. He was cognizant of what he

was doing and could not have reasonably believed that no harm would occur.

We find the case at bar to be controlled by *CNA Ins. Co. v McGinnis, supra.* The appellee in this case intentionally made numerous anonymous telephone calls to Simonetti. Like the supreme court in *McGinnis*, we find it hard to say that a plain ordinary person would not expect and intend both emotional and physical distress to result from a continuing barrage of harassing telephone calls. For the appellee to declare that he did not intend to cause injury "flies in the face of all reason, common sense and experience." *CNA Ins. Co. v. McGinnis, supra.* Therefore, we find that the trial court erred in granting appellee's motion for summary judgment and in denying appellant's motion for summary judgment. We reverse and order the trial court to enter an order consistent with this opinion.

Reversed.

MEADS and ROAF, JJ., agree.

Sherry Marie HALE and Kevin Wayne Hale *v.* STATE of Arkansas

CA CR 97-191, 192 968 S.W.2d 627

Court of Appeals of Arkansas
Division II
Opinion delivered March 18, 1998

John Wesley Hall, Jr., for appellant.

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

TERRY CRABTREE, Judge. On March 27, 1996, at approximately 1:30 a.m., police officers executed a search warrant at the residence of appellants, Kevin and Sherry Hale. As a result of items seized from their home, appellants were charged with possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and misdemeanor possession of marijuana. Prior to trial, appellants sought to suppress the evidence obtained during the search. After a hearing, the trial court denied their motion. Appellants then entered conditional guilty pleas to the possession of methamphetamine charges, and each was sentenced to forty-two months in the Department of Correction.

On appeal, they argue that it was error to deny their motion to suppress because (1) the facts contained in the affidavit in support of the search warrant did not justify the authorization of a nighttime search, and (2) the officers' failure to knock and announce their presence before entering was unreasonable. We disagree, and therefore affirm.

In reviewing a trial court's ruling on a motion to suppress, this court makes an independent determination based upon the totality of the circumstances and will reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Thompson v. State*, 42 Ark. App. 254, 856 S.W.2d 319 (1993).

I. The Nighttime Search

Appellants first argue that the affidavit submitted by Officer Roger Ahlf of the Arkansas State Police did not contain sufficient facts to justify a nighttime search. Officer Ahlf submitted the four-page affidavit to Municipal Judge Leroy Froman at approximately 12:30 a.m. on March 27, 1996. In requesting the warrant, Ahlf alleged that a controlled drug purchase had taken place earlier that night using marked bills, and that there was a possibility that evidence would be destroyed unless officers were allowed to conduct the search at night and without having to knock and announce their presence before entering the home. Judge Froman authorized the execution of the warrant at any time day or night.

Rule 13.2 of the Arkansas Rules of Criminal Procedure sets out three bases for the issuance of a nighttime search warrant. The rule states:

> (c) Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> (i) the place to be searched is difficult of easy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;
>
> the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and

> within a reasonable time not to exceed sixty (60) days from the date of issuance.

It has consistently been held that the affidavit in support of a search warrant must set out facts showing reasonable cause to believe that circumstances exist which justify a nighttime search. *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990). Appellants assert that there were insufficient facts contained in the affidavit to allow the issuing judge to form reasonable cause to believe that evidence might be destroyed.

Officer Ahlf's affidavit contained the following relevant facts in support of a nighttime search: that during the nighttime hours of March 26, a confidential informant had purchased methamphetamine from appellants using marked bills; that the informant had seen quantities of contraband and paraphernalia in the bathroom; that the purchase had taken place in the bathroom; that several other purchases by other confidential informants had taken place in the bathroom at night; and that an informant stated that appellants normally stayed awake at night and slept during the day.

At the hearing on the motion to suppress, the trial judge ruled that a nighttime search was justified based on the need to retrieve the marked bills used by the confidential informant in the transaction of March 26th. Our supreme court has held that this is a valid justification for allowing a nighttime search. In *Neal v. State*, 320 Ark. 489, 898 S.W.2d 440 (1995), the court stated:

> The affidavit of Lt. Hyatt revealed his chief reason for requesting a nighttime search warrant was his concern that the marked money used by the confidential informants to purchase marijuana from Mr. Neal would be removed from Mr. Neal's home. He stated that the informants said there were others present who indicated they were going to purchase marijuana. Judge Coxsey could easily have concluded that in the course of doing business the marked money might have been dispatched from Mr. Neal's home. We hold the nighttime search was justified on the ground that it was necessary to conduct the search as quickly as possible after the purchase the confidential informants reported they had made from Mr. Neal.

320 Ark. at 494-95, 898 S.W.2d at 444.

The totality of the circumstances militates against suppression of the evidence. In considering appellants' motions below, the trial court ruled that the marked money in and of itself justified the immediate entry to seize the evidence, and we cannot say that this finding was clearly against the preponderance of the evidence. *Thompson, supra.* Further, the fact that buys took place in the appellants' bathroom would justify a nighttime search in order to prevent the possible destruction of evidence. There was no error in allowing a nighttime search in accordance with Rule 13.2.

Appellants also argue that there was a problem with the warrant itself. They properly cite *Carpenter v. State*, 36 Ark. App. 211, 821 S.W.2d 51 (1991), for the proposition that "the warrant must contain not only a finding of justification for a nighttime search, but also an appropriate order authorizing the same." Appellants assert that the warrant simply stated that a nighttime search was required, and that such language was not sufficient. However, *Carpenter* dealt with a nighttime search warrant that was completed by "checking off" boxes on a standard printed form. In this case, the warrant clearly contained an appropriate order for a nighttime search.

II. Knock-and-Announce

The Fourth Amendment incorporates the common-law requirement that police officers must knock and announce their identity before entering a dwelling. *Wilson v. Arkansas*, 514 U.S. 927 (1995). However, the "flexible rule of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Richards v. Wisconsin*, 117 S.Ct. 1416, 1418 (1997) (citing *Wilson, supra*). In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous, futile, or that it would inhibit the investigation of the crime by, for example, allowing the destruction of evidence. *Id.* at 1421.

It is the duty of a court confronted with the question to determine whether the facts and circumstances of a particular entry justified dispensing with the knock-and-announce requirement. *Id.* We will not reverse that finding unless it is clearly against the preponderance of the evidence. *Thompson, supra.* In the present case, the trial court found that the no-knock entry was appropriate in light of the officers' reasonable suspicion that evidence might be destroyed. Appellants argue that the entry was unreasonable.

We cannot say that the trial court's ruling on the motion to suppress was clearly against the preponderance of the evidence. Officer Ahlf stated in both his affidavit and at the motion hearing that several drug purchases had taken place in appellants' bathroom, and that in his experience drugs were often flushed to avoid detection. Other confidential informants told investigators that quantities of drugs were kept in the bathroom. In short, the same facts that justified the authorization of a nighttime search authorized the no-knock execution.

This is not to say that officers are permitted to forcibly enter a home without knocking and announcing any time a nighttime search warrant is issued. Whether the reasonableness requirement adopted by the Supreme Court in *Wilson* has been satisfied depends largely upon the facts of each case. In this case, the entry into appellants' home was reasonable under the circumstances.

Affirmed.

JENNINGS and BIRD, JJ., agree.

David J. POTTER *v.* Margaret MAGEE

CA 96-1525 964 S.W.2d 412

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered March 18, 1998
[Petition for rehearing denied April 15, 1998.]

Thomas A. Potter, for appellant.

Hart, Severns & Lynch, L.L.P., by: *Fredye Long Lynch*, for appellee.

ANDREE LAYTON ROAF, Judge. Attorney David Potter appeals a jury verdict finding breach of contract in his representation of appellee Margaret Magee and awarding her $2,000 in damages. On appeal, Potter contends that the trial court erred in excluding his testimony about the services he rendered to Magee. On cross-appeal, Magee asserts that the trial court erred in: 1) granting judgment on the pleadings on the issue of punitive damages; 2) excluding proffered evidence concerning Potter's prior conduct that was probative of his breach of fiduciary duty; and 3) failing to refer Potter to the Committee on Professional Conduct, and failing to order a larger monetary award as Rule 11 sanctions. We reverse on appeal and affirm on cross-appeal.

Margaret Magee decided to obtain a divorce and began calling attorneys in the Texarkana phone directory on Memorial Day in 1995, until she reached David Potter, who was working at his office. Potter agreed to see her that day. Magee claimed that she informed Potter her objectives were to obtain a divorce, obtain custody of her child, and to remain in the marital home as long as possible to save money. Potter agreed to represent Magee and required that she pay him $3,500 up front. Potter claimed that the money was a fixed fee for handling her divorce; Magee denied that any agreement was reached regarding how the money would be apportioned. Potter deposited the entire $3,500 paid by Magee on May 30, 1995, in his business account.

Potter filed Magee's divorce complaint two days later, on June 1, 1995, and per her instructions had her husband served on June 2, 1995, at 12:10 a.m. Potter requested a temporary hearing that was apparently set for June 8, 1995, but it conflicted with the schedule of Damon Young, the attorney for Magee's husband. Potter subsequently reached an agreement with Young whereby both parties could continue to live in the marital home, but Mr. Magee would be required to leave whenever Mrs. Magee was present. The parties apparently worked different shifts, and through this arrangement could share care and custody of their

thirteen-year-old son during the pendency of their divorce. According to Potter, this made a temporary hearing unnecessary.

However, the agreement broke down when Magee's husband changed the locks on the doors several days later. At that time, Potter referred Magee to a locksmith, prepared a motion for contempt, and renewed his efforts to secure a temporary hearing. As the weeks passed, Magee became dissatisfied with the agreement that Potter had made, and on July 5, 1995, she fired Potter. Magee then hired attorney Paul Dickerson, who, for a fixed fee of $1,500, completed her divorce.

Magee later hired Attorney Fredye Mac Long to attempt to recover a portion of the $3,500 that she had paid to Potter. In a letter dated October 10, 1995, Long demanded a refund of $3,100, which Potter resisted. Magee filed suit against Potter on November 27, 1995, alleging breach of contract and breach of fiduciary duty, and seeking in addition to contract damages, unspecified punitive damages, attorney's fees, costs, and interest. Potter counterclaimed for breach of contract, libel, slander, and intentional infliction of emotional distress, and in the same pleading, moved for Rule 11 sanctions. Potter alleged that the motivation for Magee's suit was Long's personal animosity toward him because Potter was representing Long's estranged husband in a bitter divorce action.

Magee later amended her complaint to allege negligence and gross negligence. Potter then twice amended his counterclaim, after the court's deadline for amending pleadings, to add a third-party complaint against Magee's counsel, praying that she and Magee be held jointly and severally liable for intentional infliction of emotional distress, libel, and slander. The third-party complaint contained numerous allegations of wrongdoing by Magee's counsel.

The trial court ultimately granted Magee's motions to strike both of Potter's amended pleadings as untimely filed and for failure to state a cause of action upon which relief could be granted. The court ordered the pleadings sealed.

Prior to the trial, the court awarded Potter partial judgment on the pleadings and dismissed Magee's claim for punitive damages. During the trial, the judge granted Potter's motion for directed verdict on the claims of negligence and gross negligence, leaving only Magee's breach-of-contract and breach-of-fiduciary-duty counts to be submitted to the jury. The jury found in Potter's favor in the breach-of-fiduciary-duty claim, but awarded Magee $2,000 for breach of contract.

A. Direct Appeal

Potter argues that the trial court erred in excluding as cumulative his testimony during his case-in-chief regarding the exact nature of the services that he provided to Magee. Citing *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993), which he claims stands for the proposition that an attorney discharged with or without cause may recover the reasonable value of his services to the date of discharge, he contends that it was vital for him to prove that he had earned the fee that he charged. Although Potter was called to testify in Magee's case-in-chief, he asserts that he was only allowed to properly account for 2.5 of the 21.85 hours that he expended in representing her.

During Potter's case-in-chief, in a proceeding conducted out of the presence of the jury, the trial court prohibited Potter from testifying about the terms of Magee's divorce settlement because it was not relevant to the action involving his representation of Magee. The court further complained that Potter was going over matters that had already been covered and stated, "I'm going to stop you if I think you are doubling up and just doing a repeat and you're boring the jury. I won't tell you again next time." The following colloquy regarding Potter's itemized billing statement ensued:

> THE COURT: All right. Let's get in. If you've got something new, this is your time to bring it up, and I don't have any problem with that. I understand you need to do that.
> MR. POTTER: Can I go into that —
> THE COURT: Let's get back —
> MR. POTTER: — A reasonable fee for what he's being — what he deserves —

> THE COURT: You have already covered that numerous times already, back and forth. And that's why I kept, before and Ms. Long asking about first one thing and another. He kept on evading the question at the time. You went through that document there. You went through every bit before.
> Ms. LONG: I'm going to object if you didn't designate it as an exhibit.
> THE COURT: Well, if that's the same document we were looking at earlier, I think —
> MR. POTTER: He testified on direct examination.
> THE COURT: — He went through directly with every bit of that. She asked him about how he arrived and all this and that. And was subject to cross examination, every bit of it was. I think you're wasting everybody's time right now. With that admonition, though, I'm going to call them back in.

When the jury returned, Potter was only asked two questions about the services he rendered:

> Q. David, I want you to look at this answer to your interrogatories. We provided an accounting of the time you had this case, and you charged at the rate of a hundred and fifty dollars ($150.00) an hour.
> A. That's correct. And we didn't talk about everything else in here that goes into the total hours, describing the services I rendered, the actions I took, the time it took, and so forth. It's the day it occurred, what I did, and just tracks the services rendered.
> Q. Based upon those services that you provided, what was the total amount that you collected at the Plaintiff's request?
> A. Three thousand four hundred twenty-seven dollars and fifty cents ($3,427.50).

[redacted] The Rules of Evidence favor admission of evidence; relevant evidence may only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Ark. R. Evid. 403; *see, e.g.*, *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979). Taken as a whole, Potter's testimony during Magee's case-in-chief, Magee's own testimony, as well as the testimony of Damon Young and Paul Dickerson, was only sketchy at best as to the services he rendered. Potter's testimony, however, would have pulled this information together in a

coherent form which, even if cumulative, was not needlessly so because it was the essence of his case. *Childs v. Motor Wheel Corp.* 164 Ark. 149, 261 S.W. 28 (1924).

Additionally, not all of the proffered testimony duplicated testimony already presented. Potter's statement details seven office conferences and seven phone calls with Magee. Potter's testimony during Magee's case only substantively deals with one phone call and three office visits. Moreover, Potter's statement tends to refute Magee's testimony that Potter did not often return her phone calls.

Exclusion of evidence is prejudicial where a substantial right of a party is affected. *Stacy v. Lin*, 34 Ark. App. 97, 806 S.W.2d 15 (1991). Screening of relevant evidence is within the sound discretion of the trial court and will only be reversed on appeal where there is a manifest abuse of discretion. *Sony v. Balch Motor Co.*, 52 Ark. App. 233, 917 S.W.2d 173 (1996). However, here the trial court prevented Potter from effectively presenting his case. Accordingly, we reverse the award of damages to Magee.

B. Cross-appeal

On cross-appeal, Magee first argues that the court erred in granting judgment on the pleadings on the issue of punitive damages. Magee contends that the trial court improperly required that her allegations of fact satisfy the legal standard set forth in *South County Inc. v. First Western Loan Co.*, 315 Ark.722, 871 S.W.2d 325 (1994), that the tortfeasor acted with malice, intent to cause injury, or with conscious indifference such that malice may be inferred, when older cases such as *Wallace v. Dustin*, 284 Ark. 318, 681 S.W.2d 375 (1984), required only that she prove that Potter acted wantonly or with a conscious disregard for her rights. She contends that her factual allegations meet this standard.

In response, Potter contends that this issue is moot given the jury's determination that there was no breach of fiduciary duty. Under Arkansas law, a case becomes moot when any judgment rendered would have no practical legal effect on an existing legal controversy. *Dillon v. Twin City Bank*, 325 Ark. 309, 924 S.W.2d 802 (1996). Because we affirm the trial court's evi-

dentiary ruling in Magee's second point pertaining to her breach-of-fiduciary-duty claim, this issue is moot.

Magee's second argument is that the trial court erred in excluding proffered evidence concerning Potter's prior conduct that related to her cause of action for breach of fiduciary duty. In the course of her direct examination of Potter, Magee asked him about his dealings with an elderly Little Rock woman, with whom he had been involved along with two others in purchasing an apartment complex in Little Rock. Potter claimed that the partnership was short-lived and he ultimately bought out his partners' interests. Further, he denied that a local attorney had made a demand upon him alleging overreaching with respect to his dealings with the woman's money.

Potter moved *in limine* to have examination on this subject excluded, but the trial court only disallowed the testimony on the subject from witnesses other than Potter. The trial judge stated: "What I don't want to do is try this case on some side issue or something that doesn't have any bearing. I understand the rules about credibility and so forth and you're entitled to test the credibility of anyone. I don't want to get too far and get you all trying to bring in and try another lawsuit." The trial court ruled that he would not allow inquiry that would confuse the issue, but would allow Potter's credibility to be challenged if he made it an issue.

Relying on Ark. R. Evid. 403 and 404(b) and *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985), for the proposition that similar conduct in the past is admissible to prove intent or motive in the current course of conduct, Magee argues that the trial court should have allowed her to call a rebuttal witness, John Pickett, to testify that Potter had previously wrongfully refused to return money to a person with whom he had a fiduciary relationship. Alternatively, relying on dicta in *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992), Magee argues that the witness should have been allowed to testify for purposes of impeachment by contradiction.

Rule 403 states: "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Here, there was a very real danger that the proffered testimony would prejudice the jury with an assertion that Potter had tried to cheat an elderly lady and almost certainly confuse the issue under litigation. Screening of relevant evidence is within the sound discretion of the trial court and will only be reversed on appeal where there is a manifest abuse of discretion. *Sony v. Balch Motor Co., supra.* We cannot say that the trial court committed a manifest abuse of discretion in excluding the evidence.

Magee's reliance on Rule 404(b) and *Shelton v. State, supra,* is similarly misplaced. Rule 404(b) allows an exception to the general rule that evidence of past wrongs is not admissible to prove character or show conformity therewith if the evidence is offered to prove motive or intent in the current course of conduct. In *Shelton,* testimony about a burglary committed just prior to an ambush of a police officer was deemed admissible. However, there was a close temporal nexus linking the two events, and the previous act explained the reason for the subsequent act. In the instant case, no such temporal nexus is apparent, and the two events are clearly unrelated.

Magee also contends that the witness should have been allowed to testify for purposes of impeachment by contradiction. In *McFadden v. State,* 290 Ark. 177, 717 S.W.2d 812 (1986), the supreme court stated that Ark. R. Evid. 608(b) is restrictively interpreted and does not prohibit the introduction of extrinsic evidence of misconduct of a witness where the witness has testified on direct examination that he or she has not engaged in certain misconduct extrinsic to the offense charged. However, Potter's credibility was not the issue as Magee's counsel made plain in her argument to the court:

> I would like to renew my request to ask for punitive damages based on a course of conduct. I want to call John Pickett with respect to Mr. Potter's dealings with Ms. Weatherford. I am proffering his testimony to be that there was actually a lawsuit prepared to be filed against Mr. Potter based upon overreaching in line with the breach of fiduciary duty allegations — all of which is contrary to Mr. Potter's testimony.

Magee made it clear to the trial court that her reason for calling Pickett was to establish a course of conduct to justify punitive damages based on more than one instance of Potter committing a breach of fiduciary duty. Accordingly, the trial court correctly excluded this testimony as being more prejudicial than probative and as potentially misleading to the jury.

Moreover, for extrinsic evidence of misconduct of a witness to be admissible, the alleged misconduct must be *extrinsic* to the offense with which the accused is charged. *McFadden v. State, supra.* In Magee's argument to the trial court, she urged that Pickett be called to testify so as to establish a course of conduct in order to justify her claim for punitive damages. The alleged prior bad act was therefore intended to prove what she believed to be an integral part of her case, despite the fact that summary judgment had been granted on the issue of punitive damages. For this reason as well, the trial court did not err in excluding Pickett's charges.

Magee finally argues the trial court erred in not referring Potter to the State Bar of Arkansas and in not ordering a larger monetary award as sanctions. Magee argues that because Potter's third-party complaint against her counsel was not well-grounded in law, Rule 11 sanctions were appropriate, and Potter and his attorney should be referred to the Committee on Professional Conduct. Magee argues that this court should fine Potter for embarrassing her attorney, in an amount sufficient to deter future conduct of this type. She also prays that this court refer Potter to the Committee on Professional Conduct.

Magee further contends that the $1,000 awarded pursuant to her Rule 11 motion was insufficient because $2,950 would have covered her actual billing. Additionally, she argues that $492 billed relative to her motion to compel discovery, and $300 incurred in a hearing to unseal the third-party complaint for this appeal should be added to the judgment.

Regarding Magee's first contention that this court should refer Potter and his attorney to the Committee on Professional Conduct, there is no requirement in the *Procedures of the Court Regulating Professional Conduct of Attorneys at Law* that a com-

plaint be filed by a court. *See* § 5A. Moreover, while Potter's amended pleadings made some rather nasty allegations, this court has no basis for determining whether they are true or false. The only thing that is certain is that the pleadings were untimely filed, and even then it was within the trial court's discretion to allow them to be filed if it found that it would serve the interest of justice to do so. *Harris Const. Co. v. Powers*, 262 Ark. 96, 554 S.W.2d 332 (1977).

As to Magee's contention that the $1,000 in fees awarded pursuant to her Rule 11 motion was insufficient, neither she nor Potter have abstracted the judgment awarding the fees, and we are thus precluded from considering this issue. *McPeek v. White River Lodge Enters.*, 325 Ark. 68, 924 S.W.2d 456 (1996)

Affirmed on cross-appeal; reversed and remanded on direct appeal.

ROGERS, GRIFFEN, and NEAL, JJ., agree.

PITTMAN and AREY, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent because I do not agree that the trial judge abused his broad discretion in refusing to allow further testimony based on appellant's itemized billing statement. The billing statement constructed by the appellant was very lengthy. Appellant testified that he did not keep a time record of the case as it proceeded, and that the billing record on which his testimony was based was a reconstruction created after appellee brought the present action against him. Appellant wished to testify in detail concerning individual entries in the billing record. The trial judge refused to allow this, noting that appellant had already testified about the amount of time he spent on the case.

In all evidentiary matters, the trial judge must be afforded broad latitude because he or she alone is in the best position to decide what evidence would aid the jury and what would confuse the issues. *Firestone Tire & Rubber Co. v. Little*, 276 Ark. 511, 639 S.W.2d 726 (1982). Unless the trial judge is clearly wrong, we will not substitute our judgment for his or hers. *J.B. Hunt Transport, Inc. v. Doss*, 320 Ark. 660, 899 S.W.2d 464 (1995). Rule

403 of the Arkansas Rules of Evidence permits the trial judge, in the interest of the efficient administration of justice, to exclude relevant cumulative evidence upon considerations of undue delay and waste of time. Rule 403 also permits the trial judge to exclude relevant evidence where its probative value is substantially outweighed by the danger of misleading the jury. I would affirm because I believe that the testimony appellant wished to offer could reasonably be seen as both cumulative and misleading.

I respectfully dissent.

AREY, J., joins in this dissent.

Dawna BURNS *v.* BOOT SCOOTERS, INC.

CA 97-724 965 S.W.2d 798

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered March 25, 1998

Gary Eubanks & Associates, by: *Robert S. Tschiemer*, for appellant.

Q. Byrum Hurst, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant in this tort[1] case was injured during an altercation at the appellee's country-and-western bar and dancing club. She filed suit against the appellee alleging that her injuries resulted from appellee's negligence in failing to provide adequate security personnel and failing to control a fight between some other patrons. After she presented her case, the appellee made a motion for directed verdict, which was granted by the trial court. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in granting appellee's motion for a directed verdict. We agree, and we reverse and remand.

In ruling on a motion for a directed verdict, the trial court must view the evidence that is most favorable to the nonmoving party and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Carton v. Missouri Pacific Railroad Company*, 303 Ark. 568, 798 S.W.2d 674 (1990). If the evidence is so insubstantial as to require that a jury verdict for the nonmoving party be set aside, then the motion should be granted. If, however, there is substantial evidence to support a jury verdict for the nonmoving party, then it should be denied. *Id.* Substantial evidence is that which is of sufficient force

[1] We certified this case to the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 1-2(a)(15) as one presenting a question about the law of torts. The supreme court declined to accept jurisdiction and remanded the case to this court for decision.

and character that it will compel a conclusion one way or another. It must force or induce the mind to pass beyond a suspicion or conjecture. *Id.* To establish a prima facie case of negligence, a plaintiff must show that damages were sustained, that the defendant breached the standard of care, and that the defendant's actions were the proximate cause of the damages. *Union Pacific Railroad Company v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997).

Viewing the evidence, as we must, in the light most favorable to the appellant, the record shows that appellant and her date, Larry Neyland, were at Boot Scooters on June 4, 1994. A fight broke out while appellant was on the dance floor and Mr. Neyland was seated at a table. Although the fight broke out at the other end of the building from Mr. Neyland's table, it soon moved in his direction towards the exit. Mr. Neyland described the fight as "a herd of people" coming his way that "looked like a rugby match." Mr. Neyland turned in his seat and backed up against the table as far as possible when the fight reached him. Three men, including at least two security men, were escorting another man to the door. They were beating him as they did so, including blows to his face with a flashlight. The security men were not controlling the man being ejected who, although bleeding profusely, began kicking Mr. Neyland. To defend himself, Mr. Neyland picked the man being ejected up by the collar and moved him to the door. The girlfriend of the man being ejected picked up a chair and attempted to hit Mr. Neyland with it. Appellant left the dance floor as she saw the fight approaching the table where Mr. Neyland was seated. As the fight passed her, she saw a woman trying to hit Mr. Neyland from behind with a chair. Appellant, who knew the woman, took the chair, put it down, and tried to calm the woman. Someone in the crowd then pushed appellant into the woman. Appellant fell, and someone in the crowd stepped on her ankle and broke it. Appellant suffered severe pain and was taken to the emergency room. She was hospitalized, underwent surgery, lost a significant amount of wages, and continues to feel the effects of her injury.

■ ■ We think it clear that there was substantial evidence that appellant sustained damages. With regard to the standard of

care owed by a drinking establishment to its patrons, our supreme court has stated that:

> The weight of authority supports the view that while a tavern keeper or bar operator is not an insurer of the safety of his patrons, he is under the duty to use reasonable care and vigilance to protect guests or patrons from reasonably foreseeable injury, mistreatment or annoyance at the hands of other patrons. Negligence in such a situation may consist of failure to take appropriate action to eject persons of undesirable character from the premises or knowingly permitting irresponsible, vicious or drunken persons to be in and about the premises or failure to maintain order and sobriety in the establishment. Of course the proprietor is not required to protect the patrons of a bar or tavern from unlikely dangers, or improbable harm, but he is required to take affirmative action to maintain order when harm to patrons is reasonably foreseeable, and certainly whenever the circumstances are such as to indicate that the danger of harm to patrons by other patrons should have been anticipated by one reasonably alert.

Industrial Park Businessmen's Club v. Buck, 252 Ark. 513, 479 S.W.2d 842 (1972). In the case at bar there was substantial evidence to show that the person being ejected from appellee's establishment was beaten by appellee's security personnel as they attempted to remove him, but that Mr. Neyland was able to remove him from the establishment with little trouble simply by restraining him. The beating administered to the person being removed by the security men was in contravention of appellee's instructions to its security employees, which allowed the use of physical force only in self-defense and only to restrain the attacker. Appellee's instructions further require security personnel to calm down any disturbance as quickly and quietly as possible. We think that reasonable minds could conclude on this record that appellee's security personnel not only failed to calm down this disturbance, but in fact exacerbated it through use of excessive force. We hold that there was substantial evidence to show that appellee breached its duty to use reasonable care to protect its patrons.

■ ■ Finally, we think that there was substantial evidence to show that appellee's failure to use reasonable care was the proximate cause of appellant's damages. Appellant testified that she was knocked down and stepped on by persons following in the wake

of the disturbance, which Mr. Neyland described as a "herd of people." Although it is true that appellant did not know who knocked her down or stepped on her or whether these persons were employees of appellee, that is not fatal to her claim. While the intervention of an independent agency ordinarily relieves the first wrongdoer of liability, the original wrongdoer will not be relieved of liability if the result or act of the independent agent could have been anticipated. *Southwestern Bell Telephone Company v. Adams*, 199 Ark. 254, 133 S.W.2d 867 (1939). As Justice Leflar wrote in *Hill v. Wilson*, 216 Ark. 179, 224 S.W.2d 797 (1949):

> [A] *wholly* independent intervening act could be held to be the sole proximate cause of resultant injuries. If on the other hand the intervening act be one the likelihood of which was definitely increased by the defendant's act, or one which in fact was caused by the defendant's act, it is not a superseding proximate cause of injuries incurred by reason of it. "An intervening act of a human being . . . which is a normal response to the stimulus of a situation created by the actor's negligent conduct is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about." Restatement, Torts, 443. "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about if, (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or (c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent." Restatement, Torts, 447. Compare Green, Rationale of Proximate Cause (1927), with Beale, The Proximate Consequences of an Act (1920), 33 Harvard L. Rev. 633. And see Prosser, Torts (1941) 352.

We think reasonable persons, on this evidence, could properly conclude that appellee should have anticipated that the method employed to eject the disorderly patron could cause other patrons to be trampled by the crowd, and that appellee's negligence definitely increased the likelihood of such an occurrence.

Reversed and remanded.

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

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. Simply because the standard of review of a trial court's decision in directing a verdict is that the evidence is viewed most favorably to the party against whom the directed verdict was entered, certainly cannot mean that a trial court's decision must be reversed, where the party, having the burden of proving that her injuries in a negligence action were proximately caused by the defendant's fault, and where she fails to produce *any evidence* showing that anyone injured her because of the altercation that she claims the appellee failed to properly handle. It is well settled that where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. *Hardeman, Inc. v. Hass, Co.*, 246 Ark. 559, 439 S.W.2d 281 (1969). "Any evidence" means evidence legally sufficient to warrant a verdict. To be legally sufficient, the evidence must be substantial, and substantiality is a question of law for the trial court to decide. *Id.*

The Arkansas Supreme Court has held that evidence of negligence is insubstantial where a fact finder is merely given a choice of possibilities that require the jury to resort to conjecture as to cause. In *Arkansas Kraft v. Cottrell*, 313 Ark. 465, 855 S.W.2d 333 (1993), the court clearly demonstrated its understanding of this principle when it reversed a trial court's decision denying a tort defendant's motion for directed verdict and dismissed the negligence action that had resulted in a $166,630.74 verdict and judgment in favor of a man who sued Kraft for back injuries. The plaintiff in that case had testified in his case-in-chief that he became dizzy, fainted, and fell down a staircase in the paper mill while working on air conditioning units. He did not know why he became dizzy and fell, but testified that he believed that his fall resulted from the combination of heat in the uppermost part of the staircase, the steepness of the staircase, and moisture on the staircase. A fellow employee also testified to the same conditions in the vicinity of the staircase where the fall occurred. The trial

court denied Kraft's motion for a directed verdict at the end of Cottrell's case-in-chief, and the jury returned the verdict previously mentioned. After reciting the same principles for reviewing actions taken on motions for directed verdict that have been recited by the majority in this case, the supreme court held that Cottrell's case "rested upon conjecture and speculation and, as such, he failed to establish a prima facie case of Kraft's alleged negligence, and the trial court erred in not granting a directed verdict in Kraft's favor." *Id.* at 472, 855 S.W.2d at 337. In that unanimous decision, Chief Justice Jack Holt wrote:

> There is no substantial evidence to support the jury's verdict. The record reflects that Mr. Cottrell offered no proof other than his own testimony and that of a fellow worker in an attempt to show Kraft was negligent but failed to convincingly show negligence on the part of Kraft. We have long held that substantial evidence is not present where a fact finder is merely given a choice of possibilities which require the jury to conjecture or guess as to a cause. In other words, evidence showing possible causes of a fall, as opposed to probable causes, does not constitute substantial evidence of negligence. The mere fact that a person slips and falls does not give rise to an inference of negligence, and there is no such inference here.

Id. at 471, citations omitted.

Here appellant alleged that appellee failed to exercise ordinary care to protect its patrons from the risk of injury in a situation involving an altercation with members of its security staff. There was no proof that appellant was pushed because of the altercation, that she fell because of the altercation, or that anyone stepped on her ankle because of the altercation. At most, appellant presented proof from which the jury might have surmised that someone pushed her for any of several possible reasons. She could have been pushed by someone involved in or fleeing from the altercation. She could have been pushed by someone who was trying to move across the dance floor and found her in the way. She could have been pushed by someone who inadvertently jostled her for reasons having nothing to do with the altercation. When appellant fell, her ankle might have been stepped on for any of these reasons, or for none of them. Appellant rested her case-in-chief

having merely offered several possible causes for the jury to speculate about concerning the push, her fall, and the resulting ankle fracture. This is the same kind of proof that the supreme court held in *Cottrell* to justify a directed verdict in favor of the defendant, and which caused the supreme court to hold that the trial court's denial of the defendant's motion for directed verdict was reversible error.

Juries are triers of fact, not jugglers of hunches, guesses, and possible causes for injuries alleged to have been caused by negligence. Whether appellee's security personnel violated the directives relating to handling altercations or not, appellant presented no legally sufficient evidence to warrant a verdict that the injuries sustained when she was pushed, fell, and stepped on were proximately caused by anyone due to the altercation. Unless jury verdicts are to become exercises in guesswork rather than fact finding, we should affirm the trial court's decision granting the appellee's motion for directed verdict. Because the majority is unwilling to do so, despite the established legal precedent on this subject, I respectfully dissent.

Charles D. SMITH *v.* RICELAND FOODS, INC.

CA 97-910 965 S.W.2d 794

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered March 25, 1998

Philip M. Wilson, P.A., for appellant.

David S. Wilson, III, for appellee.

SAM BIRD, Judge. Charles D. Smith appeals a decision of the Workers' Compensation Commission holding that he had failed to prove by a preponderance of the credible evidence that he injured his back in a compensable fall that occurred on September 20, 1994. Appellant argues the decision is not supported by substantial evidence.

The appellant, a thirty-six-year-old man, was injured when a "man-lift" he was riding broke, and he fell thirty-five to forty feet. At first all he could feel was his legs hurting "real bad," and he couldn't get up. Appellant was immobilized and taken by ambulance to the emergency room at the University of Arkansas Medical Center (UAMS) where it was determined that his only injury was to his right knee. He was hospitalized overnight and sent home the next day in a thigh-to-ankle brace.

Appellant testified that he took physical therapy for several months and throughout that entire time he was telling his doctor, his physical therapist, and Ms. Judy Nelson, a nurse identified in a letter as the case manager for Systemedic Corporation who telephoned him to check on his progress, that he was having pain in his lower back. Dr. J. Michael Gruenwald, an orthopaedist and knee specialist, referred him to Dr. Glen Pait, a neurosurgeon. From x-rays Dr. Pait diagnosed appellant with degenerative disc disease of "obscure etiology." Appellant said after his visit to Dr. Pait nothing more was said or done about his back.

Appellant was released to return to light-duty work on May 25, 1995. Appellee placed him in a small air-conditioned room called a scale room where he weighed incoming and outgoing trucks and dumped the load on incoming trucks by controlling levers in the office.

Appellant recounted that one morning in early June 1995, as he was leaving for work, his porch was wet with dew, his cane slipped, and he fell on his buttocks. The same day he changed scale rooms, and when he started to sit down at the desk in the new room, a shelf on the wall hit him in the upper back. Appellant said he doubled his pain pills and kept on working.

Then, according to appellant, on June 14, 1995, he sat down in a broken chair in one scale room, hit his upper back on the shelf in the other scale room, and his pain became unbearable. He said his back throbbed every time he breathed. He was taken by ambulance to the emergency room at Stuttgart Memorial Hospital. He was admitted and spent seven days in the hospital. He never returned to work.

In September 1995, appellant had arthroscopic surgery on his knee by Dr. James S. Mulhollan of the Arkansas Knee Clinic in Little Rock. After the surgery his knee was better, but he still could not put his full weight on it, and his back was still hurting.

Appellant testified that he and his family physician, Dr. Jerry D. Morgan of Stuttgart, could not accept the diagnosis that he had degenerative "bone" disease, as reported by Dr. Pait, so Dr. Morgan referred him to Dr. F. Richard Jordan, a Little Rock neuro-

logical surgeon. Dr. Jordan did a CT scan but said other diagnostic testing would have to be postponed until appellant lost a great deal of weight.

The medical records show that appellant was treated at the UAMS emergency room on September 20, 1994, for an injury to his right knee secondary to a fall. On October 25, 1994, appellant was again seen at the UAMS emergency room, this time for abdominal pain. March 22, 1995, was the first time back pain was mentioned by Dr. Gruenwald. He reported that appellant was complaining of pain across his right buttock and weakness in his right leg. He thought that appellant might have some nerve impingement and referred appellant to the neurosurgery department for an evaluation. On April 4, 1995, appellant was examined by Dr. Pait, who reported that x-rays showed degenerative disc disease at L4-5 and L5-S1.

On May 22, 1995, Dr. Gruenwald wrote a letter "To Whom It May Concern" stating that appellant was under his treatment for knee and low back pain. In a similar letter dated June 21, 1995, Dr. Gruenwald stated that appellant was suffering from "right patellofemoral syndrome and low back disorder," and that appellant's back condition had been treated for a week at Stuttgart Memorial Hospital. According to counsel for both appellant and appellee, they had made several attempts to get copies of appellant's medical records from Stuttgart Memorial Hospital but neither was successful.

The record also contains a report dated July 27, 1995, of Dr. William F. Hefley in which he says appellant is a new patient who complains of knee pain and a back injury from a fall. Finally, there is a letter from Dr. F. Richard Jordan, a neurological surgeon, to Dr. Jerry Morgan, of Stuttgart, dated July 31, 1995, which describes appellant's fall down the grain shaft and states:

> His major injury was to the right knee and it has not yet recovered. He walks with a cane because of that. The low back pain was noticed at the time of the first injury but the knee pain was so severe as to overwhelm it. However, as the knee has recovered the back seems to have worsened and it has gotten much worse

> over the last two months with radiation into the right hip and upper thigh but not any further down the leg . . . .
>
> His CT scan of the lumbar spine shows a transitional vertebra at L5 where there appears to be a facet joint on the left only and above that at the L4-5 level there is a very abnormal facet on the right where it appears that a piece has broken off the lateral aspect of the joint.
>
> . . . .
>
> I believe his back symptoms are from the damaged facet joint. He is too large to investigate further with an MRI and his iodine allergy precludes myelography. For the time being I have simply suggested that he lose 80 pounds.

The administrative law judge held that the evidence "preponderates that [appellant] registered complaints relative to his low back, and attributed same to his compensable injury of September 20, 1994, prior to June 1995." The Commission reversed. In its opinion the Commission delineated certain dates in the medical records that mention appellant complaining of back pain, and concluded that they were too vague, remote, and not supported by objective evidence to support a finding that appellant hurt his back at the time of his fall down the grain shaft.

Appellant argues that the Commission erred in finding that he had failed to prove by a preponderance of the credible evidence that his low back problems were causally related to his fall on September 20, 1994, or that they were a compensable consequence of his compensable knee injury. He points to his own testimony that shortly after he got home from the hospital his back was hurting so bad that he could not even get around with crutches; he required a walker. He also said he mentioned his back pain to Dr. Gruenwald when he went for his first visit, that Dr. Gruenwald said he would refer appellant to a back doctor, but it was a couple of months before he saw Dr. Pait. Appellant described his back pain "like a giant catch." He also contends that Dr. Jordan's finding of a broken bone in his back confirms a traumatic injury.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the

findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Crossett Sch. Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996); *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 941 S.W.2d 434 (1997); *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992). 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. *St. Vincent Infirmary Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996); *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

The record shows that appellant was either examined or had tests performed at UAMS on September 27, 1994 (x-rays, right knee); October 25, 1994 (ER); January 11, 1995 (Dr. Gruenwald, knee exam); January 18, 1995 (MRI of right knee); February 1, 1995 (follow-up exam of knee); March 14, 1995 (x-ray, abdomen); and March 22, 1995 (Dr. Gruenwald, note to refer to neurosurgery for back pain evaluation). On none of these dates except the last one is there any mention of appellant complaining of back pain. Furthermore, the lumbar-spine x-rays taken when appellant saw Dr. Pait surely would have shown such severe defects as "a transitional vertebra at L5 where there appears to be a facet joint on the left only and above that at the L4-5 level there is a very abnormal facet on the right where it appears that a piece has broken off the lateral aspect of the joint." Dr. Jordan's letter dated July 31, 1995, does refer to a CT scan, which is objective evidence that by that time there was something severely wrong with appellant's back. However, there is absolutely nothing in the record to connect it to the September 1994 fall. Therefore, we find that the

record contains sufficient evidence to support the decision of the Commission.

Affirmed.

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

ROAF and CRABTREE, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I respectfully dissent from the majority's opinion because I do not agree that the Commission's finding that Smith did not sustain a compensable back injury is supported by substantial evidence.

Smith, who had worked for appellee since 1988, sustained a compensable knee injury on September 20, 1994. On that date, a man-lift in which he was riding malfunctioned, causing him to fall some thirty-five to forty feet to a concrete floor. Smith was taken to the emergency room where his initial complaints were of pain to his right knee and left thigh. X-rays were taken only of the right knee, right pelvis and left femur. Smith was heavily medicated and placed in an immobilizing hip-to-ankle leg brace on discharge.

Smith's first complaints of low back pain show up in his medical records approximately a month later, in an October 25, 1994, emergency room record. Not insignificantly, he presented at the emergency room that day seeking relief from the side effects of his prescription pain medication. Smith's next recorded complaints of low back pain occurred in March 1995, and continued thereafter until he was ultimately diagnosed with the aid of a CT scan of his lumbar spine on July 31, 1995, as having a damaged (broken) facet joint. Inexplicably, the Commission's opinion refers to this damaged facet joint as a "congenital facet joint problem."

Clearly, Smith's documented complaints of back pain arose soon after his compensable fall, and well before his later fall at home caused by his use of a cane and the two incidents when he hit his back at work, all of which occurred in June 1995. Once again, a long-time employee has been denied compensation for a traumatic injury, in the absence of any evidence that the injury

was not related to a severe fall at work, other than the claimant's delay in voicing his complaints to medical providers. *See Langley v. Danco Constr. Co.*, 57 Ark. App. 295, 944 S.W.2d 142 (1997). Here, unlike in *Langley*, there is no finding by the Commission that Smith is not credible. Because of Smith's very serious fall and his testimony that his back pain originated with the fall but that the knee injury initially overshadowed the back pain, and objective medical evidence that Smith had a broken bone in his back, which the Commission clearly misinterpreted, I would reverse.

CRABTREE, J. joins.

Buddy HINER *v.* DIRECTOR, Arkansas Employment Security Department; and Hiner Oils, Inc.

E 96-148 965 S.W.2d 785

Court of Appeals of Arkansas
Division III
Opinion delivered March 25, 1998

Bagby law Firm, P.A., by: *Philip A. Bagby*, for appellant.

Phyllis Edwards, for appellee.

WENDELL L. GRIFFEN, Judge. Buddy Hiner seeks reversal of a Board of Review decision that he is not entitled to unemployment benefits. We hold that the decision of the Board of Review that appellant voluntarily left his work without good cause connected with the work is not supported by substantial evidence. Therefore, we reverse the decision, and remand the case to the Board so that an order awarding benefits can be entered.

Appellant was employed by Hiner Oils, Inc., for twenty-eight years. For most of that time he held the position of vice-president with the firm. After the murder of his brother, Gerald Hiner, who was the president and owner of the firm, appellant worked as company president. He was named co-executor of the estate of Gerald Hiner along with Gerald Hiner's son, Paul Hiner.

Paul Hiner and his sister inherited all the stock of the corporation after their father's death, and decided to sell the firm to a new entity to be known as Hiner Distributing, contrary to the desires of appellant. It is undisputed that because of appellant's opposition to the sale Paul Hiner and his sister contemplated initiating probate proceedings aimed at removing appellant as co-executor of the estate of Gerald Hiner, and that appellant's prospect for defeating that effort was dim because his nephew and niece owned all the stock of Hiner Oils.

As part of an agreement connected with the sale of the business to Hiner Distributing on September 1, 1994, appellant agreed to resign as co-executor of the estate of Gerald Hiner and as president of Hiner Oils, effective August 31, 1994. Appellant signed a covenant not to compete with the new entity for five years, for which he was paid $60,000. Appellant also agreed to serve as consultant to the new firm for three months (September, October, and November 1994), and was paid $5,000 per month for his services. However, appellant was not retained as an employee of the new firm. He had no employee benefits during the three months that he was a paid consultant, and was unemployed afterward.

Believing that he had been laid off or discharged, appellant filed a claim for unemployment insurance benefits with the Employment Security Division of the Arkansas Department of Labor (the Department). The Department denied benefits pursuant to Ark. Code Ann. § 11-10-513 (Supp. 1997), finding that he voluntarily left his last work without good cause connected with the work. Appellant appealed to the Appeal Tribunal, which reversed the Department's determination, found that appellant was discharged for reasons other than misconduct in connection with the work based on Ark. Code Ann. § 11-10-514, and modified the decision by awarding benefits. After the employer appealed to the Board of Review, the Board reversed the Appeal Tribunal and found that appellant voluntarily left his last work without good cause connected with the work, pursuant to Ark. Code Ann. § 11-10-513(a)(1).

Although appellant's first argument is that substantial evidence supports the decision by the Appeals Tribunal that awarded him unemployment benefits and that the Board of Review erred in reversing that decision, that argument does not correctly address the standard of review applicable to appeals from decisions by the Board of Review. On appeal in unemployment compensation cases, findings of fact by the Board of Review are conclusive if supported by substantial evidence, and review by the Court of Appeals is limited to determining whether the Board could reasonably reach its decision upon the evidence before it. *Rodriguez v. Director*, 59 Ark. App. 8, 952 S.W.2d 186 (1997). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. This Court reviews the evidence and all reasonable inferences deducible therefrom in a light most favorable to the Board of Review's findings. *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). We do not conduct a *de novo* review of the evidence in an appeal from a Board of Review decision. 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. *Cowan v. Director*, 56 Ark. App. 17, 936 S.W.2d 766 (1997).

The Board of Review held that appellant was disqualified from receiving unemployment benefits because he voluntarily left his job with Hiner Oils without good cause connected with the work pursuant to Ark. Code Ann. § 11-10-513(a)(1). The term "good cause" means a justifiable reason for not accepting the particular job offered. *Id.*; *Rowlett v. Director*, 45 Ark. App. 99, 872 S.W.2d 83 (1994). To constitute good cause, the reason for refusal must not be arbitrary or capricious, and the reason must be connected with the work itself. *Id.* The question of what is good cause must be determined in the light of the facts in each case. *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (Ark. App. 1980). Although benefits will be denied an employee who leaves employment for general economic reasons not connected with some specific unfairness perpetrated by his employer, where the employer does an act that causes economic injury to the employee

that act may be good cause connected with the work within the meaning of the statute. *Jackson v. Daniels*, 269 Ark. 714, 600 S.W.2d 426 (Ark. App. 1980).

We have recently held that good cause sufficient to have a successful unemployment benefits claim is cause that would reasonably impel an average able-bodied, qualified worker to give up his employment. *Garrett v. Director*, 58 Ark. App. 7, 944 S.W.2d 865 (1997). Good cause depends 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 depends on the reaction of an average employee. *Id.*

Viewing the evidence in the light most favorable to the Board of Review, we are unable to find substantial evidence to support its finding that appellant voluntarily quit his position as president of Hiner Oils without good cause connected with the work. Although appellant testified that he voluntarily signed a letter of resignation and the covenant not to compete, and that he was paid $60,000 as consideration for doing so and for resigning as co-executor of the estate of Gerald Hiner, there is no evidentiary basis for concluding that he did so without good cause connected with his work. Appellant's job was terminated because his employer was being sold to another entity. Appellant had no power to halt or otherwise control the circumstances of the sale because the company was owned by his nephew and niece, who inherited Gerald Hiner's stock following his demise. The undisputed evidence is that the niece and nephew were preparing to initiate probate proceedings to remove appellant as co-executor of their father's estate in furtherance of their decision to sell the business. It is also undisputed that appellant was neither promised nor offered a job as an employee with the prospective purchaser of the business. The sale of the firm to the new owner ended appellant's status as an employee of Hiner Oils, left him without medical coverage for his heart condition, and resulted in him being retained by the owner as a consultant for only three months when he had previously been vice-president and president of the business.

Like the appellant in *Garrett v. Director, supra*, the appellant in this case attempted to resolve his concerns about continued employment without success. He could not convince his niece and nephew to keep the business they inherited. He could not

persuade the purchaser to retain him as an employee. These were certainly legitimate reasons for resigning his positions as president of Hiner Oils and co-executor of the estate of Gerald Hiner. The fact that appellant voluntarily accepted $60,000 in exchange for entering into a covenant not to compete with the new firm and agreed to be a paid consultant with the new firm does not mean that he lacked good cause to give up his job with Hiner Oils. This undisputed proof prevents us from holding that the Board of Review reasonably decided that appellant left his job as president of Hiner Oils voluntarily and without good cause connected with the work.

We reach this decision especially mindful of the purpose behind our unemployment compensation legislation, and the benefits provided thereby. As Judge George Howard wrote in *Wacaster v. Daniels, supra,* unemployment compensation laws were enacted during the Great Depression of the 1930s to provide a reasonable and effective means for the promotion of economic security and to assist financially those employees who are *involuntarily unemployed because of the reduction of an employer's work force due to adverse economic conditions.* These measures are not designed to penalize employers or reward employees, but are designed to promote the common good or general welfare of the State. More particularly, the goal is to provide for employees who are able to work, available for work, but cannot find work.

The Arkansas General Assembly articulated this humane and beneficent purpose by the following statement of legislative intent when the Arkansas Employment Security Law was originally enacted:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which may fall with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this great hazard of our economic life. This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of

> unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance.

See Ark. Code Ann. § 11-10-102 (Repl. 1996).

When we consider this public policy purpose in light of the undisputed evidence concerning the imminent sale of the company for which appellant had worked for twenty-eight years, the fact that appellant would have not only been replaced as president of the business but was not promised employment except as a short-term paid consultant without employee benefits, and the fact that appellant was unemployed after his three-month consultant situation expired following the sale, we are unable to hold that the Board of Review reasonably found that appellant voluntarily left his job as president of Hiner Oils without good cause connected with the work. Therefore, we reverse and remand the case to the Board of Review so that it can award appellant his unemployment benefits.

Appellant also argues that the Board of Review erred when it permitted the employer's attorney to testify on behalf of the employer and remain its advocate. While this argument appears to have merit, we are unable to address it because the record does not demonstrate that appellant objected to the testimony by the lawyer. Based on our established position that arguments raised for the first time on appeal will not be considered, we decline to reverse the Board of Review on that ground. *See Hooks v. Pratte*, 53 Ark. App. 161, 920 S.W.2d 24 (1996). However, attorneys for litigants are reminded that Rule 3.7 of the Model Rules of Professional Conduct adopted by our supreme court expressly provides that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where the testimony relates to an uncontested issue, the testimony relates to the nature and value of legal services rendered in the case, or disqualification of the lawyer would work substantial hardship on the client. The general rule exists to prevent prejudice to opposing parties and conflict of interest between lawyers and their clients. *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995).

Reversed and remanded.

ROBBINS, C.J., and MEADS, J., agree.

CENTRAL ARKANSAS TELEPHONE COOPERATIVE, INC., et al. *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 97-950 965 S.W.2d 790

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered March 25, 1998
[Petition for rehearing denied April 22, 1998.]

William Bullock; *George Hopkins*; and *Williams & Anderson*, by: *Leon Holmes*, for appellants.

Paul J. Ward, for appellee Arkansas Public Service Commission.

Stephen B. Rowell; and *Friday, Eldredge & Clark*, by: *Kevin A. Crass* and *R. Christopher Lawson*, for appellee ALLTEL Arkansas, Inc.

TERRY CRABTREE, Judge. On August 18, 1997, Central Arkansas Telephone Cooperative and seven other local exchange carriers, appellants, filed a notice of appeal from Order No. 9 issued by the Arkansas Public Service Commission (Commission) in Docket No. 96-428-U. Appellants also filed a motion for stay and expedited appeal. This court denied their motion for stay but granted their motion for an expedited appeal. Their appeal concerns Act 77, the "Telecommunications Regulatory Reform Act of 1997," and its effect on the Arkansas IntraLATA Toll Pool (AITP or Toll Pool). In Order No. 9, the Commission held that the passage of Act 77 made participation in the Toll Pool voluntary and vacated Order No. 7, which created the Toll Pool. On appeal, appellants argue that the Commission erred in holding that Act 77 made participation in the Toll Pool voluntary without further action of the Commission.

The Arkansas IntraLATA Toll Pool (the Toll Pool) was established by Commission Order No. 7 in Docket No. 83-042-U to allow local exchange carriers (LECs) to recover their costs of providing intraLATA toll service. Participation in the Toll Pool was required by Order No. 7, and the Toll Pool agreement provided that all LECs would charge their customers uniform rates for intraLATA toll calls and contribute these revenues to the Toll Pool.

The Toll Pool then redistributed the revenues to the LECs based on their individual needs, causing some LECs to contribute more to the Toll Pool than their actual expenditures and some LECs to receive more in reimbursements than their contributions to the Toll Pool.

In 1996, GTE Southwest, Inc., and GTE Arkansas, Inc. (collectively "GTE"), sought permission from the Commission to exit the Toll Pool so that it could flexibly price intraLATA toll services to meet competition as required by the federal Telecommunications Act of 1996. GTE argued that it was the only local exchange carrier in Arkansas that was required to implement full competition for intraLATA toll service in its serving areas by August 7, 1997, and therefore, it needed the same flexibility in pricing toll plans as the interexchange carriers, which is inconsistent with a pooling environment. Docket No. 96-428-U was opened by the Commission in response to GTE's motion.

Act 77, the "Telecommunications Regulatory Reform Act of 1997," was passed by the Arkansas General Assembly and became law on February 4, 1997. Act 77 significantly changed the Commission's regulation of the telecommunications industry. Basically, it limited the Commission's authority over certain "electing" LECs and their revenues and permitted companies that elect regulation under Act 77 to avoid much of the rate regulations of the Commission to which telephone companies are subject. Additionally, section 4 of the Act created the Arkansas Universal Services Fund (AUSF), the purpose of which is "to promote and assure the availability of universal service at rates that are reasonable and affordable, and to provide for reasonably comparable services and rates between rural and urban areas."

After Act 77 was enacted, the Commission expanded Docket No. 96-428-U to also consider AT&T Communications of the Southwest, Inc.'s (AT&T's) request to abolish the Toll Pool in light of the passage of Act 77. The Commission entered Order No. 5, which set a public hearing on GTE's and AT&T's requests. Alltel Arkansas, Inc. (Alltel) and appellants, and others were permitted to intervene in the docket.

In its comments filed with the Commission, AT&T argued that the Toll Pool should be abolished because it depends on mandatory participation. AT&T noted that section 11(f) of Act 77 exempts certain LECs from the requirements of Ark. Code Ann. § 23-3-114(b), which gives the Commission authority to fix uniform rates, and that this exemption could be interpreted to mean that the Commission no longer has authority to order uniform or statewide average intraLATA toll rates for electing LECs.

Alltel argued in its prefiled testimony that participation in the Toll Pool became voluntary with the passage of Act 77. Its witness, Jack Redfern, testified in his prefiled testimony that Act 77 significantly changed the status of telecommunications providers in the state of Arkansas:

> [H]istorically the Commission has relied on a provision of Arkansas law which allowed it to require statewide average toll rates. This law is referred to in the AT&T Comments as Arkansas Code Annotated Section 23-3-114. Section 11(f) of Act 77 expressly provides that Arkansas Code Annotated Section 23-3-114 is not applicable to companies electing alternative regulation under Act 77. Additionally, and just as importantly, Act 77 provides ILECs [Interstate Local Exchange Carriers] the ability to elect to be regulated under forms of regulation that are alternative to the traditional rate base rate of return regulation. A number of ILECs have elected to be regulated under Section 6 or Section 12 of Act 77, the alternative regulation provisions. One of the significant results of these elections is that the Commission no longer regulates the earnings and revenue streams of the ILECs. While rates of basic local exchange services and intrastate switched access rates are capped, electing ILECs are granted pricing flexibility with regard to all other services including intraLATA toll. The electing ILECs, therefore, cannot be required to maintain toll rates at the same level as all other ILECs. Thus, there is an irreconcilable conflict between Act 77 and the Commission's previous Order requiring ILECs to participate in the Toll Pool. As a result of the passage of Act 77 and the subsequent election of ILECs under Act 77, the Toll Pool, therefore has become a purely voluntary arrangement among telecommunications providers and the Commission cannot mandate participation in the Toll Pool. In other words, the Commission lacks jurisdiction to require participation in the Toll Pool or to estab-

lish the intraLATA toll rates charged by an incumbent local exchange carrier.

Staff of the Commission also argued that participation in the Toll Pool became voluntary as a result of the passage of Act 77. John Bethel, manager of the Telecommunications section of the general Staff of the Commission, argued that participation in the Toll Pool should no longer be mandatory for all LECs. In his prefiled testimony, he noted that sections 8(c) and 9(a) of Act 77 authorize ILECs selecting alternative forms of regulation to increase or decrease rates at any time for telecommunications services (including intraLATA toll service) and, consequently, electing ILECs may change their intraLATA toll rates without prior Commission approval. He then explained that the operation of the Toll Pool is dependent upon all members charging uniform intraLATA toll rates and that, absent identical toll rates being charged by all participants, the Toll Pool members could not be equitably compensated under the Toll Pool's current compensation scheme. He concluded that participation in the Toll Pool should no longer be mandatory for all ILECs.

Appellants' witness Larry Lovell, chairman and CEO of E. Ritter Telephone Company and Tri County Telephone Company, disagreed with AT&T's suggestion that the Commission should abolish the Toll Pool and argued that the establishment of the Arkansas Universal Services Fund (AUSF) must precede the abolishment of the Toll Pool. He testified that the LECs realize that the current Toll Pool arrangement will have to change with the implementation of the dialing arrangements required by federal law but argued that significant time and industry resources would be required to allow an acceptable method of Toll Pool compensation to replace the existing Toll Pool procedures. He also testified that, under section 4(e) of Act 77 of 1997, the LECs must have an opportunity to apply for replacement of any revenue shortfalls that might be caused by elimination of the Toll Pool and, at this time, it is unclear when the AUSF will be in place and available to replace such revenue losses.

Another witness for appellants, Steven Sanders, president and general manager of Northern Arkansas Telephone Company, Inc., also stated in his prefiled testimony that he did not believe the

General Assembly intended to abolish the Toll Pool with the passage of Act 77.

Order No. 9 was entered by the Commission on July 2, 1997. In it, the Commission held that participation in the Toll Pool became voluntary with the passage of Act 77. The Commission explained:

> In Act 77, the General Assembly clearly provided ILECs the opportunity to elect to operate under alternative forms of regulation and once an ILEC elects alternative regulation, it can flexibly price intraLATA toll services under §§ 8(c) and 12(a) of Act 77. Furthermore, when an ILEC elects alternative regulation, § 11(f) of Act 77 exempts the ILEC from a number of statutory requirements including, Ark. Code Ann. § 23-3-114 which requires the maintenance of average message toll service rates. The ILEC deregulatory election provisions in conjunction with the § 11(f) exemptions of Act 77 supersede and vacate the Commission Order requiring mandatory participation of the ILECs in the AITP.
>
> Based upon Act 77, the Commission finds that ALLTEL is correct in stating that "the Toll Pool *became* voluntary with the passage of Act 77" and pursuant to Act 77 "the Commission lacks jurisdiction to require participation in the Toll Pool or to establish the intraLATA toll rates charged" by electing ILECs. Therefore, the Commission finds that by operation of law Order No. 7 in Docket No. 83-042-U was vacated effective February 4, 1997, upon enactment of Act 77. AT&T's request to abolish the AITP need not be addressed since the Commission order requiring participation in the AITP was vacated by operation of law. With the enactment of Act 77, GTE's Motion became moot.

Thereafter, appellants moved for clarification of Order No. 9, specifically requesting the Commission to issue an order stating that any reduction in the net revenue experienced by any rural telephone company as a result of the operation of Act 77 on the distributions of the Toll Pool would be subject to revenue replacement in accordance with section 4(e)(4)(B) of Act 77. The Commission responded in Order No. 10 that absolutely nothing in Order No. 9 should be interpreted as a bar to any LEC's right, pursuant to section 4(e)(4)(B) of Act 77, to seek revenue replacement later in an appropriate docket. Appellants petitioned the

Commission to rehear Order No. 9 and to stay its effective date pending rehearing. The Commission denied appellants' petition in Order No. 11.

Appellants' single point for reversal is that the Commission was clearly erroneous in interpreting Act 77 to hold that it rendered participation in the Toll Pool voluntary effective the date of its passage. Appellants argue that nowhere in the Act does it state that participation in the Toll Pool becomes voluntary on the effective date of the Act and that section 4(e) of the Act prohibits participation in the Toll Pool being made voluntary before the AUSF is implemented. Section 4(e) of Act 77 provides: "The Commission shall not, prior to the implementation and availability of funds from the AUSF, require any local exchange carrier to reduce rates for intrastate switch access services or require any local exchange carrier to reduce its net revenue received from the Arkansas IntraLATA Toll Pool (AITP)."

The Commission addressed this argument in Order No. 9:

> The ILECs contend that no action may be taken on the AITP until such time as the Arkansas Universal Service Fund is established to compensate the ILECs for any revenues lost through dissolution of the AITP . . . .
>
> The Commission has not taken any action which requires any ILEC "to reduce rates for intrastate switched access services," nor has the Commission taken any action which requires any ILEC "to reduce its net revenue received" from the AITP. Act 77 vacated the Commission order requiring participation in the AITP effective February 4, 1997, without Commission action. Therefore, § 4(e) of Act 77 cited by the ILECs has no application in this proceeding.

Nevertheless, appellants maintain that the Commission's action in holding that participation in the Toll Pool became voluntary allows members to leave the Toll Pool before the AUSF is in place, which will cause a reduction in revenues to the Toll Pool and thus a reduction in the revenues received by the remaining Toll Pool members. They conclude that this result is contrary to the plain wording of section 4(e). The problem with appellants' argument is that there is no evidence that appellants have suffered any lost revenue since the Commission held that Act 77 rendered

participation in the Toll Pool voluntary. Consequently, even if the Commission erred in its finding, appellants have not demonstrated that they have been prejudiced by this action. While they speculate that they could be prejudiced by the Commission's decision in the future, no prejudice has been shown at this time. It is well settled that the appellate court does not render advisory opinions nor answer academic questions. *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997). *See also Almond v. Cigna Property and Casualty Ins. Co.*, 322 Ark. 268, 908 S.W.2d 93 (1995); *Tortorich v. Tortorich*, 50 Ark. App. 114, 902 S.W.2d 247 (1995). Where error is alleged, prejudice must be shown. *City of W. Memphis v. Burroughs*, 319 Ark. 611, 893 S.W.2d 323 (1995). It is no longer presumed that error is prejudicial. *Abernathy v. Weldon, Williams, & Lick, Inc.*, 54 Ark. App. 108, 923 S.W.2d 893 (1996); *Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993).

Moreover, assuming without deciding that appellants are correct in their contention that Act 77 did not render participation in the Toll Pool voluntary effective the date of its enactment, appellants' argument is now moot because the AUSF is in place. Appellants' initial appeal was that the Commission erred in finding that participation in the Toll Pool became voluntary prior to the implementation and availability of funds from AUSF. In its response to the appellants' motion for stay and expedited appeal, the Commission attached a copy of Order No. 5, which states that "the Commission will implement rules for the AUSF and make funds available to the eligible telecommunication carriers on or before October 13, 1997." Order No. 5 was entered in Docket No. 97-041-R, a rule-making proceeding to establish rules and procedures necessary to implement the Arkansas Universal Service Fund. Indeed, appellants' counsel acknowledged in the oral argument of this appeal that the AUSF is in effect. Therefore, a decision on the issue appellants raised on appeal will have no practical effect. An issue is moot when it has no legal effect on an existing controversy; when a decision of this court could not afford appellant any relief. *Bryant v. Arkansas Pub. Serv. Comm'n*, 45 Ark. App. 47, 870 S.W.2d 775 (1994). As a general rule, the appellate

courts do not address moot issues. *Dillon v. Twin City Bank*, 325 Ark. 309, 924 S.W.2d 802 (1996).

Appeal dismissed.

ROBBINS, C.J., and AREY, JENNINGS, STROUD, and MEADS, JJ., agree.

Dorothy A. JONES *v.* DIRECTOR of Arkansas Employment Security Department

E 97-230 965 S.W.2d 789

Court of Appeals of Arkansas
Opinion delivered March 25, 1998

Appellant, pro se.

Phyllis Edwards, for appellee.

PER CURIAM. The Director of the Employment Security Department has filed a Motion to Strike additional infor-

mation filed by the appellant, Dorothy A. Jones, with her petition for review. However, there is no need to file such a motion in Employment Security cases; the decision of the Board of Review in this case was affirmed without opinion on March 18, 1998, pursuant to Rule 5-2(b) of the Rules of the Supreme Court and Court of Appeals, without consideration of the additional information submitted. This court does not consider additional evidence filed except as ordered by this court and directed to the Board of Review pursuant to Ark. Code Ann. § 11-10-529(c)(2)(A) (Repl. 1997). *See also Fry v. Director of Labor*, 16 Ark. App. 204, 698 S.W.2d 816 (1985).

In the future, the Director should be advised that a Motion to Strike for the reason set out above is cumulative and unnecessary.

It is so ordered.

Walter BUFORD *v.* Jim ALDERSON and Donna Alderson, d/b/a Alderson Lumber Company

CA 97-1037 965 S.W.2d 802

Court of Appeals of Arkansas
Division IV
Opinion delivered April 1, 1998

Butler, Hicky & Long, by: Fletcher Long, Jr., for appellant.

Easley, Hicky, Cline & Hudson, by: *Preston G. Hicky*, for appellees.

JOHN MAUZY PITTMAN, Judge. This case involves the sale of standing timber by appellant Walter Buford to appellees Jim Alderson and Donna Alderson, d/b/a Alderson Lumber Company. The timber was located on eighty acres of land owned by appellant Buford. Pursuant to the terms of the sale agreement, Alderson had one year from September 22, 1994, to harvest the timber. Buford appeals the amended judgment that the Cross County Chancery Court entered against him in which the court awarded Alderson damages of $35,700.90 for the timber that his company was not able to harvest. We affirm the chancery court's amended judgment.

Below, the chancery court prepared a memorandum opinion setting forth its findings of fact. In this opinion, the chancery court summarized the material facts of this case, in pertinent part, as follows:

> The facts are basically undisputed. In a nutshell, Alderson Lumber Company [bought] the timber off 80 acres of land owned by Mr. Buford. The timber deed granted to Alderson Lumber Company a period of one year to remove the timber. The timber deed was not recorded. Mr. Buford sold the 80-acre tract before the one-year period had expired. The purchaser of the land ordered Alderson Lumber Company off the land. Alderson Lumber Company filed suit against Mr. Buford for breach of contract and prayed for its lost profits as damages . . . .

> Alderson Lumber Co. employees began harvesting the trees around October 1, 1994. They worked in the woods until approximately December 1st when the winter rains forced them from the woods. They started back to work on the 80-acre tract in the spring of 1995.
>
> On April 14, 1995, Mr. Buford, along with his co-tenants, sold the 80-acre tract to Mr. Willard G. Burks and his wife. Mike Alderson [appellee Alderson's son] first learned of the sale when Mr. Burks told him to leave the woods. Mr. Buford never gave notice to Mike Alderson nor Alderson Lumber Company that the land had been sold. He never asked them when the timber cutting would be finished. Mr. Buford testified that he thought the timber cutting was finished when he received the [purchase price] because Mike Alderson had told him that he could not pay him until the logs were harvested. Mr. Buford was paid on or about November 16, 1994.

On appeal, Buford presents a very narrow allegation of error.[1] According to Buford, the chancery court erred in characterizing the transaction at issue as a contract for the sale of timber. Buford asserts that the transaction was not a contract but was, instead, his delivery of a deed to the timber to appellee Alderson in return for $17,200; therefore, he argues, he is not liable to appellee Alderson for breach of a contract to sell the timber at issue because there was no contract between them to be breached. We note that the deed by which Buford conveyed the timber to Alderson contained the following warranty provision, "that [Buford], his heirs, successors and assigns, will warrant and defend unto the Grantee, his heirs, successors and assigns, the title and quiet possession to said timber and trees and to the land whereon they are located, against the claims of all persons whomsoever." We note further that Buford conveyed the eighty acres at issue to the Burkses by a warranty deed that did not make any mention of his previous sale of the timber on the acreage to appellee Alderson.

Assuming, without deciding, that Buford's characterization of his transaction with appellee Alderson as the delivery of a timber deed is correct, we conclude that the chancery court did

[1] We note that no argument has been made concerning the application or effect of Ark. Code Ann. § 4-2-107 (Repl. 1991), or of Ark. Code Ann. § 4-2-312 (Repl. 1991).

not err in awarding damages to appellee Alderson. The chancery court's award of damages was correct, given the warranty provision of the timber deed Buford delivered to Alderson and given the Arkansas Supreme Court's case of *Koonce v. Fordyce Lumber Co.*, 123 Ark. 85, 184 S.W. 440 (1916). *Koonce* is on all fours with the material facts of this case.

In *Koonce*, the Arkansas Supreme Court stated:

> The [Fordyce] lumber company purchased the timber on the lands in question in 1908 from appellants and the same was conveyed to them by a warranty deed granting twenty years in which to remove the timber. On July 11, 1913, appellant Koonce conveyed his one-half undivided interest in the lands to appellant, McKee, by deed without reserving or excepting the timber therefrom. On February 13, 1914, McKee conveyed to R.S. Treadway and W.J. Key without any exception or reservation of the timber and the deed was recorded on the 28th of February. This deed contained some lands on which the right of the lumber company to cut timber had expired, and a lien was retained therein to secure the unpaid purchase money and subsequently on March 23, 1914, McKee and wife executed a quit claim deed to said grantees releasing the vendor's lien. On March 19, 1914, Treadway and Key conveyed all the standing timber on the lands to Cox and Richardson, who in the suit of the lumber company against them, were held to be innocent purchasers thereof, and entitled to the timber, after which decree appellee company instituted this suit. Its deed to the timber was not recorded until April 13, 1914.
>
> Appellants first demurred to the complaint for misjoinder of parties and upon the demurrer being overruled, answered admitting the making of the conveyances of the timber and lands at the time alleged and stated that the deed from Koonce to McKee of the one-half interest in the land was not intended to and did not convey the timber, which both parties knew belonged to the lumber company and was only intended to convey the lands, that therefore no reservation or exception of the timber was made therein; that upon the making of the deed to Treadway and Key, it was understood between the parties that the timber upon the lands was not conveyed although no exception or reservation was contained in the deed; that said grantees knew that the lumber company was the owner of the timber.

They denied any liability to the lumber company for the loss of the timber and alleged that if any damage or loss was suffered, it was on account of the failure of the company to record its deed to the timber, which they supposed had been recorded. The timber conveyed to the lumber company by appellants' deed and lost to them by their subsequent conveyances of the land without reservation or exception of the timber as set out, was shown to be worth the sum of $3,500. Koonce and McKee testified denying any intention to wrong the lumber company or deprive it of the timber sold to it by the later conveyances of the land, each testifying that they notified the grantees down to and including Treadway and Key that the timber belonged to the lumber company and did not pass with the conveyance of the land. They also stated that they had no information that the timber deed was not recorded and in fact supposed it had been recorded before making such conveyances.

. . . .

. . . . Their [appellants'] testimony also shows that they had no intention in fact or rather did not make the conveyance of the land to the last grantees for the purpose of defrauding the lumber company of the timber already conveyed to it as they supposed its deed was of record and would protect its interest. However, this may be, it is unquestionably true that the conveyance of the land conveyed the timber standing thereon and that this fact was well known to appellants in making the deeds thereto. They also knew that their conveyances of the land contained no reservation or exception of the timber thereon from the grant, and were chargeable of course with knowledge that the conveyances of the land without such reservation or exception of the timber, carried the timber and would have effect to defeat their prior conveyances of the timber to the lumber company if said timber conveyance was not of record and the lands were afterwards granted to a *bona fide* purchaser without notice of it. Their affirmative action in making such conveyances without proper exceptions and reservations to protect their grantee of the timber whose deed might not have been and was not recorded, had the same effect to defeat its right and defraud the grantee of the timber as though they had intended the result effected, and for which they must be held answerable. They were owners as tenants in common, each of an undivided half of the lands upon which the timber stood, and conveyed the timber thereon to the lumber company by a warranty deed granting twenty years time for its removal, and their

> warranty was broken, and their grantee appellee, deprived of the timber by a *bona fide* purchaser through their subsequent conveyances of the lands within said time without reservation or exception of the timber, for the loss of which they became liable. Whether the action be regarded arising out of contract or sounding in tort, the effect is the same, since the damage would not have resulted but for their subsequent conveyances of the land without reservation or exception of the timber . . . .

Koonce v. Fordyce Lumber Co., 123 Ark. at 85-87, 89-90.

For the reasons set forth by the Arkansas Supreme Court in *Koonce*, we affirm the amended judgment entered by the Cross County Chancery Court in this case.

Affirmed.

ROGERS and NEAL, JJ., agree.

Danny Lee MORTON *v.* Judy Karon MORTON

CA 97-418 965 S.W.2d 809

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered April 1, 1998

Gean, Gean & Gean, by: *Roy Gean, Jr.*, for appellant.

Eddie N. Christian, by: *Joe D. Byars, Jr.*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant filed a complaint against appellee seeking a decree of divorce. After a hearing, an order was entered granting appellant a divorce, providing for child custody and support, and dividing the bulk of the marital property. However, the chancellor held in abeyance any determination on alimony or division of appellant's military retirement. The chancellor found that appellant participated in two such retirement plans, one of which was vested and one of which was not, but that appellant could not draw benefits from both. Consequently, when the second retirement vests on June 4, 1998, appellant will need to make an election between the two plans. The chancellor reserved jurisdiction of the division of the military retirement until appellant made an election between the two plans. From that decision, comes this appeal.

For reversal, appellant contends that the chancellor erred in holding in abeyance his decision regarding the division of the military retirement until appellant elects between the two retirement plans for which he will be qualified on June 4, 1998. Appellee has filed a motion to dismiss this appeal, asserting that the chancellor's order is not final for purposes of appellate review. We grant appellee's motion and dismiss for lack of an appealable order.

With some exceptions not applicable here, an appeal may be taken only from a final judgment or decree entered by the trial court. Ark. R. App. P.—Civ. (2)(a)(1). An order is not final and appealable merely because it settles the issue as a matter of law; to be final, the order must also put the court's directive into execution, ending the litigation or a separable branch of it. *Scaff v. Scaff*, 5 Ark. App. 300, 635 S.W.2d 292 (1982). Our supreme court has said that the amount of a final judgment must be computed, as near as may be, in dollars and cents, so as to be enforced by execution or in some other appropriate manner. *Estate of Hastings v. Planters and Stockmen Bank*, 296 Ark. 409, 757 S.W.2d 546 (1988). Furthermore, the fact that a significant issue is involved is not sufficient, in itself, for the appellate court to accept jurisdiction of an interlocutory appeal. *Scheland v. Chilldres*, 313 Ark. 165, 852 S.W.2d 791 (1993).[1]

Finally, we note that the chancellor made no determination in the case at bar that there was no just reason for delay so as to permit an interlocutory appeal under Ark. R. Civ. P. 54(b). Rule 54(b) provides that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

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[1] We note the dissent's argument that this case should be certified because it presents significant issues of first impression. We agree that the issues are novel and significant, and it is quite possible that the case would be certified should it return to us after a final order is entered. But in the absence of a final, appealable order, neither court has jurisdiction and there is nothing for us to certify at this time.

This rule is applicable to property-division issues in divorce cases. *Cook v. Lobianco*, 8 Ark. App. 60, 648 S.W.2d 808 (1983). Under these circumstances, the chancellor's order was not appealable, and we dismiss.

Appeal dismissed.

AREY and NEAL, JJ., agree.

JENNINGS, J., concurs.

STROUD and GRIFFEN, JJ., dissent.

JOHN E. JENNINGS, Judge, concurring. I agree with the majority that this is not a final appealable order and concur separately only to note that appellant may have had a remedy by way of mandamus. *See Toney v. White*, 31 Ark. App. 34, 787 S.W.2d 246 (1990).

JOHN F. STROUD, JR., Judge, dissenting. I dissent from the majority opinion in this case because I believe it should be certified to the Arkansas Supreme Court. Our research has not revealed a case involving facts similar to those presented in the instant case. Here, the appellant participated in two military retirement plans, one of which was vested at the time of the divorce and one of which was not. The chancellor held in abeyance his decision regarding the division of the military retirement until appellant elects one of the plans as he will not be entitled to draw benefits from both.

This case presents an issue that is of first impression, that is of substantial public interest, and that needs development of the law. Accordingly, in my opinion it should be certified to the Arkansas Supreme Court pursuant to Rule 1-2(a)17(i), (iv), and (v) of the Rules of the Supreme Court and Court of Appeals. I am authorized to state that Judge Wendell Griffen joins in this dissent.

GRIFFEN, J., agrees.

ZENITH INSURANCE COMPANY *v.* VNE, INC., d/b/a TGI Fridays, Jerry D. Gardner, and Sierra Hotel Corporation

CA 97-994 965 S.W.2d 805

Court of Appeals of Arkansas
Division II
Opinion delivered April 1, 1998

Brazil, Adlong, Murphy & Osment, by: *William Clay Brazil*, for appellant.

Thompson & Llewellyn, P.A., by: *James M. Llewellyn, Jr.*, for appellees.

SAM BIRD, Judge. This is an appeal from an order of the Sebastian County Circuit Court, which granted the appellee's motion to dismiss appellant's complaint for lack of subject-matter jurisdiction pursuant to Ark. R. Civ. P. 12(b)(1). The court held that jurisdiction for appellant's claims lies in the Workers' Compensation Commission. We agree and affirm.

Appellee VNE, Inc. (hereinafter VNE), obtained a policy of workers' compensation insurance from appellant, Zenith Insurance Company, covering the period of October 1, 1994, through October 1, 1995. Appellant contends that in its application for that insurance, VNE misrepresented to appellant that it did not own, lease, or use an airplane. On October 24, 1994, Jerry D. Gardner (hereinafter Gardner), who, with his wife, owned both VNE and Sierra Hotel Corporation[1] (hereinafter Sierra), was piloting an airplane owned by Sierra and occupied by Michael Coats, an employee of VNE, when the airplane crashed. As a result of the crash, Coats sustained injuries. The appellant investigated the airplane accident and paid Coats temporary total disability benefits and medical expenses.

[1] Gardner was the sole owner of all the outstanding stock in Sierra Hotel Corporation, and Gardner and his wife, Vonda J. Gardner, owned all of the outstanding stock in VNE.

Appellant later filed a complaint against VNE, Gardner, and Sierra seeking to recover the amount of workers' compensation benefits it had paid to Coats. In its complaint and amended complaints, appellant asserted four reasons it should be entitled to recover. First, it alleged that Gardner had misrepresented that VNE did not own, lease, or use an airplane, that appellant had relied upon those misrepresentations when it issued its workers' compensation policy, and that it would not have issued the policy had Gardner not made such misrepresentations. Second, appellant alleged that Gardner had been negligent in operating the airplane in which Coats was injured and that Gardner's negligence was the proximate cause of Coats's injuries. Third, appellant alleged that it had paid Coats's workers' compensation claims in reliance upon representations by Coats that he was on an employment-related trip for VNE at the time of the airplane crash, but that during his deposition Coats admitted that he and Gardner were on a recreational trip at the time of the crash and that he had earlier lied about the purpose of the trip at Gardner's insistence. And finally, appellant alleged that Coats should not have been entitled to workers' compensation benefits because VNE continued to pay his salary during the time he was receiving temporary total disability payments from appellant.

In response to appellant's complaint, appellee filed a motion contending that appellant's cause of action for misrepresentation about VNE's ownership, lease, or use of an airplane should be dismissed under Ark. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted, and that the other three claims should be dismissed under Ark. R. Civ. P. 12(b)(1) because, pursuant to Ark. Code Ann. § 11-9-105(a) (Repl. 1996), these claims were within the exclusive jurisdiction of the Workers' Compensation Commission. The court granted appellees' motion.

Appellant does not appeal the court's dismissal of the claim of misrepresentation about the ownership, lease, or use of an airplane. Appellant appeals only that part of the trial court's order that dismissed its second, third, and fourth claims. We affirm the circuit court's order because jurisdiction of appellant's second,

third, and fourth claims properly lies in the Workers' Compensation Commission.

Negligence Claim Against Gardner and Sierra

In accordance with Ark. Code Ann. § 11-9-105(a), the rights and remedies granted to employees under the Arkansas Workers' Compensation Law (Ark. Code Ann. § 11-9-101 through Ark. Code Ann. § 11-9-1001 (Repl. 1996)) are within the exclusive jurisdiction of the Arkansas Workers' Compensation Commission. Simply stated, an employer that has secured to its employees the benefits of workers' compensation cannot be sued in tort by its employees for injury or death arising out of their employment.[2] Only when the employer fails to secure the payment of compensation for the benefit of an employee who is injured or killed in the course of his employment can the employee or his legal representative elect to maintain a legal action in court for damages. Ark. Code Ann. § 11-9-105(b)(1).

However, an injured employee or the legal representative of a deceased employee may, in addition to pursuing a claim for workers' compensation benefits, maintain an action in court against any "third party" who may be responsible for such injury or death. Ark. Code Ann. § 11-9-410(a) (Repl. 1996); *Wilson v. Rebsamen Ins.*, 330 Ark. 687, 957 S.W.2d 678 (1997). Arkansas Code Annotated section 11-9-410(a) states that the employer or its workers' compensation insurance carrier has the right to receive notice of the employee's third-party action and to join in that action if it wishes. Under Ark. Code Ann. § 11-9-410(b), the employer or its carrier that is liable for the payment of workers' compensation benefits may be subrogated to the employee's claim and assert an action against a third party, but it must notify the employee in writing that he has the right to pursue any benefits to which he may be entitled in addition to the subrogation interest.

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[2] An exception to this rule exists when the injury or death of the employee results from an employer's intentional act to bring about the injury or death of the employee, *Sontag v. Orbit Valve Co.*, 283 Ark. 191, 672 S.W.2d 50 (1984); but this exception has no application to the case at bar.

In the case at bar, appellant contends that Gardner and Sierra are third parties within the meaning of Ark. Code Ann. § 11-9-410(b) and claims that Coats's injuries resulted from Gardner's negligence in the operation of Sierra's airplane. We do not agree that Gardner is a third party within the meaning of Ark. Code Ann. § 11-9-401(b). The Arkansas Supreme Court has defined a third party under section 11-9-410 as "some person or entity other than the first and second parties involved, and the first and second parties can only mean the injured employee and the employer or one liable under the compensation act." *Wilson v. Rebsamen Ins., supra* (citing *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969)). Thus, under section 410, neither a workers' compensation carrier nor an employer can be a third party. *Wilson v. Rebsamen Ins., supra.*

In this case, the first party is the injured employee, Coats; and the second party is the employer, VNE, or its workers' compensation insurance carrier, which is the appellant. Since appellant's claim against third parties exists only by virtue of Ark. Code Ann. § 11-9-410(b), as a subrogee of Coats, appellant stands in the same position as Coats, who is prohibited by Ark. Code Ann. § 11-9-105(a) from suing VNE. Also, Gardner cannot be a third party in this case because he is the sole owner and an officer (and therefore a "persona") of VNE, Coats's employer, that is protected by the exclusive remedy provisions of Ark. Code Ann. § 11-9-105(a). Since no third party exists in the case at bar, section 11-9-410(b) is simply not applicable.

Appellant argues that Sierra qualifies as a third party within the meaning of Ark. Code Ann. § 11-9-410(b), but its complaint alleges no acts of negligence on Sierra's part that would subject it to liability as a result of the plane crash. The complaint filed by appellant states:

> That in the alternative, the plaintiff is entitled to reimbursement for sums paid to and to be paid to Coats based on the Workers' Compensation claim from defendants Gardner and Sierra, jointly and severally. That on the 23rd day of October, 1994, Gardner, acting as an owner, agent and employee of Sierra, failed to exercise reasonable case (sic) in the operation of the 703SR SeaRey amphibian airplane, owned by Sierra, in that when piloting the

> plane on said date, Gardner attempted to land on the Arkansas River on pontoons but negligently failed to cause the wheels to be raised, thereby causing the airplane to crash nose-first into the river where it first touched down, all of which was the proximate cause of Coats' injuries.

Even if this court could construe the above-quoted portion of appellant's complaint to mean that Gardner's negligence should be imputed to Sierra, jurisdiction still remains in the Workers' Compensation Commission pursuant to Ark. Code Ann. § 11-9-105(a), which clearly states,

> No role, capacity, or persona of any employer, principal, officer, director, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter, and the remedies and rights provided by this chapter shall in fact be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.

Appellant argues that Gardner and Sierra are two distinct legal entities. However, Sierra is a persona of Gardner in that, as the complaint states, Gardner was acting as owner, agent, and employee of Sierra at the time of the airplane crash that resulted in Coats's injuries. Therefore, section 11-9-105(a) places jurisdiction before the Workers' Compensation Commission.

Appellant also argues that the exclusive remedy provision of Ark. Code Ann. § 11-9-105(a) applies only to the claims of employees against their employers and not to claims of insurance carriers against employers. However, this argument overlooks the fact that a workers' compensation insurance carrier's right to pursue a tort claim against third parties arises solely by virtue of Ark. Code Ann. § 11-9-410(b), which grants to the carrier a right of subrogation only. As a subrogee, appellant's claim stands on the same footing as the claim of Coats, to whose claim appellant is subrogated. Since Coats is precluded by Ark. Code Ann. § 11-9-105(a) from pursuing a claim against his employer, so is appellant.

Course and Scope of Employment

The trial court also found that it did not have jurisdiction because the appellant alleged in its complaint that appellee was not working in the course and scope of his employment in that the airplane trip was not related to Coats's employment with VNE. Appellant argues that it originally paid Coats's claims because it relied upon representations by Coats that he was on an employment-related trip at the time of the accident. However, during a deposition, Coats admitted that he and Gardner were on a recreational trip. The appellant originally paid compensation benefits to Coats and is now seeking to recover the amount it paid from Coats's employer by claiming that Coats was not working in the course and scope of his employment when his injury occurred. Arkansas Code Annotated section 11-9-102(5)(A) (Repl. 1996) defines a compensable injury as "[a]n accidental injury . . . arising out of and in the course of employment . . . ." Thus, whether an injury is compensable for purposes of workers' compensation depends, in part, on whether the injury occurred within the course and scope of the injured employee's employment. This is necessarily an issue to be determined by the Commission in deciding whether to award benefits. Therefore, appellant's contention in this action that Coats was not acting within the course and scope of his employment when his injury occurred is one that should be made before the Workers' Compensation Commission because of the exclusive remedy provisions of Ark. Code Ann. § 11-9-105(a).

Salary Payment in Addition to Workers' Compensation Benefits

In its second amended complaint, appellant asserts that it learned that while it was paying benefits to Coats, Coats was in turn receiving a salary from VNE. The appellant contends that since Coats was being paid a full salary by VNE while he was disabled, appellant should not have been required to pay temporary total disability to Coats at the same time. Appellant seeks to recover from VNE the amounts of disability compensation it alleges that it erroneously paid to Coats. While under Ark. Code Ann. § 11-9-807(b) (Repl. 1996) Coats may not be entitled to

receive disability compensation while also receiving a full salary from his employer, this is a defense that should be asserted before the Workers' Compensation Commission.

Affirmed.

MEADS and ROAF, JJ., agree.

Hubert RAMAGE *v.* STATE of Arkansas

CA CR 97-568 966 S.W.2d 267

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered April 8, 1998

Maxie G. Kizer, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, Hubert Ramage, was charged with possession of a controlled substance (cocaine) with intent to deliver. His pretrial motion to suppress evidence was denied. He then entered a conditional plea of guilty pursuant to Ark. R. Crim. P. 24.3(b). On appeal, he contends that the trial court erred in denying his motion to suppress. We affirm.

Officer Michael Coleman of the Pine Bluff Police Department testified that, at approximately 1:00 a.m. on July 10, 1996, he stopped the vehicle that appellant was driving because the license plate was not illuminated as required by law. Appellant was unable to produce a driver's license, registration for the car, or proof of insurance. The officer also determined that the license

plate was fictitious. When appellant went to the passenger side of the car to look in the glove compartment for a registration card and proof of insurance, the officer reached in the driver's side window and lowered the sun visor in what he described as an "attempt[ ] to assist [appellant] in locating his registration." A package of cigarettes and a matchbox fell from the visor to the seat. The officer picked up both items and inspected them "to see if there was anything out of the ordinary there." Apparently, there was nothing unusual about the cigarette package. The officer then shook the matchbox to see if it sounded as though it contained matches. The officer testified that it sounded inconsistent with matches being inside, so he opened the matchbox. Inside, he found crack cocaine.

The trial court denied appellant's motion to suppress evidence of the cocaine on two grounds: (1) that the officer legally could help appellant look for his papers, the matchbox lawfully came into plain view, and, once the officer's training and experience told him that the box did not contain matches, he had probable cause to open it; and (2) alternatively, that the evidence would have been inevitably discovered as the result of an inventory anyway, as the officer testified that, without a driver's license and the necessary paperwork, he would not have allowed appellant to leave in the car but would have impounded it and inventoried its contents. Appellant attacks both of these grounds on appeal. He does not contest the legality of the initial traffic stop.

The State first contends that we should affirm without reaching the merits of appellant's arguments because appellant failed in his burden of establishing that he had any standing to contest the search. We agree.

Fourth Amendment rights against unreasonable searches and seizures are personal in nature. *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997). The pertinent inquiry regarding standing to challenge a search is whether the defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recog-

nize that expectation as reasonable. *McCoy v. State, supra*; *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). It is well settled that the defendant, as the proponent of a motion to suppress, bears the burden of establishing that his Fourth Amendment rights have been violated. *McCoy v. State, supra*; *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995). A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by the search of a third person's premises or property. *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863 (1992); *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997). A defendant has no standing to question the search of a vehicle unless he can show that he owns the vehicle or that he gained possession of it from the owner or someone else who had authority to grant possession. *McCoy v. State, supra*; *Littlepage v. State, supra*; *State v. Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992). One is not entitled to automatic standing simply because he is present in the area or on the premises searched or because an element of the offense with which he is charged is possession of the thing discovered in the search. *United States v. Salvucci*, 448 U.S. 83 (1980); *see Rakas v. Illinois*, 439 U.S. 128 (1978). This court will not reach the constitutionality of a search where the defendant has failed to show that he had a reasonable expectation of privacy in the object of the search. *McCoy v. State, supra*; *Rankin v. State, supra*.

Here, the record contains *no* evidence on which one could base a finding that appellant had standing to contest the search. Appellant presented no proof whatsoever that he had a legitimate expectation of privacy in either the vehicle or the matchbox that fell from the sun visor. Appellant did not testify at the suppression hearing and assert the proprietary or possessory interest necessary to establish standing, although he could have done so without danger of self-incrimination. *See Brown v. United States*, 411 U.S. 223 (1973); *Simmons v. United States*, 390 U.S. 377 (1968); *Gass v. State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986). The only witness who testified at the suppression hearing was Officer Coleman, and his testimony demonstrated only that the vehicle bore a fictitious license plate and that appellant could not produce a driver's license, registration, or proof of insurance

for the vehicle. No evidence was offered that appellant either owned or lawfully possessed the vehicle. Nor did appellant ever assert ownership of or a right to possess the matchbox that was found above the sun visor. Because appellant failed to prove lawful possession of the objects of the search, we conclude that he failed in his burden of establishing standing to challenge the search. Therefore, we do not reach the merits of his arguments on appeal. *See McCoy v. State, supra.*[1]

Affirmed.

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[1] The dissent contends that, because the State argues appellant's lack of standing for the first time on appeal, the issue cannot be considered by this court. The three cases cited for that proposition are *Arkansas Game & Fish Commission v. Murders*, 327 Ark. 426, 938 S.W.2d 854 (1997); *Pulaski County v. Carriage Creek Improvement District No. 639*, 319 Ark. 12, 888 S.W.2d 652 (1994); and *State v. Houpt*, 302 Ark. 188, 788 S.W.2d 239 (1990). In each of those cases, however, the *appellant* raised the *appellee's* lack of standing for the first time on appeal in an effort to obtain a *reversal*. The supreme court held only that lack of standing is not a jurisdictional defect of the sort that will allow an *appellant* to make an argument for *reversal* for the first time on appeal. In none of those cases did the court do any violence to the longstanding rule that we may *affirm* the result reached by the trial court, if correct, even though the reason given by the trial court may have been wrong. *See Summers v. State*, 292 Ark. 237, 729 S.W.2d 147 (1987) (trial court's decision affirmed although the decision should have been based on a different reason, which was not argued by the appellee in the trial court); *Garcia v. State*, 18 Ark. App. 110, 711 S.W.2d 176 (1986) (trial court's decision affirmed, albeit for a reason neither relied upon by the trial court nor argued below by the appellee).

The dissent also incorrectly states that the issue of standing was argued to and clearly addressed by the trial court in each of the cases cited in the text of this majority opinion. In fact, the opinions in *Dixon v. State, supra*; *McCoy v. State, supra*; *Littlepage v. State, supra*; and *Davasher v. State, supra*, do not state that the State argued the issue in the trial court, much less that the trial court ruled on the question. Nevertheless, in each case, the supreme court affirmed the denial of the motion to suppress because the appellant had failed to establish his standing to raise a Fourth Amendment challenge in the first place. In fact, the opinions in *McCoy* and *Littlepage* state specifically that the trial court denied the appellants' motions on the merits of their Fourth Amendment arguments, and indicate only that the State argued *on appeal* the appellants' failure to establish standing. *See also Fernandez v. State*, 303 Ark. 230, 795 S.W.2d 52 (1990) (trial court denied motion to suppress because it found challenged search consensual, but supreme court affirmed because appellant failed to establish standing; no indication of what State argued either below or on appeal); *Duckett v. State*, 268 Ark. 687, 600 S.W.2d 18 (Ark. App. 1980) (trial court's denial of motion to suppress, which was based on merits of the challenge, was affirmed by court of appeals on account of appellants' lack of standing, "a matter not discussed in the parties' briefs").

AREY, JENNINGS, and STROUD, JJ., agree.

NEAL and GRIFFEN, JJ., dissent.

OLLY NEAL, Judge, dissenting. This criminal appeal is taken from a judgment of conviction based on appellant's conditional guilty plea to possession of a controlled substance with intent to deliver. Mr. Ramage argues on appeal that the trial court erred in denying his pretrial motion to suppress certain physical evidence. I agree that the evidence should have been suppressed and would reverse his conviction.

At the hearing on appellant's motion to suppress, Michael L. Coleman, the police officer who arrested appellant, testified that he stopped a car appellant was driving on July 10, 1996, in a high crime area in Pine Bluff because "the little plate bulb that illuminates the license plate was out." Appellant could not produce a driver's license, and the car he was driving bore a fictitious license plate. Mr. Ramage was allowed to go to the passenger side of the car to look for his registration and insurance documents in the glove box while the officer "attempted to assist him" by searching the driver's side. When Officer Coleman flipped the driver-side sun visor down, a package of cigarettes and a box of matches fell onto the seat. He admitted that he picked up both items "to see if anything out of the ordinary was there" and testified that the box did not sound like it contained matches when he shook it. The officer then opened the box, found rock cocaine inside, and placed appellant under arrest. In addition to being charged with possession with intent, appellant was ultimately cited for his failure to produce a driver's license and received a warning ticket for the burned out "registration light."

Contrary to the majority decision, we should not validate Officer Coleman's alleged "inadvertent discovery" of contraband by declaring that it occurred during a lawful search, incident to appellant's arrest. The arresting officer did not have probable cause to arrest Mr. Ramage when he found the incriminating evidence; he was in the process of determining whether Ramage possessed the very documents that would have completely exonerated Ramage of any criminal liability. The search also preceded officer Coleman's discovery of any circumstance or evidence that

would have given him authority to impound Ramage's car, thereby obfuscating any claim that the search was a valid inventory search. The record is completely devoid of any testimony or other real evidence as to whether Ramage was able to produce proof of insurance and registration at trial. We cannot reasonably rely upon the "inevitable discovery" doctrine, because it is apparent that, but for the officer's belated decision to arrest appellant or to impound his vehicle, neither a search incident to the arrest nor an inventory search could have been lawfully performed; the officer simply was in no position to "discover" any contraband without violating appellant's Fourth Amendment rights.

As a final note, appellant's standing to raise the Fourth Amendment violation at issue is not properly before us; the State never once raised that issue at trial. Our supreme court specifically stated in *Pulaski County v. Carriage Creek Imp. Dist. No. 639*, 319 Ark. 12, 888 S.W. 2d 652 (1994):

> [W]e are unaware of any authority in this Court holding that lack of standing deprives a trial court of jurisdiction. (Citation omitted). If the issue were one of jurisdiction of the subject matter, we would address it despite the fact that it was not raised before the Trial Court. As it is not such an issue, we decline to address it for the first time on appeal.

This case was cited with approval in *Arkansas Game & Fish Comm'n v. Murders*, 327 Ark. 426, 938 S.W.2d 854 (1997), where the supreme court, once again, declined to discuss the issue of standing where it was not raised at trial.

Furthermore, our supreme court addressed the State's argument that standing is a jurisdictional issue in *State v. Houpt*, 302 Ark. 188, 788 S.W.2d 239 (1990). In *Houpt*, an interlocutory appeal by the State from a trial court's order of suppression, the supreme court, in framing the issue on appeal, stated:

> The State asserts that it should be permitted to raise appellee's lack of standing for the first time on appeal because appellee's standing is a jurisdictional, or a "quasi-jurisdictional," requirement. We reject the State's argument.

Id. at 189.

Notwithstanding the fact that a criminal defendant who moves to suppress evidence bears the burden of establishing that he has standing to contest an illegal search (which was duly recognized by the *Houpt* court), the supreme court concluded:

> [T]he state's proof apparently fell short [on the issue of probable cause to search] and it now seeks to try this same fourth amendment issue by using a different theory. In line with this court's long standing rule that precludes appellants from raising new issues on appeal, we reject the state's request to allow it to do so here.

Id. at 191. This rule is also applicable to any non-appealing party who attempts to advance arguments for the first time on appeal. *See Dempsey v. Merchant's Nat'l Bank*, 292 Ark. 207, 729 S.W.2d 150 (1987); *Stoutt v. Ridgway*, 9 Ark. App. 315, 658 S.W.2d 420 (1983); and *Hendricks Adm'r v. Burton*, 1 Ark. App. 159, 613 S.W.2d 609 (1981). It is fundamental that when a matter can readily be clarified by the trial court if a timely objection is made, failure to object prevents a party from raising the issue on appeal. *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981).

In *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1993), *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997), and each of the other cases relied on by the majority, the issue of standing was clearly addressed by the trial court and the record was developed by each party on the issue of whether the appellant owned or held any possessory interest in the subject property. In each of those cases, it was necessary for the trial court to decide squarely whether or not the appellant had a sufficient expectation of privacy to justify his Fourth Amendment challenge to an allegedly illegal search. The present case, of course, is clearly distinguishable because no one raised the issue of appellant's expectation of privacy or standing to challenge the search at trial. As it did in *Houpt*, *supra*, the State now attempts to circumvent the appellant's Fourth Amendment rights by arguing a different basis for denial of appellant's motion for suppression than it did at trial. The trial court never had an opportunity to consider the matter. It is so clear in our case law that it requires no further citation of authority that our appellate courts do not and should not consider issues which the parties have not submitted to the trial court for resolu-

tion. Our supreme court specifically stated in *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997):

> It is the opportunity of the trial court to first hear and address the parties' arguments that is of importance in determining whether the argument has been preserved for appeal.

This pronouncement is consistent with the historical "established rule" the court of appeals noted in *Phillips v. State*, 266 Ark. 883, 890, 587 S.W.2d 83, 87 (Ark. App. 1979). There, the court unequivocally stated:

> *[N]o party* ought to be allowed to assign as error on appeal a ruling by the trial court that might have been corrected in the first instance by timely objection or inquiry.

(Emphasis added.) Here, if the State believed appellant's lack of standing was a bar to the admissibility of the testimony he offered in support of his motion to suppress, the State should have either entered a proper objection or made a proper inquiry as to whether appellant had any ownership interest in the automobile he was driving.

For these reasons, I respectfully dissent.

GRIFFEN, J., joins this dissent.

ODOM ANTENNAS, INC. *v.* Candy STEVENS

CA 97-941 966 S.W.2d 279

Court of Appeals of Arkansas
Division I
Opinion delivered April 8, 1998

Hatfield & Lassiter, P.A., by: *Richard F. Hatfield* and *Jeffrey W. Hatfield*, for appellant.

Cearley Law Firm, P.A., by: *Robert M. Cearley, Jr.*, for appellee.

D. FRANKLIN AREY, III, Judge. The White County Circuit Court awarded appellee Candy Stevens compensatory and punitive damages, costs, and a reasonable attorney's fee against appellant, Odom Antennas, Inc. The award of compensatory damages was based on alternative theories, breach of contract and a claim for retaliation under the Arkansas Civil Rights Act of 1993; the award of punitive damages was based upon a violation of the Arkansas Civil Rights Act. Appellant argues that the trial court erred when it determined that the employment agreement was valid and enforceable; that the award of punitive damages is not supported by an award of compensatory damages; and that there is insufficient proof as to the number of appellant's employees, so

that punitive damages could not be calculated under the Arkansas Civil Rights Act. We affirm.

Bill Thornton, Odom's chief executive officer, persuaded Stevens to come work for the company. She moved from Washington, D.C., to Beebe and began work on July 11, 1994, with the title of Executive Director. Her duties included securing financing to help overseas customers and handling personal matters assigned by Thornton. Thornton testified that Stevens was a "perfect employee" for the first couple of months of employment.

On September 8, 1994, Stevens presented Thornton with an employment agreement that she prepared. He asked her a question, they discussed it, and then they both signed the agreement. It provides that "Employer agrees to employ the full-time services of a professional and administrative nature of the Employee . . . and the Employee agrees to accept employment from the Employer . . . ." The agreement outlines Stevens's compensation and benefits, and in paragraph 5 states: "In the event of termination of employment for any reason, other than voluntary termination on the part of Employee, the Employer agrees to separation pay equal to one (1) year [sic] salary."

Stevens and Thornton agree that their relationship began to worsen almost immediately after the agreement was signed. Thornton testified that Stevens began to be absent too much, and that she was causing "chaos" with the other employees. He alleged that he fired her for a number of reasons, including (1) not cancelling an advertising order, (2) telling an Arkansas Development Finance Authority employee that Odom was not interested in any of its programs, (3) not setting her own priorities, and (4) having a bad attitude.

Stevens, on the other hand, claims that she was ultimately fired because she would not lie for Thornton in an Equal Employment Opportunity Commission investigation. She testified that Thornton told her not to talk to the EEOC investigator, but she did so anyway, giving the investigator examples of what was happening at the office. She also gave two or three employees articles on sexual harassment.

Thornton asked Stevens to leave the company on Monday, September 19, 1994. He said that he did not trust her; she refused to leave, citing her contractual obligation. The next day Thornton gave Stevens a signed note that informed her that her employment was terminated.

Stevens sued for breach of the employment agreement, and sought to recover her salary for one year and benefits. She subsequently amended her complaint to add a claim for retaliation and termination in violation of the Arkansas Civil Rights Act, Title VII of the Federal Civil Rights Act of 1964, and common law wrongful discharge.

The trial court awarded Stevens a year's salary on her breach of contract claim, with an attorney's fee and costs. The trial court found that Stevens stated a claim for retaliation under the Arkansas Civil Rights Act, and that she was entitled to compensatory damages in the same amount as awarded on the breach of contract claim. However, the trial court did not allow Stevens to recover this same sum twice; rather, the trial court awarded Stevens a year's salary in the amount of $36,400 under the alternative theories. The trial court awarded Stevens punitive damages on her Arkansas Civil Rights Act claim; that amount was limited to $50,000 under Ark. Code Ann. § 16-123-107(c) (Supp. 1997), based on a perceived number of employees at Odom.

Odom first argues that the trial court erred by determining that the employment agreement was a valid and enforceable contract. Odom contends that the agreement does not obligate Stevens to do anything; thus, her promise to perform is illusory, and there is no valid consideration on her part supporting a contract.

This argument raises the issue of mutuality of obligation. The essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Hunt v. McIlroy Bank & Trust*, 2 Ark. App. 87, 616 S.W.2d 759 (1981). The concept of "mutual obligations" has been explained by our supreme court as follows:

> A contract to be enforceable must impose mutual obligations on both of the parties thereto. The contract is based upon the

> mutual promises made by the parties; and if the promise made by either does not by its terms fix a real liability upon one party, then such promise does not form a consideration for the promise of the other party. ". . . [M]utuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." A contract, therefore, which leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other.

Townsend v. Standard Indus., Inc., 235 Ark. 951, 954, 363 S.W.2d 535, 537 (1963)(quoting *El Dorado Ice & Planing Mill Co. v. Kinard*, 96 Ark. 184, 131 S.W. 460 (1910)) (citations omitted). Mutual promises that constitute consideration for each other are the classic method of satisfying the doctrine of mutuality. *J.L. McEntire & Sons, Inc. v. Hart Cotton Co.*, 256 Ark. 937, 511 S.W.2d 179 (1974).

The employment agreement satisfies the doctrine of mutuality because it contains mutual promises that are consideration for each other. Odom "agrees to employ the full-time services of a professional and administrative nature" of Stevens. In turn, Stevens "agrees to accept employment from" Odom. Stated another way, Stevens agreed to work for Odom, by rendering "professional and administrative services." This is not an illusory promise on Stevens's part; she is agreeing to work for Odom, in a particular capacity, in return for stated consideration. *Cf. Keith v. City of Cave Springs*, 233 Ark. 363, 344 S.W.2d 591 (1961)(a promise to supply all of the services that a promisee may thereafter order is not an illusory promise; instead, it is a very definite promise that creates a large power in the promisee).

Odom insists that it is necessary to construe the employment agreement against Stevens in order to resolve this issue. We disagree. If there is no ambiguity in the language of the employment agreement, then there is no need to resort to rules of construction. *See Koppers Co. v. Missouri Pac. R.R. Co.*, 34 Ark. App. 273, 809 S.W.2d 830 (1991). The determination of whether a contract is ambiguous is a matter of law. *Arkansas Burial Assoc. v. Dixon Funeral Home, Inc.*, 25 Ark. App. 18, 751

S.W.2d 356 (1988). The quoted provisions of the employment agreement are not ambiguous; therefore, resort to rules of construction or to Stevens's subjective interpretation of the employment agreement is not necessary.

Odom argues that the trial court's award of punitive damages was not proper, because the trial court did not award compensatory damages under the Arkansas Civil Rights Act. The trial court's Amended Findings of Fact and Law state:

> Under ACA 16-123-101 . . . Stevens is entitled to compensatory damages in the sum of the total salary and all perks of the contract between the parties. However, the Court interprets the contract to the figure of one's salary regardless of the reason for termination. The amount awarded under ACA 16-123-107 is the same amount awarded under the contract action. [Stevens] cannot collect both amounts.
>
> . . .
>
> Plaintiff is entitled to punitive damages, attorney fees and costs for violation of ACA 16-123-101 et seq.

Thus, the trial court awarded compensatory damages under alternative theories: breach of contract and Stevens's Arkansas Civil Rights Act retaliation claim.

Because the trial court did award compensatory damages under the Arkansas Civil Rights Act, its award of punitive damages on that same cause of action was proper. Punitive damages would be improper in the absence of an award of compensatory damages for the underlying cause of action. *See Bell v. McManus*, 294 Ark. 275, 742 S.W.2d 559 (1988). Here, there is an award for damages on the underlying cause of action; compensatory damages were awarded under the Arkansas Civil Rights Act. Thus, punitive damages on that same cause of action are proper.

It is of no significance that the trial court awarded compensatory damages on alternative theories. We read the trial court's Amended Findings of Fact and Law as actually awarding compensatory damages under the Arkansas Civil Rights Act; it goes on to prohibit a "double recovery" of the same sum. Since

compensatory damages were awarded for retaliation, an award of punitives for that same reason is proper. *See Bell, supra.*

The trial court awarded punitive damages under Ark. Code Ann. § 16-123-107(c). Odom argues that there was no proof as to the number of its employees, which is necessary to calculate punitive damages under § 16-123-107(c). Therefore, Odom argues that the award of punitive damages was in error.

Stevens's claim for retaliation was based on Ark. Code Ann. § 16-123-108(a).[1] *See* Theresa M. Beiner, *An Overview of the Arkansas Civil Rights Act of 1993*, 50 Ark. L. Rev. 165, 191 (1997). If a cause of action for retaliation is proven, § 16-123-108(c) provides that the "remedies and procedures available in § 16-123-107(b) shall be available . . . ." *See* Beiner, *supra*, at 195. Section 16-123-107(b) allows a recovery of "compensatory and punitive damages, and, in the discretion of the court, [recovery of] the cost of litigation and a reasonable attorney's fee." Section 16-123-107(c) is not applicable.

Although the trial court incorrectly applied 16-123-107(c), instead of 16-123-107(b), the award of punitive damages should still be sustained. "It has long been the rule in Arkansas that a trial judge's decision will not be reversed if he reached the right result, even though he gave an erroneous reason." *Moose v. Gregory*, 267 Ark. 86, 90-91, 590 S.W.2d 662, 665 (1979). Here, the trial court had the authority under § 16-123-107(b) to award punitive damages; Odom does not contend that punitive damages were not justified at all. Therefore, we affirm the trial judge's award of punitive damages. This result renders Odom's argument concerning proof of its number of employees irrelevant on appeal, since § 16-123-107(b) does not require this proof.

Affirmed.

STROUD and ROAF, JJ., agree.

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[1] We note that Stevens was fired in 1994, but the General Assembly did not enact a statutory cause of action for retaliation until 1995. *See* § 16-123-108 (originally enacted as Act 480 of 1995). This point was not raised below. Because we do not think this point raises a question of subject matter jurisdiction, it will not be considered here. *See Leinen v. Arkansas Dep't of Human Serv.*, 47 Ark. App. 156, 886 S.W.2d 895 (1994); *Banning v. State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987).

SERVICE CHEVROLET *v.* Doug ATWOOD

CA 97-618 966 S.W.2d 909

Court of Appeals of Arkansas
Division I
Opinion delivered April 8, 1998

[redacted]

Walter A. Murray, for appellant.

David E. Smith, for appellee.

D. FRANKLIN AREY, III, Judge. The Workers' Compensation Commission found that the appellee, Douglas Atwood, sustained a compensable injury to his left eye. The appellant, Service Chevrolet, was found to be responsible for appellee's medical treatment and expenses; the Commission approved reservation of the issue of appellee's permanent disability pending additional treatment. Appellant argues on appeal that the Commission's decision is not supported by substantial evidence, and that the Commission erred by reserving the issue of permanent disability for later determination. We affirm.

In determining the sufficiency of the evidence to sustain the Commission's findings, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997). 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; rather, the extent of our inquiry is to determine if the Commission's findings are supported by substantial evidence. *See Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

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 authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989). The testimony of medical experts is an aid to the Commission in its duty to resolve issues of fact. *Id.* It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted, and when it does so, its findings have the force and effect of a jury verdict. *Id.*

Appellant employed appellee to detail cars. On January 30, 1995, appellee was spraying cleaner on the wheel of a car when a drop of the cleaner splashed into his left eye. Appellee immediately washed his eye with water but did not report the incident at that time. Appellee testified that he began to experience difficulties with his left eye approximately one week after the incident. His initial symptoms included redness, swelling, watering, and matting of the left eye. Appellee eventually reported the incident because these symptoms persisted.

John McDonald, appellant's service manager, testified that sometime after January 30, 1995, appellee informed him that he had splashed the tire cleaner in his eye, and that his eye was burning. McDonald advised appellee to go to the office, fill out a workers' compensation report, and go see his doctor. An injury report was completed on February 20, 1995, suggesting that appellee first reported the incident approximately three weeks after it occurred.

Appellee was referred by his initial treating physician to Dr. Susan Blair, an ophthalmologist. She first saw appellee on May 12, 1995. Her report noted that appellee experienced problems with his eye since the time of the injury, and that he experienced watering, redness, swelling, and decreased vision in his left eye. Dr. Blair prescribed non-steroidal, anti-inflammatory eye drops.

She subsequently noted that the redness, pain, and swelling in the left eye improved.

Visual acuity testing indicated that appellee's vision was 20/20 in the right eye and 20/40 in the left eye. Dr. Blair referred appellee for a corneal topography at UAMS, which confirmed irregular astigmatism in the cornea of appellee's left eye as compared to a normal topography of appellee's right eye.

In a report dated August 4, 1995, Dr. Blair noted appellee's reported history of splashing wheel cleaner in his left eye. She observed that she did "not have a record of what medical evaluation was completed at the time of the initial injury." She diagnosed irregular corneal astigmatism in appellee's left eye accounting for his mild decrease in visual acuity in that eye. She continued:

> An ophthalmologic exam before and immediately after the injury would be needed to clearly associate the injury with this. Certainly, an acidic solution such as wheel cleaner can cause irregular corneal astigmatism like what is present in Mr. Atwood's eye.

The Commission concluded that appellee proved by a preponderance of the evidence each of the requirements necessary to establish a compensable injury. It noted the objective findings by Dr. Blair and her observations of redness and swelling, as well as the abnormality indicated by the corneal topography. The Commission further noted that appellee consistently related his left eye problems to a chemical injury sustained on January 30, 1995; that both appellee and Dr. Blair indicated that the wheel cleaner was an acidic solution; and that Dr. Blair opined that an acidic solution such as the wheel cleaner can cause irregular corneal astigmatism like that present in appellee's left eye.

Appellant first argues that appellee did not prove that he sustained a compensable injury under Ark. Code Ann. § 11-9-102(5)(A)(i) (Supp. 1997). In support of this argument, appellant contends that appellee failed to report his injury in a timely fashion and failed to seek medical treatment in a timely fashion. These arguments go to the weight and credibility of the testimony, and these matters are exclusively within the province of the Commission. *See Stephens Truck Lines*, 58 Ark. App. at 278,

950 S.W.2d at 474. The statutory definition of a compensable injury does not require timely reporting of an injury, or receipt of medical treatment within a specified period. *See* Ark. Code Ann. § 11-9-102(5)(A)(i).

Appellant next argues that the Commission's opinion is based upon speculation and conjecture, because appellee did not introduce certain medical records, nor did he introduce evidence of the toxicity of the wheel cleaner. These arguments fail to recognize that it is the Commission's function to determine the credibility of appellee, and the weight to be given to his testimony concerning his medical history. *See Whaley*, 51 Ark. App. at 169-70, 912 S.W.2d at 15. The Commission obviously relied upon appellee's relation of his left eye problems to the chemical injury he sustained on January 30, 1995. Further, it relied upon appellee's and Dr. Blair's indications that the wheel cleaner was an acidic solution. Thus, substantial evidence supports the Commission's findings.

Appellant also argues that Dr. Blair's medical testimony was not stated to a reasonable degree of medical certainty. Specifically, appellant argues that the standard is not satisfied by Dr. Blair's opinion that the wheel cleaner "can" cause an irregular corneal astigmatism.

Appellant's argument requires us to further interpret Act 796 of 1993. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Vanderpool v. Fidelity & Casualty Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997); *Terral v. Terral*, 212 Ark. 221, 205 S.W.2d 198 (1947). The basic rule of statutory construction to which all other interpretive guides defer is to give effect to the intent of the legislature. *Vanderpool*, 327 Ark. at 415, 939 S.W.2d at 285. A legislature is presumed, in enacting a statute, to have had in mind court decisions pertaining to the subject legislated on and to have acted with reference thereto. *Terral*, 212 Ark. at 228, 205 S.W.2d at 201.

Prior to the passage of Act 796, proof of causation in workers' compensation cases did not require medical certainty. *See Hubley v. Best Western-Governor's Inn*, 52 Ark. App. 226, 232 &

n.1, 916 S.W.2d 143, 146 & n.1 (1996). Our decisions simply did not require physicians to express opinions in terms of either a "most likely possibility" or "a reasonable degree of medical certainty." *Pittman v. Wygal Trucking Plant*, 16 Ark. App. 232, 700 S.W.2d 59 (1985). Thus, in pre-Act 796 cases, we held that the medical experts' use of such terms as "possible" or "might cause," among others, did not preclude a finding of causal connection provided there was other evidence supporting that conclusion. *Id.*; *see Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986).

Act 796 clearly works a change in our prior law. Section 11-9-102(5)(D) states that "[a] compensable injury must be established by medical evidence . . . ." Section 11-9-102(16)(B) requires that "[m]edical opinions addressing compensability . . . must be stated within a reasonable degree of medical certainty . . . ." The statute does not require the use of the phrase, "reasonable degree of medical certainty." Rather, it requires that the opinion be stated *within* a reasonable degree of medical certainty.

Viewed in the context of our prior law, the change wrought by § 11-9-102(16)(B) becomes apparent. Our prior law did not bar a finding of causal connection if a doctor used tentative expressions or phrases, provided that there was other evidence supporting the conclusion. *See Pittman*, 16 Ark. App. at 236, 707 S.W.2d at 61-62. We presume that the General Assembly was aware of this when it enacted Act 796. *See Terral, supra.* Section 11-9-102(16)(B) changes prior law. Now, medical opinions addressing compensability under § 11-9-102(5)(A)(i) must be stated in terms expressing the medical expert's reasonable certainty that the claimant's internal or external physical harm was caused by his accidental injury.

A recent decision of the Supreme Court of Nebraska is helpful in this regard:

> Our cases discussing the sufficiency of expert opinions have been a survey of various characterizations by the claimant's experts as to how certain they are that the claimant's injury was caused by his or her employment. We have held that expert medical testimony based on "could," "may," or "possibly" lacks the definite-

> ness required to meet the claimant's burden to prove causation. Our well-known preference for the use of the phrases "reasonable degree of medical certainty" or "reasonable degree of probability" is an indication to courts and parties of the necessity that the medical expert opinion must be stated in terms that the trier of fact is not required to guess at the cause of the injury.

Paulsen v. State, 249 Neb. 112, 121, 541 N.W.2d 636, 643 (1996)(citations omitted). Although the court expressed a preference for certain phrases, it noted "that an expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words 'reasonable medical certainty.'" *Id.*

Applying this reading of § 11-9-102(16)(B), appellant's challenge to Dr. Blair's opinion must fail. Relying upon appellee's account, Dr. Blair stated that "[c]ertainly, an acidic solution such as wheel cleaner can cause irregular corneal astigmatism like that present in [appellee]." This opinion complies with the statute.

Appellant also challenges the Commission's reservation of the issue of permanent disability for later determination. Appellant contends that if appellee has not developed his evidence, he should not be allowed a second chance to offer proof. Appellant cites Ark. Code Ann. § 11-9-705(c)(1) for the proposition that all evidence must be presented in the initial hearing.

Appellee sought permanent disability compensation for the decreased visual acuity caused by the irregular corneal astigmatism in his left eye. The Commission affirmed the administrative law judge's reservation of this issue. The Commission referenced Dr. Blair's determination that appellee's uncorrected visual acuity is 20/40, and her statement that his visual acuity may be subject to improvement by use of a hard contact lens over the cornea. Arkansas Code Annotated § 11-9-521(c)(2) provides that, in all cases of permanent loss of vision, the use of corrective lenses may be taken into consideration in evaluating the extent of loss of vision. Since all medical treatment had been controverted, and since Dr. Blair had not yet determined the degree of correctable

impairment, the Commission found that the ALJ properly reserved this issue.

We agree. Appellee's initial medical treatment and evaluation were never completed, justifying a reservation of the issue of permanent disability for later determination. *See Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996).

Affirmed.

NEAL and GRIFFEN, JJ., agree.

CONTINENTAL EXPRESS *v.* William HARRIS

CA 97-1252 965 S.W.2d 811

Court of Appeals of Arkansas
Division II
Opinion delivered April 8, 1998

Roberts Law Firm, P.A. by: *Bud Roberts* and *James D. Robertson*, for appellant.

Lane, Muse, Arman & Pullen, by: *Donald C. Pullen*, for appellee.

SAM BIRD, Judge. Continental Express, a trucking company, appeals a decision of the Workers' Compensation Commission holding that appellee had rebutted the presumption contained in Ark. Code Ann. § 11-9-102(5)(B)(iv)(b) (Repl. 1996), and proved that the one-vehicle accident in which he was injured was not "substantially occasioned" by the use of alcohol. Appellant argues that the Commission erred in (1) interpreting and applying Ark. Code Ann. § 11-9-102(5)(B)(iv)(b); (2) finding that appellee's seizures are causally related to his employment; and (3) awarding additional temporary total disability benefits because there was not substantial evidence to show that the claimed period of total incapacitation was causally connected to the compensable injury. We affirm.

On December 21, 1994, appellee was on his way to Crossett. He testified that it was raining and foggy, that he was on a two-lane road, that he was driving about forty-five miles an hour, and that his trailer was empty when a small white car attempted to pass without adequate room and cut closely in front of him. Appellee

said that when he put on his brakes to avoid hitting the car and an on-coming vehicle, his truck jackknifed and went into a ditch.

Appellee testified that he was unconscious for a short time and awakened to find a witness asking him if he was all right. He said he crawled out of the truck, across the ditch and onto the highway where law enforcement officers were waiting. He had bruises and cuts on his head, hands, and knees. There was a twelve-pack of unopened beer in the cab of his truck, but an officer performed a field sobriety test on appellee, and appellee passed. Appellee was taken to the hospital by ambulance where he was treated for a laceration to his scalp, a neck injury, a lower back injury, and a left leg injury. Blood withdrawn at the hospital revealed that appellee's blood-alcohol content was .021%. It is unlawful to operate a motor vehicle if a person has one-tenth of one percent (0.10%) or more alcohol in his blood. Ark. Code Ann. § 10-65-103 (Repl. 1993). However, Ark. Code Ann. § 27-23-112 (Repl. 1994) provides that a commercial truck driver shall be disqualified from holding a commercial driver's license if convicted of driving a commercial vehicle with a blood-alcohol concentration of four one-hundredths of one percent (0.04%) or greater.

Appellee testified that on December 21, 1994, he and his partner had driven all night from Albuquerque, New Mexico, to Little Rock, and had arrived between 5 and 7 a.m. While waiting for a new load, appellee and his co-driver drank a couple of beers, and then appellee went to bed. Late that afternoon he was told to go pick up a load in Crossett. The accident occurred just north of Monticello. Appellee was taken to Drew Memorial Hospital in Monticello where the emergency-room report shows the time as being 7:09 p.m. The blood-alcohol report shows that appellee's blood was drawn at 7:45 p.m.

Following his release from the hospital, appellee returned to his hometown of Rayville, Louisiana, where he was treated by Dr. Charles S. Krin, a family practice physician in Rayville. Appellee began to have severe headaches, vertigo, and seizure-like episodes, in addition to his other injuries. On June 15, 1995, appellee was taken to the emergency room at Richardson Medical Center in

Rayville because he had been drinking and suffered a seizure. His blood-alcohol level was 0.28 percent. Appellee testified at the hearing that he quit drinking that day and had not had a drink since.

Appellant originally accepted the claim as compensable and paid medical expenses and temporary total disability benefits until October 30, 1995, but controverted any claim subsequent to that date. Appellee sought compensation for temporary total disability and medical expenses to the end of his healing period. Appellant raised the defense of Ark. Code Ann. § 11-9-102(5)(B)(iv)(b), which provides that the presence of alcohol, illegal drugs, or prescription drugs used in contravention of 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. Section (d) states that 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.

The administrative law judge held that the presumption had been rebutted, and the Commission affirmed and adopted his opinion. It pointed to the evidence that there was a small amount of alcohol in appellee's blood, that he was driving under the posted speed limit, that there was rain and fog, that his trailer was empty, that his truck was cut-off by a car pulling in too quickly, and that appellee was not cited for being under the influence of alcohol by the investigating officer. The Commission also found that appellee's testimony was credible, that his seizures were the result of his injury, that he remained in his healing period and totally incapacitated to earn wages as of April 18, 1996, and that he was entitled to temporary total disability benefits from October 30, 1995, through the end of his healing period.

Appellant first argues that the Commission erred in its interpretation and application of Ark. Code Ann. § 11-9-102(5)(B)(iv)(b), because it "engaged in a 'cause in fact' analysis in its interpretation of the definition of 'substantially occasioned' and

erred in its application of the facts to that standard." Appellant contends that the proper test is merely one of causation and does not equate to a "causation in fact" or a "but for" analysis but instead correlates to a "concurrent cause" analysis. As an example, appellant points to cases of joint and several liability in which concurrent acts of negligence combine to produce a single injury and "each is responsible for the entire result, *even though his act alone might not have caused it*," citing *Woodward v. Blythe*, 249 Ark. 793, 462 S.W.2d 205 (1971) [emphasis appellant's]. Appellant asserts that to the extent that the Commission required more than a "concurrent cause" analysis, its decision should be reversed and remanded so it can consider the case under a proper standard. Appellant then submits that the rebuttable presumption *establishes* that appellee's consumption of alcohol was "at least a concurrent cause" of the accident and appellee was required to prove that alcohol was not a factor by proving the existence of a superseding, intervening cause.

A statutory presumption is a rule of law by which the finding of a basic fact gives rise to the existence of a presumed fact, unless sufficient evidence to the contrary is presented to rebut the presumption. *Black's Law Dictionary* 1185 (6th ed. 1990). If evidence that is contrary to the presumed fact is presented, the determination of the existence or nonexistence of the presumed fact is a question for the trier of fact. *Ross v. Vaught*, 246 Ark. 1002, 440 S.W.2d 540 (1969); *Curtis Circulation Co. v. Henderson*, 232 Ark. 1029, 342 S.W.2d 89 (1961); *Ford & Son Sanitary Co. v. Ransom*, 213 Ark. 390, 210 S.W.2d 508 (1948); *Ball v. Hail*, 196 Ark. 491, 118 S.W.2d 668 (1938). The determination of the weight to be given a presumption is a matter within the province of the trier of fact. *Dunn v. Dunn*, 255 Ark. 764, 503 S.W.2d 168 (1973). Whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996); *see also 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).

Appellant argues that appellee never presented proof that there was a white car and that the only proof that he was not impaired was his own self-serving testimony. We disagree. As the Commission noted, appellee was driving between six and seven p.m. on a two-lane road under the posted speed limit, it was raining and foggy, his trailer was empty, he was cut off by another vehicle, he passed a field sobriety test administered by the investigating officer, and he was not cited for being under the influence of alcohol. The Commission found this evidence to be credible and sufficient to rebut the presumption. 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). While it is true that the uncorroborated testimony of an interested party is never considered uncontradicted, this does not mean that the fact finder may not find such testimony to be credible and believable or that it must reject such testimony if it finds the testimony worthy of belief. *Ringier Am. v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). 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). Since whether a presumption is rebutted is a fact question, we must affirm the Commission unless we are persuaded that fair-minded persons, with the same facts before them, could not have reached the conclusion reached by the Commission. We think fair-minded persons could interpret the evidence as the Commission did; therefore, we affirm the Commission's finding that appellee had rebutted the presumption that the accident was substantially occasioned by the use of alcohol.

Next appellant challenges the Commission's finding that appellee's seizures are causally related to his employment. Appellant contends that there is no objective evidence that appel-

lee even had seizures, much less that they are the result of the accident. It takes the position that the evidence of seizures is based only on appellee's verbal history, and that Dr. Krin's reliance on a March 4, 1996, CT scan is misplaced. Appellant argues that because the March 4 CT scan was without contrast and the CT scan performed on May 9, which was both with and without contrast, showed no abnormalities, the CT scan of March 4 is erroneous. The Commission has the duty of weighing the medical evidence as it does any other evidence, *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996); *Brantley v. Tyson Foods, Inc.*, 48 Ark. App. 27, 887 S.W.2d 543 (1994), and its resolution of the medical evidence has the force and effect of a jury verdict. *Roberson v. Waste Management*, 58 Ark. App. 11, 944 S.W.2d 858 (1997); *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989). When the Commission chooses to accept the testimony of a physician, the courts are powerless to reverse the Commission's conclusion in this regard. *Jones v. Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981); *Hunter Wasson Pulpwood v. Banks*, 270 Ark. 404, 605 S.W.2d 753 (Ark. App. 1980).

Appellant also alleges that no doctor had ever witnessed appellee in an active seizure and the medical tests did not provide definite evidence of seizures. Therefore, appellant submits, the most likely cause of appellee's alleged seizures is alcohol. We disagree. On March 3, 1996, on a history and physical when appellee was admitted to Richardson Medical Center, Dr. Krin wrote:

> We have unfortunately not been able to catch any of these seizures on work-up *except for one which was observed by myself.* We are going to go ahead and repeat his EEG while we have him in today. This episode started yesterday afternoon at which time he was noted to have tonic clonic movement of all extremities. He was postictal at the time of arrival at emergency room however he started coming out of his postictal state shortly thereafter. Loss of memory extends for at least an hour.

As to whether his seizures are attributable to his work-related accident, on December 1, 1995, Dr. Krin wrote:

> I have been following Mr. Harris for the last year since he was involved in a motor vehicle accident. He has suffered from seizures since that time, and is barred from working as a truck

> driver for this reason (unable to pass the physical exam for a Commercial Driver's License with a history of seizures.)

The Commission accepted Dr. Krin's opinion regarding appellee's seizures and their etiology, and since it is the Commission's function to weigh the medical evidence, its resolution of the issue has the force and effect of a jury verdict. *Roberson v. Waste Management, supra*; *McClain v. Texaco, Inc., supra.*

Finally, appellant argues that there is no evidence to support the finding that appellee was totally incapacitated and still within his healing period after October 30, 1995, or that his alleged incapacitation was causally connected to his injury. Appellant relies on an outpatient disability evaluation note of that date from Dr. Stephen Horne:

> Patient has left arm pain, exact etiology unknown. It is, however, suspected that the patient is doing something at home, more than what he relates to me as he does have heavily calloused hands which I would not expect after this period of time and also, it appears that he has lateral epicondylitis which is a repetitive trauma type disorder and it is my suspicion that the man is doing some type of work at home that he is not relating to me.

However, in a letter dated April 18, 1996, speaking of Mr. Harris, Dr. Krin said:

> He has not been able to perform his usual and customary occupation since the accident on 21 December 1994, as seizure disorder is an absolute grounding condition for commercial truck drivers under DOT standards.
>
> The only thing that I can find as a cause of his continued seizures and headaches is the accident referred to above.

The Commission chose to accept the medical opinion of appellee's treating physician, Dr. Krin, over that of Dr. Horne. When the Commission chooses to accept the opinion of one physician over another, the courts are powerless to reverse the Commission's conclusion in this regard. *Jones v. Scheduled Skyways, Inc., supra*; *Hunter Wasson Pulpwood v. Banks, supra.*

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

STATE of Arkansas OFFICE OF CHILD SUPPORT ENFORCEMENT *v.* Jerry Gordon OFFUTT

CA 96-1321 966 S.W.2d 275

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered April 8, 1998

Amy L. Ford, for appellant.

Dana A. Reece, for appellee.

SAM BIRD, Judge. The Office of Child Support Enforcement (OCSE) brings this appeal from the Chancery Court of Lonoke County challenging the authority of the court to enter an amended judgment after the lapse of time prescribed by Ark. Civ. P. 60(b).

Before we discuss the merits of the case, the facts need to be set forth. Scarlett Offutt and Jerry Gordon Offutt, appellee, were married and resided in Alabama. They separated in 1977, and

appellee moved to Arkansas where he obtained a divorce in January 1978. Mrs. Offutt gave birth to a male child on October 10, 1977, but appellee denied that he was the child's father. In 1994, appellant commenced this action to establish paternity of the child and to collect current and past-due child support on behalf of the child's mother. The parties consented to DNA testing to determine paternity; the testing resulted in a determination of the probability of paternity being 99.41 percent. On May 19, 1995, a hearing[1] was conducted, but the chancellor did not issue a ruling, taking the case under advisement. In November of 1995, six months after the paternity hearing and after having received no decision from the court, the appellant's attorney prepared a precedent containing a finding that appellee was the father of the child and setting appellee's child-support arrearage at $6,000, based upon $100 per month for five years.[2] The precedent was mailed to the judge and appellee's attorney, along with a transmittal letter by which appellee's attorney was requested to notify the judge within seven days if she objected to the precedent, and the judge was requested to sign the order if he did not receive an objection from appellee's attorney within seven days. The appellee's attorney received the transmittal letter and the precedent and, on the seventh day, she telephoned the judge and voiced her objection to the precedent. However, the order was entered on November 29, 1995.

On December 8, the appellee filed a "Motion for Relief from Decree/and Amendment of Judgment of Paternity" pursuant to Ark. R. Civ. P. 52 and Ark. R. Civ. P. 60(b), but the court took no action on appellee's motion until it entered an order on January 30, 1996, which granted a hearing on February 5. A hearing was conducted on February 5, and the judge made oral findings on the record that the November 29, 1995, order should be amended to reduce the child-support arrearage from $6,000 to $635. Counsel for appellee was instructed to prepare the precedent, but no order was entered until July 16, 1996.

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[1] The testimony from this hearing was not included in the record. The appellee filed a motion to supplement the record with a transcript of the May 19, 1995, hearing, but this court denied the motion.

[2] By that time the child had already reached majority, so no current support was set.

Appellant appeals from the July 16, 1996, order, arguing that under Ark. R. App. P.—Civ. 4(c), the December 8, 1995, motion was "deemed denied" when not acted upon by the trial court within thirty days, and that, thereafter, the order was final, and the trial court lacked jurisdiction to consider appellee's motion. The appellant also argues that the trial court lacked authority to modify its November 29, 1995, order under Ark. R. Civ. P. 60(b) after the lapse of ninety days. We agree with the appellant and reverse and remand.

Appellant argues on appeal that the court erred in granting appellee's motion for relief because the motion was deemed denied when the court failed to act on it within thirty days from the filing of the motion. Arkansas Rules of Appellate Procedure—Civil 4(a) provides that a notice of appeal shall be filed within thirty days from the entry of the judgment, decree, or order appealed from. Sections (b) and (c) of the rule state:

> (b) Time for Notice of Appeal Extended by Timely Motion. Upon timely filing in the trial court of a motion for judgment notwithstanding the verdict under Rule 50(b), of a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), or of a motion for a new trial under Rule 59(b), the time for filing of notice of appeal shall be extended as provided in this rule.
> (c) Disposition of Posttrial Motion. If a timely motion listed in section (b) of this rule is filed in the trial court by any party, the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting or denying any other such motion. Provided, that if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion will be deemed denied as of the 30th day.

This rule has been strictly construed. *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997); *Arkansas State Highway Comm'n v. Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992); *Wal-Mart Stores, Inc. v. Isely*, 308 Ark. 342, 823 S.W.2d 902 (1992).

In the case at bar, the appellee timely filed his motion requesting relief from the paternity judgment on December 8, 1995, but the court took no action on appellee's motion until January 30, 1996, when an order was entered setting the motion

for hearing on February 5. Although the hearing on appellee's motion was conducted on February 5, this was too late because appellee's motion was already "deemed denied" by virtue of the court's failure to act on it within thirty days, and the court had already lost jurisdiction. *Slaton v. Slaton, supra*; *Arkansas State Highway Comm'n v. Ayres, supra*; *Wal-Mart Stores, Inc. v. Isely, supra.*

The case at bar is similar to *Slaton v. Slaton, supra.* In *Slaton,* the parties were divorced on September 26, 1991, and Jeffery Slaton was awarded custody of their children. Several hours after the decree was entered Teresa Slaton filed a motion for reconsideration. On September 30, 1991, the trial court entered an order stating that the decree should be stayed and held in abeyance, and it scheduled a hearing for October 8, 1991. However, the hearing was not held until February 24, 1992. When the hearing was held, the court granted the motion for reconsideration. On March 5, 1992, the court entered an order modifying the original order. Over the next three years, the parties filed several motions dealing with child custody, support, and visitation. However, on December 26, 1995, Jeffery Slaton filed a motion contending that the March 5 order was void. On appeal, the supreme court agreed.

First, the supreme court held that even though a chancery court has continuing jurisdiction, in order to modify child-support awards, the chancery court must find that the moving party has demonstrated a change in circumstances that would require modification. 330 Ark. at 292, 956 S.W.2d at 153.

Second, the court held that Teresa Slaton's motion for reconsideration was deemed denied after thirty days; therefore, the court did not have jurisdiction to modify the order. *Id.* at 294-95, 956 S.W.2d at 154. As in *Slaton,* in the case at bar, the court did not act upon the appellee's motion for relief until more than thirty days after it was filed. Therefore, it was deemed denied, and the court did not have jurisdiction to modify the original order.

Finally, in *Slaton,* the court held that Ark. R. Civ. P. 60 dictates that the trial court loses jurisdiction to modify or set aside an order ninety days after it is entered. *Id.* at 295, 956 S.W.2d at 154. In the case at bar, the court lost jurisdiction to

correct its original order of November 29, 1995, on February 27, 1996, ninety days after it was entered. Therefore, the July 16, 1996, order was void.

The appellee seeks to uphold the trial court's action amending its November 29, 1995, order by arguing that the appellant's attorney committed fraud. He refers us to Ark. R. Civ. P. 60(c)(4) that provides that a trial court may set aside a judgment even after the lapse of ninety days "[f]or fraud practiced by the successful party in obtaining the judgment." Appellee points to the conduct of appellant's attorney in preparing the precedent containing findings not made by the court and mailing it to the judge along with a letter requesting that the judge sign the order if no objection is received from appellee's attorney within seven days. In support of his position he cites *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987), in which the supreme court affirmed a trial court's determination that an attorney had acted fraudulently in procuring a judgment when he prepared and mailed to the judge a precedent that contained an award of damages almost twice the amount actually awarded by the judge in a letter opinion. He sent the precedent to the judge along with a letter explaining his reasons for changing the amount of the damages award, but failed to send a copy of the letter to opposing counsel. The judge "routinely" signed the precedent and returned it to the attorney who prepared it.

The case at bar is clearly distinguishable from *Davis*. Here, appellant's attorney sent a copy of the precedent and transmittal letter to both the judge and appellee's attorney. By requesting that the judge sign the precedent only if he did not receive an objection by opposing counsel within seven days, the judge was alerted to the fact that there might be an objection from appellee's counsel as to the form or content of the judgment. We do not interpret this action as an effort by appellent's attorney to deceive either the judge or appellee's attorney. In fact, we know that appellee's attorney received the precedent and letter because she contacted the judge and voiced her objection to the precedent, but the judge signed it anyway. We do not consider the conduct of appellant's attorney in this case to be in any way similar to the

conduct of the attorney in *Davis* and certainly not fraudulent within the meaning of Rule 60(c)(4).

In addition to *Davis v. Davis, supra*, the dissenting opinion also refers to *First Nat'l Bank v. Higginbotham Funeral Serv., Inc.*, 36 Ark. App. 65, 818 S.W.2d 583 (1991), in stating that the facts of the case at bar are suggestive of fraud on the part of appellant's attorney in procuring the November 29, 1995, judgment. We believe that *Higginbotham* is also clearly distinguishable from this case. In *Higginbotham*, an attorney succeeded in getting the trial judge to sign a consent judgment by telling the judge that he was the attorney for a party to the litigation under circumstances in which the attorney knew or should have known that his status as the attorney for that party was in doubt. After the lapse of more than ninety days, the trial court set the consent judgment aside, finding that the attorney's action constituted fraud within the meaning of Ark R. Civ. P. 60(c)(4). We do not find the conduct of appellant's attorney in the case at bar to be in any way similar to the conduct of the attorney in *Higginbotham*.

Davis, supra, and *Higginbotham, supra*, are also distinguishable from this case because in *Davis* and *Higginbotham*, the trial courts found that there was fraud in the procurement of the judgments. In the present case, appellee never argued in the trial court that the November 29, 1995, order should be set aside for fraud in its procurement under Rule 60(c)(4). Appellee relied solely on Ark. R. Civ. P. 60(b) and 52(b) in support of his motion in the trial court. The party seeking to set aside the judgment has the burden of showing that the judgment was obtained by fraud. *Karam v. Halk*, 260 Ark. 36, 537 S.W. 2d 797 (1976).

Therefore, we reverse and remand this case to the trial court with instructions to reinstate the November 29, 1995, order.

Reversed and remanded.

ROBBINS, C.J., ROGERS AND MEADS, JJ., agree.

ROAF AND CRABTREE, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would affirm the chancellor because I believe the facts of this case are suggestive

of constructive fraud as defined by this court in *First Nat'l Bank v. Higginbotham*, 36 Ark. App. 65, 818 S.W.2d 583 (1991), and our supreme court in *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987). In this case, it is undisputed that the trial court took the matter of the arrearage award under advisement after a hearing and did not issue a ruling. After several months had passed, the attorney for OCSE prepared a precedent that awarded OCSE $100 per month for five years and sent it to the judge and to Offutt's attorney with a pro forma cover letter advising the attorney to notify the judge if she had any objections. The order was signed by the judge about three weeks later, after Offutt's attorney had objected to the order by telephone, but failed to promptly file a motion to set aside the order.

Although Offutt's motion relied solely upon Ark. R. Civ. P. 60(b) and 52(b), the hearing on the motion was held within 90 days of the entry of the original judgment. Unfortunately, the amended judgment was entered after the ninety days had elapsed. However, I believe we can affirm because of the allegations of deceptive conduct set forth in Offutt's motion and because of OCSE's response, acknowledging that it, and not the court, determined the amount of the arrearage awarded in the initial judgment. Even though Offutt could have been more diligent in insuring that the modified judgment was entered within 90 days, the trial court is not precluded from modifying the award pursuant to Ark. R. Civ. P. 60(c)(4) if OCSE employed fraud in procuring the original judgment. Submitting a precedent for a money judgment never ordered by the trial court, in my opinion, constitutes constructive fraud under the holdings of *Higginbotham*, *supra* and *Davis*, *supra*. In addition, the form cover letter failed to advise the trial court of the true origin of the order submitted, but rather put the burden upon Offutt's attorney to "object." As this court stated in *Higginbotham*:

> Constructive fraud is defined as the 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.
>
> (Citations omitted.)

The judgment and the form cover letter submitted to the trial court in a case heard over six months earlier undoubtedly had the "tendency to deceive." And, OCSE had a number of less deceptive alternatives that it, as the moving party, could have taken to prompt the trial court into taking action, including mandamus. OCSE could also have submitted a precedent with blanks to be filled in by the trial court for the amount and duration of the arrears to be awarded. It could have submitted a cover letter that more accurately advised the trial court of the status of the case, and that it had taken the liberty of calculating what it deemed to be an appropriate arrearage award, subject to the trial court's approval. However, the course of action it undertook was, either by design or by *lack of candor*, likely to mislead the trial court. Notwithstanding its attempt to shift the onus of correcting any misunderstanding onto the nonmoving party, it is the conduct of OCSE, not Offutt, which mandates affirmance of this case.

Finally, we conduct a *de novo* review of appeals from chancery court, and it is well settled that we will affirm a chancellor's decision if it is correct for any reason. *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996); *Pryor v. Raper*, 46 Ark. App. 150, 877 S.W.2d 952 (1994). Here, there is ample evidence in the record to support a finding of constructive fraud, and I cannot say that the trial court was clearly erroneous in setting aside the judgment under these circumstances.

CRABTREE, J., joins.

James Lee REID *v.* Gregory S. FRAZEE and Jacqueline Frazee

CA 97-1025 966 S.W.2d 272

Court of Appeals of Arkansas
Division I
Opinion delivered April 8, 1998

[redacted]

James V. Coutts, for appellant.

Pate & Swain, by: *James R. Pate*, for appellees.

JOHN F. STROUD, JR., Judge. This is an adoption case in which James Lee Reid, appellant and natural father of the adopted child, challenges the adoption on the grounds that 1) he received no notice of the petition for adoption and 2) the petition was neither signed nor verified by the person seeking the adoption. Appellees Gregory S. Frazee, who is the adoptive father, and his wife, the child's natural mother, ask that the adoption stand or, alternatively, that the case be remanded for a hearing on the merits of the petition for adoption. We find that appellant was entitled to notice; therefore, we reverse and remand for a hearing on the merits.

Appellant and Jacqueline L. Reid were divorced by decree of the District Court of Douglas County, Kansas in 1989, when their only child was one and one-half years old. The district court granted primary custody to the child's mother, who later married Gregory Frazee and became Jacqueline Frazee. Appellant was ordered to pay $275 a month support and maintenance until the

child reached the age of eighteen. On September 5, 1995, Mr. and Mrs. Frazee, who had lived in Arkansas for five years, filed in the Probate Court of Pope County a petition to adopt the child. After a hearing on October 12, 1995, the court granted the petition for adoption. The decree of adoption included the finding that appellant's consent to the adoption was not required.

We now address the points on appeal.

I. Whether appellant was entitled to notice of the adoption proceedings.

Adoption proceedings were unknown to the common law, so they are governed entirely by statute; because they are in derogation of the common law, the statutes are strictly construed and applied. *Swaffar v. Swaffar*, 309 Ark. 73, 827 S.W.2d 140 (1992). Arkansas Code Annotated § 9-9-207 (Repl. 1993) provides in part:

> (a) Consent to adoption is not required of:
>
> (1) A parent who has deserted a child without affording means of identification or who has abandoned a child;
>
> (2) A parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree.

When a petitioner alleges that a person entitled to notice cannot be located, the court shall appoint an attorney *ad litem* who shall make a reasonable effort to locate and serve notice upon the person entitled to notice, and upon failing to so serve actual notice, the attorney *ad litem* shall publish a notice of the hearing directed to the person entitled to notice in a newspaper having general circulation in the county. Ark. Code Ann. § 9-9-212(a) (Repl. 1993). A person who wishes to adopt a child without the consent of the parent must prove by clear and convincing evidence that the consent is unnecessary. *King v. Lybrand*, 329 Ark. 163, 946 S.W.2d 946 (1997).

Appellees alleged in their petition for adoption, as they do on appeal, that the consent of appellant was not required because he had for one year or more failed significantly, without justifiable cause, to communicate with the child; for one year or more failed to provide for the financial care and support of the child as directed by law or judicial decree; and had abandoned and deserted the minor child. At the hearing on the petition to adopt, the child's mother testified that she had done what could be done to notify appellant of the petition for adoption. She stated that certified letters sent to his last two known addresses in Kansas had been returned unclaimed, and that she believed appellant might have recently moved to California. She also testified concerning the absence of contact between appellant and the child and the absence of support for over a year.

The probate court found that the natural father had failed to comply with the divorce decree's requirement to keep the child's mother informed of his address. The court also found that appellant's consent to the adoption was not required because for a period of one year preceding the date of the filing of the petition he a) had failed significantly, without justifiable cause, to visit and communicate with the child; and b) had failed to provide financial care and support for the child as directed in the decree of divorce. The probate court granted the petition for adoption upon finding that it was in the best interest of the child to do so.

Appellant subsequently filed a petition to set aside the decree of adoption on the ground that he had not received notice of the hearing on the petition to adopt. He denied the allegations upon which appellees asserted that his consent was not required, and he asserted that appellee Ms. Frazee knew his whereabouts. He alleged that at a meeting of bankruptcy creditors approximately eighteen days before the petition for adoption was filed, she and he discussed his plan to return to California to live with his mother. He further alleged that Ms. Frazee knew his mother's address.

In appellees' response to appellant's petition to set aside the decree of adoption, Ms. Frazee admitted attending the bankruptcy meeting but denied any discussion of appellant's move to Califor-

nia. Appellees filed an affidavit in which Ms. Frazee referred to a visit by the child to his paternal grandmother in California in the summer of 1995 and stated that she could not verify whether appellant telephoned the child in California.

Appellant also filed a motion for summary judgment asking that the decree of adoption be set aside because 1) the petition was neither signed nor verified by appellee Gregory Frazee; and 2) appellant had no notice of the adoption hearing, nor was an attorney *ad litem* appointed for him. At a hearing on his motion for summary judgment, appellant pointed out defects in the adoption proceeding. The probate court denied the motion for summary judgment upon finding that appellant was not entitled to receive notice or give his consent because of his actions in failing significantly and without just cause to communicate with the child, or to provide for the child's care and support as set out in Arkansas Code Annotated section 9-9-207(a)(2). Further, the court dismissed, with prejudice, appellant's petition to set aside the final decree of adoption, and the court confirmed the final decree of adoption.

Appellant argues on appeal that the trial court erred in making findings of fact without affording him the opportunity to present his side at a hearing on the merits to determine whether his consent to adoption was required. He states that if he had received notice of the proceedings, he could have appeared and presented his side of the case. Then, he continues, the probate court could have appropriately ruled on whether his consent was required and could have decided whether the adoption should go forward without his consent. Appellees respond that appellant is an absentee father who willfully failed to support or communicate with his child, and who abandoned and deserted his child. They point to testimony, affidavits, and responses to interrogatories that support their position. They assert that the fact that appellant did not receive notice by certified letter is the fault of appellant and not of appellees.

We agree with appellant that the court erred in entering its order of adoption without affording him an opportunity to appear and present his response to the petition for adoption. The

critical aspects of this case are that appellant did not receive notice of the petition to adopt nor was an attorney *ad litem* appointed to represent his right to receive notice. Arkansas Code Annotated § 9-9-212(a) (Repl. 1993) mandated that, once appellees alleged that they could not locate him, his interests were to be protected by the appointment of an attorney *ad litem* who should make a reasonable effort to locate him and serve notice upon him. The statute is not discretionary. All findings of the probate court regarding support, communication, and abandonment were therefore improperly entered. We also think that the two letters sent to appellant's Kansas address did not constitute a good faith effort to notify appellant of the petition to adopt his natural child, particularly when appellee Ms. Frazee knew that his mother lived in California.

We reverse and remand for a hearing to determine whether appellant's consent to adoption was required. We need not reach the parties' arguments concerning support and communication because those issues will be determined by the probate court after a full hearing on the merits of this issue.

II. Whether the statutory requirements for the filing for the petition of adoption and the granting for the decree of adoption have been met.

Arkansas Code Annotated section 9-9-210(a) (Repl. 1993) specifies that certain information be stated in a petition for adoption signed and verified by the petitioner. Appellant complains that appellee Mr. Frazee did not sign and verify the petition, nor did his testimony at the hearing on the petition to adopt cure this defect. He notes that in a 1997 affidavit appellee Ms. Frazee stated that she signed her husband's name and that the signature was notarized by a notary public who knew it not to be genuine. Appellees Mr. and Ms. Frazee point out that they were both petitioners for the adoption. They contend that the wife signed her husband's name with his permission and further contend that her testimony at the adoption hearing verified the allegations in the petition.

We need not address this issue because we reverse and remand on the first point on appeal, and the probate court now clearly has jurisdiction to hear this adoption proceeding.

Reversed and remanded.

AREY and ROAF, JJ., agree.

TYSON FOODS, INC. *v.* Teddy GRIFFIN

CA 97-1184 966 S.W.2d 914

Court of Appeals of Arkansas
Division I
Opinion delivered April 8, 1998

Bassett Law Firm, by: *Earl Buddy Chadick*, for appellant.

Walters, Hamby & Verkamp, by; *Michael Hamby*, for appellee.

JOHN F. STROUD, JR., Judge. Tyson Foods, Inc., appeals a decision of the Arkansas Workers' Compensation Commission that found that Teddy Griffin sustained a compensable injury to his hands as a result of his employment. Tyson challenges the sufficiency of the Commission's findings regarding osteoarthritis and carpal tunnel syndrome. It contends that Mr. Griffin did not 1) present objective medical findings to support the Commission's finding that his osteoarthritis was aggravated by his employment, and 2) establish that his carpal tunnel syndrome is a compensable claim. We affirm.

In reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences

deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Terrell v. Arkansas Trucking Service, Inc.*, 60 Ark. App. 93, 959 S.W.2d 70 (1998). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Id.*

At the hearing before the administrative law judge, testimony of appellee and two co-workers described appellee's employment and difficulties with his hands. He worked as a "deboner" for eight months, washed tubs for two years, worked in de-icing for three years, went back to washing tubs, and was later assigned to the main plant in the "Steak and Ale" area. There he removed bags of meat from a conveyor line, cut the meat with scissors and wrapped it — repeating the motion several thousand times a night. His fingers were sore after the first couple of nights; then his condition worsened to include pain and numbness in both hands, and difficulty in holding things. He followed the company nurse's advice to dip his hands in wax and to wear a splint, but he was sent to the company doctor, M. S. Harford, after nothing helped.

Dr. Harford, a family practitioner, diagnosed appellee with osteoarthritis and released him to return to work. Appellee sought more specialized treatment from Dr. James S. Deneke, a rheumatologist, who diagnosed osteoarthritis, tendinitis, and carpal tunnel syndrome. At the time of the hearing, appellee was working on the chicken line, where he picked up boxes of chicken and laid them on a conveyer belt, handling up to 3,400 boxes in three hours. The pace on the line required workers "to be pretty quick" with their hands, and appellee had problems keeping up.

The Commission affirmed and adopted the opinion of the administrative law judge, including all findings of fact and conclusions of law. The Commission's decision included the following:

> The claimant has proven by a preponderance of the credible evidence that he has sustained two compensable injuries to his hands, within the meaning of A.C.A. §11-9-102(5)(A)(ii)(a)

> while in the employ of this respondent. These compensable injuries are in the form of bilateral carpal tunnel syndrome and an aggravation of his degenerative arthritis, involving his hands. Specifically, the claimant has proven that these conditions constitute injuries arising out of and in the course of his employment with this respondent, that these conditions have resulted in internal physical harm to the affected portions of his anatomy, that these injuries were caused by rapid repetitive motion required by his employment, that these injuries are established by medical evidence, supported by objective findings, and that these injuries are the major cause of his need for medical treatment on and after December 5, 1995. The claimant has failed to "establish" by medical evidence, *supported by objective findings*, the presence of the diagnosed condition of tendinitis. Thus, he has failed to prove that this condition constitutes a compensable injury within the meaning of the Act.

The Commission found appellee to be a very credible witness, found that the opinions of Dr. Deneke were entitled to more weight than the opinions of Dr. Harford, and found that the greater weight of the credible medical evidence established that appellant's difficulties with his hands and wrists were the result of three separate, but perhaps interacting conditions: degenerative arthritis, tendinitis, and carpal tunnel syndrome. It also found that appellant's employment activities in the form of rapid repetitive movement had aggravated his degenerative osteoarthritis in the area of his hands and wrists, and that his conditions of bilateral carpal tunnel syndrome and aggravation of his pre-existing degenerative arthritis constituted the major cause of his need for ongoing medical treatment.

Osteoarthritis

Tyson contends that appellee failed to present objective medical findings to support the Commission's finding that his osteoarthritis was aggravated by the employment, arguing that the opinion of Dr. Deneke was not stated with a reasonable degree of medical certainty and is entitled to little weight.

In a letter to appellee's counsel on March 25, 1996, Dr. Deneke wrote, "It would certainly be my feeling that required use of the hands, i.e. wrapping as well as using scissors, is likely to

aggravate osteoarthritis of the hands . . . ." He also stated that, although he did not expect the arthritis to go away, appellee should avoid repetitive use of his hands. Appellant contends that these two statements cannot be reconciled and that Dr. Deneke's "feeling" does not rise to the requirement of Arkansas Code Annotated § 11-9-102(16)(B) that medical opinions addressing compensability "be stated within a reasonable degree of medical certainty." We do not agree.

We addressed a similar argument regarding section 11-9-102(16)(B) in *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998), also handed down today. Giving the words their ordinary and usually accepted meaning in common language, we construed the statute just as it reads and stated, "The statute does not require the use of the phrase 'reasonable degree of medical certainty.' Rather, it requires that the opinion be stated *within* a reasonable degree of medical certainty." *Id.* at 196. We noted that an expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of "magic words." *Id.* at 197, *citing Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).[1]

In addition to the opinion stated by Dr. Deneke in the letter of March 25, 1996, the Commission had before it Dr. Deneke's report of appellant's office visit on March 29, 1996. Reporting appellant's complaints of numbness and continued "significant pain in his hands with his job," Dr. Deneke continued:

> [A]t least the numbness in his hands is related to the carpal tunnel syndrome. Whether any pain is related remains to be seen. Certainly, the stiffness and discomfort is at least partially related to the osteoarthritis and tendinitis of his hands and it would seem that his job requiring repetitive lifting of boxes, etc. has led to a large portion of this.
>
> . . .

[1] See *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998), for a discussion of Act 796 of 1993, which dramatically changed workers' compensation law in Arkansas and gave rise to Ark. Code Ann. § 11-9-102(16)(B) (Repl. 1996).

> Certainly, it is likely that continuing his present job is going to continue the aggravation in his hands and I have explained this to Mr. Griffin. I think primarily we are seeing an overuse type syndrome.

Appellant points to the contrasting opinion of Dr. Harford that appellee's osteoarthritis was simply a "disease process that occurs in many people as they age."

The Commission wrote in its decision, "Dr. James S. Deneke clearly states that it is his opinion that the claimant's employment activities for the respondent, which required strenuous and rapid use of his hands, was 'likely to aggravate osteoarthritis of the hands . . . .'" Noting that Dr. Deneke had far more expertise in the area of appellee's medical difficulties than did Dr. Harford, the Commission found that his opinion was entitled to greater weight and credit. It further found that Dr. Deneke expressed his opinion in accord with accepted medical theories, and with sufficient conviction and absoluteness to be within a reasonable degree of medical certainty; and found it immaterial that he did not use the term "reasonable degree of medical certainty."

■ ■ Determinations of the weight and credibility of the evidence are exclusively within the province of the Commission. *George W. Jackson Mental Health Ctr. v. Lambie*, 49 Ark. App. 139, 898 S.W.2d 479 (1995). Furthermore, it is the function of the Commission to draw inferences when testimony is open to more than one interpretation, and when it does, its findings have the force and effect of a jury verdict. *Pilgrim's Pride Corp. v. Caldarera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996). The Commission in the present case considered the opinions of two doctors regarding the causal connection between appellee's employment activities and his multiple conditions, and it assigned greater weight and credibility to Dr. Deneke. We find that Dr. Deneke's March 1996 letter and office notes constitute sufficient evidence to support the Commission's finding that appellee's employment aggravated his osteoarthritis.

Carpal Tunnel Syndrome

Carpal tunnel syndrome injuries are addressed by our workers' compensation statute as follows:

> (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) (Supp. 1997). The burden of proof for injuries falling within the definition of compensable injury under subdivision (5)(A)(ii) shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(5)(E)(ii) (Supp. 1997). Thus, in the present case, appellee had the burden of proving by a preponderance of the evidence that his carpal tunnel syndrome injury was the major cause of the disability or need for treatment.

Appellant argues that the major cause of appellee's need for treatment was osteoarthritis and contends that appellee failed to establish the compensability of his carpal tunnel syndrome. Appellant challenges the following finding of the Commission:

> Finally, the . . . evidence is sufficient to establish by a preponderance of the evidence that the claimant's conditions in the form of bilateral carpal tunnel syndrome and an aggravation of his pre-existing degenerative arthritis of his hands was the major cause of the claimant's need for ongoing medical treatment since December 5, 1995, [thus] satisfying the requirement of A. C. A. § 11-9-102(5)(E)(ii).

On December 27, 1995, Dr. Deneke diagnosed osteoarthritis and probable tendinitis, noting that appellee had experienced a year's discomfort in his hands with occasional sore wrists, pain in his left forearm, and his right hand "going to sleep" and more painful than the left. Dr. Deneke's office notes of March 29,

1996, state that a nerve conduction study showed carpal tunnel syndrome to be moderate on the right and mild on the left, that numbness was related to the syndrome, and that the relation of pain to the syndrome remained to be seen. Dr. Deneke wrote that if splints were not of benefit over the next two months, "[W]e will consider referring to Orthopaedics for carpal tunnel release, at least on the right. If his symptoms worsen and he is unable to work, we may need to send him sooner. Certainly, it is likely that continuing his present job is going to continue the aggravation in his hands."

The Commission found that appellant's bilateral carpal tunnel syndrome and the aggravation of his osteoarthritis were both compensable injuries. We do not view Arkansas Code Annotated section 11-9-102(5)(E)(ii) (Supp. 1997), as precluding a finding that separate injuries or conditions that occur simultaneously or near in time to each other can be compensable. This is true even though the statute requires that both compensable injuries or conditions are the major cause of the disability or need for treatment. Neither does the fact that injuries are located in the same body member, as here, act to disqualify an award of benefits when a claimant meets the statutory requirements of the need for treatment. "Major cause," which is defined as more than fifty percent of the cause, shall be established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14)(A) & (B) (Repl. 1997).

As discussed earlier in this opinion, appellee and his coworkers testified that at the time of onset and progression of his difficulties, he grasped and lifted and moved thousands of items during an eight-hour shift. Dr. Deneke diagnosed carpal tunnel syndrome, a nerve conduction study confirmed the diagnosis, and medical records established the need for medical treatment. Thus, there was sufficient evidence to support the Commission's finding that the claimant's carpal tunnel syndrome was compensable.

Affirmed.

AREY and ROAF, JJ., agree.

Ruel LOWE, Special Administrator of the Estate of Ira E. Lowe, Deceased *v.* Mike RALPH and Cleta Ralph, Individually, In Their Own Rights, and As Parents and Next Friends of Tommy A. Ralph, Deceased, and Eric Michael Ralph, Mike Ralph, Individually

CA 97-1056 966 S.W.2d 283

Court of Appeals of Arkansas
Division I
Opinion delivered April 8, 1998

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Bruce Munson* and *Julia Busfield*, for appellant.

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

ANDREE LAYTON ROAF, Judge. This is an appeal from a jury verdict in favor of the appellees, who were plaintiffs in a negligence case. The jury found that Ira Lowe, deceased, was negligent in causing the death of the appellees' sixteen-year-old son in an automobile accident, and awarded $500,000 in compensatory damages and $500,000 in punitive damages. The punitive damages were awarded based upon willful and wanton conduct by Lowe, who was intoxicated when the accident occurred. The appellant's sole point on appeal is that the trial court erred in excluding the testimony of one of his witnesses because of violation of the rule of sequestration. We agree that the trial court erred, and reverse and remand.

On a rainy day in April 1993, Ira Lowe and Tommy Ralph were involved in an automobile accident. Ralph was killed instantly when his car struck Lowe's vehicle. Lowe and one of Ralph's passengers, Jamie Owens Mooney, were injured and were transported to the hospital for medical treatment.

Ralph's parents, Mike and Cleta Ralph, subsequently filed suit against Lowe. Some time after the commencement of the lawsuit, Lowe died, and the action was continued against his estate. At trial, there was evidence that Lowe was intoxicated, and there was also testimony that Ralph had been "goofing off" immediately prior to the accident by jerking the steering wheel back and forth. There was also testimony that Ralph's car hydroplaned and he lost control of the car before hitting Lowe. In a deposition taken before he died, Lowe testified that he pulled off onto the shoulder of the road and stopped when he saw Ralph's car coming towards him. However, there was conflicting testimony at trial as to whether Lowe's vehicle was straddling the

center line of the road when the accident occurred, or completely in his own lane of traffic.

Mooney testified at trial. She stated that Lowe's car was stopped in the middle of the road at the time of the accident. Mooney was the only witness who placed Lowe in the center of the road at the moment of impact. Trooper Jerry Roberts, one of the officers at the scene of the accident, also testified. He stated that, based on his observation of the final resting place of the vehicles, the location of debris and scuff and gouge marks on the road surface, the accident occurred in Lowe's lane of traffic.

Roberts was later recalled, and during his direct examination, one of Lowe's witnesses, Anita Kramers, heard approximately thirty minutes of his testimony before Lowe's attorney became aware she was in the courtroom. Lowe's attorney immediately interrupted the proceedings and informed the court of her presence. Ralph's attorney then objected to allowing her to testify because she violated Ark. R. Evid. 615, the witness sequestration rule. The trial court ruled that although her actions were innocent, he had no discretion in the matter and was required by law to exclude her testimony. Kramers' testimony was then proffered for the record. Her testimony directly contradicted that of Mooney. In her proffer, she stated that she was the emergency medical technician who transported Lowe and Mooney to the hospital after the accident. She stated that, at the hospital, Mooney told her that Ralph had been "goofing off" when his car hydroplaned, Ralph lost control of the car, crossed the center line, and hit Lowe's car. Kramers further stated that Mooney admitted that the accident was Ralph's fault and not Lowe's fault. At the close of all the evidence, the jury found in favor of Ralph and awarded damages.

Lowe's sole point on appeal is the trial court committed reversible error when it excluded Kramers' testimony. He asserts that her testimony was crucial in that it would have impeached Mooney's testimony. He contends that the trial court has only very limited discretion to exclude the testimony, and should have utilized other available sanctions. We agree.

Rule 615 of the Arkansas Rules of Evidence provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Rule 615 was invoked upon oral motion by Lowe, and Kramers violated the sequestration rule when she sat in the courtroom and listened to a portion of Trooper Roberts' testimony.

Both parties assert that *Blaylock v. Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987), is controlling. We agree that it is controlling, and further conclude that it mandates reversal of this case. *Blaylock* involved a tort action for alienation of affection. The appellant was sued for allegedly engaging appellee's wife in a homosexual relationship. Following appellee's opening statement, his daughter approached opposing counsel and stated that she wanted to testify because the appellee's opening statement was untrue concerning appellant's conduct toward the couple's children. The daughter was called as a witness, however, the trial court excluded her testimony because of violation of Rule 615. The supreme court reversed, stating that the three possible methods of enforcement available to the trial judge when a violation of the sequestration rule has occurred are: (1) citing the witness for contempt; (2) permitting comment on the witness's noncompliance in order to reflect on her credibility; and (3) refusing to allow her testify. In addition, the court stated that the trial court has very narrow discretion in refusing to allow the testimony of a witness who violates the rule, and the discretion can only be exercised when the noncompliance occurs with the consent, connivance, or procurement by a party or his attorney. The court stated that since the daughter was an important witness, as conceded by both parties, it was not harmless error to exclude her testimony.

In Lowe's case, there was no evidence of the consent, connivance, or procurement by appellant or his attorney. In fact, Lowe's attorney immediately informed the court when he learned

that Kramers was present in the courtroom. His attorney asserted that Kramers heard no testimony that was pertinent to her own testimony, which was impeachment testimony. During voir dire, Kramers testified that she was unaware that she was not to be in the courtroom, and that when she arrived at the courthouse, someone from the clerk's office had told her to go in the courtroom. Moreover, the trial court stated that Kramers' actions were absolutely innocent and unintentional, and there was no allegation of any misconduct by the appellant or his attorney. Finally, the testimony of Kramers contradicts the testimony of Mooney, the only witness who placed Lowe's car in the center of the road. The exclusion of her testimony was clearly prejudicial to Lowe. Under the circumstances, it was reversible error for the trial court to exclude Kramers' testimony, and we reverse and remand for a new trial.

Reversed and remanded.

AREY and STROUD, JJ., agree.

Donna S. *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 97-705 966 S.W.2d 919

Court of Appeals of Arkansas
Division IV
Opinion delivered April 15, 1998

Suzanne Penn, for appellant.

Ed Wallen, for appellee Arkansas Department of Human Services.

Merry Alice Bost Hesselbein, Guardian Ad Litem, for appellee juveniles.

JOHN MAUZY PITTMAN, Judge. The appellant is the mother of Darrell and Everett. Darrell, who is now five years old, suffers

from emotional and behavioral disorders; Everett, who is three years old, has serious health problems that require special care. On March 14, 1995, the appellee filed a petition alleging that both boys were dependent-neglected. After an adjudication hearing, an agreed order finding the children to be dependent-neglected was entered and the children were removed from appellant's custody. After several unsuccessful attempts to rectify the conditions causing removal, appellee filed a petition to terminate parental rights. After a hearing, the trial court entered an order terminating appellant's parental rights on March 10, 1997. From that decision, comes this appeal.

For reversal, appellant contends that the evidence was insufficient to support the trial court's findings that appellant had not remedied the conditions that caused removal; that appellee made a meaningful effort to rehabilitate the home and correct the conditions that caused removal; that termination of parental rights was in the best interest of the children; and that appellee had an appropriate placement plan for the children. In addition, appellant contends that Ark. Code Ann. § 9-27-341(b)(2)(E) creates an unconstitutional presumption that the mentally ill have the inability to rehabilitate their circumstances. We affirm.

The trial court based the termination of appellant's parental rights on Ark. Code Ann. § 9-27-341 (Supp. 1995), which provides, in pertinent part, that:

> (b) The court may consider a petition to terminate parental rights if it finds that the Department of Human Services has physical or legal custody of the juvenile and the parent or parents, or putative parent, if the putative parent can be identified, have received actual or constructive notice of the hearing to terminate parental rights. An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (1) That it is in the best interest of the juvenile;
>
> (2) Of one or more of the following grounds:
>
> (A) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months, and, despite a meaningful effort by the Department of Human Services to rehabilitate the home and

> correct the conditions which caused removal, those conditions have not been remedied by the parent. It is not necessary that the twelve-month period referenced in this subdivision (b)(2)(A) immediately precede the filing of the petition for termination of parental rights, or that it be for twelve (12) consecutive months . . . .

We first address appellant's contention that the evidence was insufficient to support the trial court's findings that appellant had not remedied the conditions that caused removal; that appellee made a meaningful effort to rehabilitate the home and correct the conditions which caused removal; that termination of parental rights was in the best interest of the children; and that appellee had an appropriate placement plan for the children.

The record shows that Darrell and Everett were initially removed from appellant's home because appellant was not giving Everett necessary medical care and because her home was filthy, mildewed, and unsafe. Appellant was ordered to attend parenting classes and medical appointments; ADHS was to provide transportation to and from the appointments and assist appellant to find adequate housing. Although ADHS did provide housing assistance, transportation, homemaker services, and referral to parenting classes, appellant failed to attend required therapy sessions with Darrell, and her living conditions remained deplorable so as to cause a Family Service Worker who visited the residence to become physically ill. Furthermore, the unsanitary living conditions were extremely detrimental to Everett, who suffers from sickle-cell anemia and who will consequently forever be at risk for life-threatening infection. Everett also suffers from an eating disorder and must be fed by means of an apparatus which must be kept clean. Darrell has a psychological disorder for which he is required to attend therapy, but appellant missed therapy sessions for him while he was in her custody. There was evidence that appellant has a low level of intellectual functioning with an I.Q. of 74 but is not mentally retarded. There was also evidence that, although she was capable of meeting the children's needs, she was resistant to attempts to teach her to do so through services provided by ADHS, such as parenting classes, housekeeping services, and counselling. For example, although appellant demonstrated

her ability to keep a clean house by doing so when she initially relocated to a trailer, her housekeeping efforts subsequently lapsed and again became unacceptable. We think that the inadequacy of housing which caused the children to be removed was largely the result of uncleanliness, a condition which was not remedied despite meaningful efforts by ADHS. Furthermore, although there is no assurance that the children will be adopted, we cannot say that the ADHS plan for placement of the children is not appropriate given appellant's unwillingness to provide proper care for them. We find no error on this point.

Nor do we agree with appellant's argument that the trial judge committed reversible error in granting the termination petition because it was filed before both children had continued out of the home for twelve months. The record shows that, at the time the petition was filed, Everett had been outside the home for more than twelve months, but Darrell had been in foster care for a few days over eleven months. However, even if Ark. Code Ann. § 9-27-341(b) did not permit a termination petition to be filed until both children had continued out of the home for twelve months (a matter which we do not decide), any error that may have taken place in the case at bar was cured because the hearing was not conducted until both children had been out of the home for over fourteen months. *See Briscoe v. State*, 323 Ark. 4, 912 S.W.2d 425 (1996).

Next, appellant contends that Ark. Code Ann. § 9-27-341(b)(2)(E) creates an unconstitutional presumption that the mentally ill have the inability to rehabilitate their circumstances. We do not address this issue because appellant lacks standing to raise it. The trial judge's order specifically stated that appellant had the mental capacity to remedy her conditions and that the termination petition was not granted under Ark. Code Ann. § 9-27-341(b)(2)(E). An appellant lacks standing to challenge the constitutionality of a statute where it was not applied to her in a discriminatory manner. *Wineman v. Brewer*, 280 Ark. 527, 660 S.W.2d 655 (1983).

Affirmed.

JENNINGS and STROUD, JJ., agree.

Jimmy HEPP *v.* Debbie Lee HEPP (Byrum)

CA 97-1082 968 S.W.2d 62

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered April 15, 1998

[redacted]

John Bynum, for appellant.

Doug Skelton, for appellee.

JUDITH ROGERS, Judge. Appealing from an order denying his motion for a change of custody, appellant contends that the chancellor's decision is clearly against the preponderance of the evidence. We disagree and affirm.

Appellant, Jimmy Hepp, and appellee Debbie Byrum, were divorced in September of 1991 when their daughter, Cassandra, was twenty months old. Custody of the child was contested, and the court placed her in the care of appellee. Appellant later petitioned for a change of custody. By order of December 11, 1995, the chancellor denied that petition. The order provided, however, that a change of custody would be forthcoming if appellee associated with or had the child in the presence of a man named Johnny Lee Boggs. The appellant filed another petition for a change of custody in March of 1997. As grounds for this motion, appellant alleged that appellee had constantly been with Mr. Boggs, that she

was drinking excessively, and that she was failing to properly care for the child. After a hearing on May 28, 1997, the chancellor denied the motion. This appeal followed.

In deciding this case, we are guided by the following principles. As in all custody cases, the primary consideration is the welfare and best interest of the child involved; all other considerations are secondary. *Fitzpatrick v. Fitzpatrick*, 29 Ark. App. 38, 776 S.W.2d 836 (1989). It is well settled that, although this court reviews chancery cases *de novo* on the record, the chancellor's findings will not be disturbed unless clearly against the preponderance of the evidence. *Bennett v. Hollowell*, 31 Ark. App. 209, 792 S.W.2d 338 (1990). Since the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the superior position of the chancellor, especially so in those cases involving custody. *Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996). Repeatedly our courts have recognized that there are no cases in which the superior position, ability, and unique opportunity to view the parties carry as great a weight as those involving minor children. *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993).

The first witness called by appellant was Rigmor Mereness, appellee's supervisor at the health department in Russellville. She testified that appellee worked for $5 an hour as a health-care aide who provides services to persons in their homes. She said that appellee had a good record of service and that she had heard of no complaints having been registered against her by her clients. She stated that appellee had asked for additional hours of work but that none were available.

The child, Cassandra, age seven and in the first grade, responded to questioning as follows. She said that she lives in a trailer with her mother and that she likes it. She testified that she sleeps with her mother and that she sleeps on a pallet on the floor when her mother is sick. Cassandra said that her Aunt Joyce had lived in the trailer for three weeks and that her half-sister, Nakita, also lived there. She said that her mother gets her up in the mornings for school and that she would either eat breakfast at home or at school. She said that she usually ate breakfast at school because

her mother gets up too early. Cassandra testified that she preferred to live with her father in that she felt safer with him because he does not leave her alone like her mother does. She said that her mother drinks beer once a week. She stated that being drunk means acting screwed up or weird and said that her mother did not get drunk every week, but that she was once drunk for two weeks. She said that she stays away from her mother when she is drinking because her mother might get rowdy. She also said that her mother has friends over when she is drinking and that they fight. She said that her mother fought with Nakita's dad and Brent, but she corrected herself to say that Brent was Nakita's father. When asked about Uncle Terry being one of those friends, she had no response. When prompted, Cassandra said that she liked it when Uncle Terry came over but that she was scared when he drinks. She testified that marijuana was something that you smoke and that her mother smokes marijuana in front of her. She said that her mother had done that only one time, that she had never done it recently, and that her mother had smoked marijuana two weeks ago. She testified that her mother rolled it up in a little box of paper, licked it, and used "plier things" to smoke it. Cassandra was asked to demonstrate this process for the chancellor but the record does not reflect what the demonstration entailed. She said that her mother acts strange when she smokes marijuana. She said that she is never scared when she is with her father and that she sees him one time a week. She said that she had seen her mother so drunk that she could not stand up and that it scared her. She said that her father helps her with her homework and that he gives her $2 when she makes good grades. She said that she sleeps in her own bed when she is with her father. She said that her father picks her up from school, that he buys clothes for her a lot, and that she goes to him when she needs something. She stated that she spends the night sometimes with her mother's boyfriend, Thomas, who lives in a shed. She said that she sleeps on a pallet when he and her mother are together and that they drink and smoke marijuana.

On cross-examination, Cassandra testified that the only reason she could think of for wanting to live with her father was because he makes her feel safe because he does not leave her alone.

She said that her mother leaves her alone for three or four minutes when she goes to the grocery store. She said that her mother tells her and Nakita to lock the door and stay inside while she is gone. She said that her mother had not left her alone any other time. She related that she spends one day a week with her father, on Sundays, and that she spends weekends at her grandparent's home. She said that her father had worked at Tile Stiles for twelve years and that she had seen Johnny Boggs there, who had come to see her grandfather. She said that Boggs was a friend of her father's family now and that she likes him. She further testified that she had seen Boggs beat her mother and that she had seen her grandfather pay him money one or two times, but that he did not work at Tile Stiles. She said she was excited about her father's apartment that he had had for one day, and she agreed that it had a nice swimming pool. Cassandra testified that after school she had playtime, cartoontime, then bathtime and bedtime. She said that her mother had snacks for her after school and that her mother either cooked every night or got something for dinner, like pizza. She said that she makes good grades in school, all A's. She testified that her sister had a bedroom in the trailer and that she had a room of her own that was now a playroom. She said that she does not sleep there because it is full of toys. She also said that she slept with her grandmother on weekends. She said that there was another bedroom but that it had all of her grandmother's "grave stuff" in it, saying that it had belonged to an uncle who had died when she was three years old. She testified that she had seen her mother drunk one time since they had moved into the trailer and that her mother had once been drunk for two weeks. She said that her father helped her with her homework but that he did not come over on school nights. She said he helped her with her spelling words on Sundays. She said that her father picks her up from school every Friday, but that sometimes her grandparents picked her up. She said that her grandmother had been picking her up for a long time and that her father had picked her up three times.

On redirect examination, she testified that she had seen Mr. Boggs three times at the tile business and that she had seen her mother drinking not many times, or three or four times.

Johnny Lee Boggs then testified on behalf of the appellant. Boggs stated that he was disabled from a back injury that had resulted from a car accident in 1975 and that he had been receiving disability benefits since July of 1996. He testified that he had met appellee in 1991, that they had dated and had once been engaged. He said that he was aware of the December 1995 order which forbade him from associating with appellee. He testified that appellee did not stay away from him. He said that they began seeing each other on the sly in February of 1996 and that their relationship continued until April of 1997. He said that appellee had been drinking consistently since 1991, that she drank most every weekend that they were together, and that, as far as he knew, she did not attend AA meetings. Boggs testified that he took his ring back from appellee in April because of an incident that had occurred on March 6. He said that appellee came to his home that Thursday, got drunk, and remained that way for two and a half days. Boggs stated that appellee was so drunk that night that she could not speak and that he was afraid that she might die. He said that he tried to get her to check on the children and that he finally got her to do so at around 11:30 that night. He drove her to the trailer, and they found that the children were not there. He said that she left his house on Saturday and that Cassandra was with her grandparents over the weekend, while Nakita stayed with appellee's sister. Boggs further testified that appellee would visit him during the week and would sometimes get off work by telling her employer that one of the children was sick. He said that appellee fought once with Brent Keeling who was staying with her because none of his family would have him. Boggs stated that appellee felt that the child's homework was part of the teacher's job.

When cross-examined, Boggs said that he did not work at Tile Stiles and denied having been paid for his testimony. He said that he had no idea what the previous custody hearing was about, and he said that he did not remember beating appellee in front of the child. He testified that he did not know what the previous court order said. Boggs denied that he had tried to get appellee to come back to him or that he had asked a preacher to speak to appellee about it because he was contemplating suicide. He testi-

fied that he drank alcohol off and on, that he was not a heroin addict, but that he was a convicted felon. He said that he had not seen Cassandra since December of 1995, but then he said that he had seen her by accident at the appellant's shop where he had gone to check on the price of tile and the cost of laying it. He denied having followed appellee's fiance around and said that he had left notes on appellee's door because she did not have a phone.

Appellant testified that he had been living at the Shadow Lakes Apartments for a month and that before that he had been living with his grandmother and uncle in Casa, Arkansas. He explained that his grandmother was older and needed help and that he and his uncle got groceries for her and took her to doctor's appointments. He said that he was self-employed and owned a business called Tile Stiles with his parents and brothers and that they had been in business for twelve years. He works eight to ten, or twelve hours a day, four to six days a week. Appellant testified that appellee had agreed to let Cassandra visit nearly every weekend, rather than every other weekend as provided in the latest order, and that he usually has her more than the six-week period ordered in the summer. He said that appellee sees Cassandra three or four times during the summer. He testified that, because of his work schedule, his mother picks Cassandra up from school on Fridays and that he sometimes allows her to spend Friday evenings with his parents, picking her up on Saturday after work. He said that appellee had reduced his visitation to every other weekend since the filing of his motion for a change of custody and that appellee had instructed Cassandra's teachers to refuse him access to the child. Appellant testified that he and Cassandra watch videos, play video games or fish on the weekends. He helps her with her homework and checks on her progress at school. Appellant stated that Cassandra was intelligent but that he had learned that she was doing poorly in spelling and that with his help her grade had improved. As a reward for good grades, he gives her money or treats her to pizza. He said that he paid child support and provided health insurance for Cassandra and that he buys her school clothes and gifts at Christmas and on her birthday. Appellant testified that he filed the petition because he can take better care of

Cassandra. He said that appellee had problems with alcohol and substance abuse and that she was sick and needed help. He added that he would approve of appellee having liberal visitation and that he would not keep the child from her.

Appellant denied on cross-examination that he had been accused of fondling a minor child, but he also stated that he had been accused of molesting his step-daughter. He said that the allegation was not true, and he denied telling appellee that it was. He testified that his first wife was fourteen years old when they married, while he was age twenty-four. He said that he had joined the military as a young man and had received a dishonorable discharge. He testified that he had been arrested in 1990 for being absent from the reserves without leave and that he had spent some time in the brig. He admitted that he had pulled a gun on a police officer when he was in high school. Appellant further testified that he had once hit appellee during the marriage, but that he had done so only after she had struck him four times. He said that he did not ask appellee to get an abortion and denied that he had beaten her when she refused. Appellant agreed that one could say that he ran out and got the apartment for purposes of the hearing, and he said that he had told Cassandra about the apartment and the swimming pool after he rented it. He said that he has picked the child up once for visitation since 1995 and that he had never been the one to return her to appellee. He stated that the child spends quite a bit of time with his parents. Appellant thought that appellee allowed more visitation to both foster good relations and to be able to do things on the weekends. Appellant was shown photographs taken by appellee of his parents' home. Although appellant has failed to include these photographs in his abstract, they reveal a yard that is overgrown with weeds and brush with old vehicles, appliances, and trash scattered about. The photographs of the interior show a home that is filthy and in utter disarray. Appellant testified that the photos were a fair representation of the outside of the house, but he said that the inside was not normally that messy.

In her testimony, appellee stated that she had been an admitted alcoholic since 1990. She said that she rarely has a problem with it because she stays with AA pretty strictly, attending meet-

ings once or twice a week. She admitted that she had one relapse in March of 1997. She testified that she was driving to work when the clutch on her car went out and that she went to Boggs's home because it was nearby. She said that he was drinking and that she started drinking. She explained that she was upset because she had recently spent a lot of money having her car repaired. Appellee testified that she does not remember much about that day after twelve or one o'clock in the afternoon, saying that she blacks out when she drinks. She said that she spent the next day recuperating because drinking makes her very sick. She stated that she contacted her sister on Friday to see if her fiance, Thomas Johnston, was angry and to make sure that the children had gotten off to school. Appellee testified that she knew that the children would be cared for by Johnston because he had planned to come over that Thursday afternoon. She said that she and Johnston had been dating since December of 1995 and that they had become engaged in December of 1996. With regard to Boggs, she stated that he contacted her after December of 1995 because he needed a witness for his disability case since his family would not help him. She went with him to Little Rock to consult with an attorney and attended the disability hearing. She said that Boggs had always worked and was unfamiliar with the benefits he could draw and that she helped him obtain food stamps. She said that she was afraid of Boggs and did not want to make him mad because in the past he had been physically violent with her, had threatened to kill her, had held knives to her throat, and had vandalized her apartment and damaged her car. She said that she was familiar with the previous court order and thought that it meant that Boggs was to have no contact with Cassandra since the Hepp family had alleged that Boggs had beaten the child. Appellee further testified that she lived in a three-bedroom, two-bath mobile home with her two children. She said that Cassandra had a bedroom but that Cassandra insists on sleeping with her because she is afraid to sleep alone. She said that the child does not sleep on the floor. She testified that the children get home from school at 3:30 p.m. and that they play, eat supper, do their homework, take a bath and then go to bed. She said that they were occasionally left alone in the afternoon if she works until 3:00 or 3:30 p.m. and that she has instructed them to stay inside with the doors locked.

She said that the children might also be left alone when she goes to the market three miles away. Appellee stated that, in addition to her income from work, she receives food stamps and draws a social security check for Nakita on account of her father's disability. She said that she had no trouble paying her bills or providing food and clothing for the children. Appellee testified that appellant would not make a good parent because he has never been responsible. She said that appellant had not wanted the child and had told her to get an abortion to correct his mistake. She said that whenever she sees the child or calls during appellant's visitation that she is with his parents. She stated that appellant had never picked up or returned the child from visitation before filing the petition, but that he had since done so two weeks ago and when the child left for summer visitation.

When she was examined by appellant's counsel, appellee stated that her sister-in-law Joyce was an alcoholic but she denied that Joyce was living with her. She testified that Brent Keeling, Nakita's father, had mental problems and that he had stayed with them over the Christmas holidays and for several weeks in the summer. She denied that she smoked marijuana and said that she had drunk alcohol only that one time in March. She said that she had gone to Boggs's home, despite her fear of him, because it was close and she had no car phone. She also admitted that in her deposition she had refused to provide the names of AA members so as to verify her attendance. She said that it was against the rules to divulge the identity of other members, including her sponsor. She testified that she had not taken Cassandra to the doctor since early 1994, but she acknowledged that the child had been sent home from school since then with enlarged tonsils. She testified that it had been discovered that the child had enlarged tonsils during an examination after a car accident, and that on the day in question Cassandra had no fever and was not complaining of a sore throat. Appellee testified that she worked twenty to twenty-five hours a week, that she had approximately $786 a month to spend, and that she saw no reason to work any harder or earn more money. She does not have a telephone, but she said that she had access to a neighbor's phone in case of emergency. Appellee testified that her fiance lived in an efficiency-type apartment and

admitted that she and the children had spent several nights there. She also admitted that she had entered the Hepp's home to take the photographs that had been introduced during appellant's testimony, but she testified that the door had been open and that she had always been permitted access to the home to use the telephone.

In his testimony, Thomas Johnston, appellee's fiance, recalled the night that appellee became intoxicated. He said that it was their arrangement for him to come over every day after work and that he arrived that day at 4:00 p.m. The children were watching cartoons, and he stayed fifteen to twenty minutes before going to the home of appellee's sister. He returned to the trailer because appellee was not at her sister's and talked with a neighbor until 7:30 p.m. He took the girls to Sonic for dinner and to his home for the night, where they watched a movie, bathed, and went to bed. Johnston testified that he had been dating appellee since December of 1995 and had become engaged to her a year later. Their wedding was scheduled in June. He said that he had never seen appellee drunk and that what occurred in March had never happened again. Johnston said that appellee was a good mother. He testified that she helps them with their homework, that they always have family time, and that the children bathe and go to bed at the same time every night. He said that he had never spent the night in the trailer while the children were present, but that appellee and the children had spent several nights at his home.

After hearing the testimony, the chancellor ruled as follows:

> Well, gentlemen, since I'm obviously familiar with this case, since the 28th day of March of 1991, I have had several hearings in this matter. I'm going to find that there is an insufficient change of circumstances to change the custody in this case. And I might add that with the exception of the child's testimony, who I don't believe has testified before, there was absolutely no change in the testimony. It's essentially the same that I've heard for at least two times.

It is the appellant's argument on appeal that appellee is an unfit mother based on testimony revealing that she has abused alcohol and marijuana and that she acted irresponsibly during the admitted drinking binge in March of 1997. Appellant contends

that the child's testimony describing appellee's actions was more credible than that of appellee, who was lying and not a person to be believed. We find no merit in this argument.

The chancellor in this case was well acquainted with the parties after having presided over two previous hearings concerning custody of the child. It is clear from the record that appellee's alcoholism was not a new development in the case. Despite appellant's argument, the chancellor was in a better position to gauge the worth of appellee's testimony, and he was entitled to believe her testimony that what occurred in March of 1997 was an isolated incident, that she was not presently drinking, and that she was receiving help and support for her problem by regular attendance at AA meetings. The chancellor was also entitled to believe appellee's denial that she used marijuana. Thus, the chancellor could find that the child was not at risk in appellee's custody. In making that determination, the chancellor could also consider the testimony that the child was well cared for and was doing well in school, and he could conclude that the child had suffered no ill-effects from being in appellee's custody for over five years. Also, while a child's preference is certainly to be considered, it is not binding on the court. *Marler v. Binkley*, 29 Ark. App. 73, 715 S.W.2d 218 (1989). Here, the testimony of the seven-year-old child was for the most part the result of leading questions and was laden with inconsistencies. We note that appellee argued with some force at the hearing that the child's testimony was influenced by appellant and his parents. We thus cannot fault the chancellor for not giving her testimony a full measure of credence. We must also observe that appellant's character was not without blemish and that there was some suggestion in the record that the child has spent more time with his parents than she has with him during visitation. Nevertheless, the grandparents did not testify at the hearing, even though they had filed a motion to intervene seeking their own visitation with the child. The chancellor denied that petition.

This court has stated numerous times that a material change in circumstances affecting the best interests of the child must be shown before a court may modify an order regarding child custody, and the party seeking modification has the burden

of showing such a change in circumstances. *Harrington v. Harrington*, 55 Ark. App. 22, 928 S.W.2d 806 (1996); *Fitzpatrick v. Fitzpatrick, supra.* Our reasons for requiring more stringent standards for modification than for initial determinations of custody are to promote stability and continuity in the life of a child, and to discourage repeated litigation of the same issues. *Jones v. Jones*, 328 Ark. 97, 940 S.W.2d 886 (1997). As was observed by the court in *Holt v. Taylor*, 242 Ark. 292, 413 S.W.2d 52 (1967):

> For a court to choose, in a custody case, between the mother and the father, the respective personalities of the parents are vital. It is in this realm that personal observation is of inestimable value. As was stated in *Wilson v. Wilson*, 228 Ark. 789, 310 S.W.2d 500 (1958): "We know of no type of case wherein the personal observation of the court mean more than in a child custody case." The chancellor's experience with these parents began in late 1962. In the succeeding years he entered at least ten orders touching on matters of divorce, child custody, and support money. These experiences afforded the chancellor opportunities to reach wise conclusions respecting the moral fiber of these parents. We are certainly justified in assuming that the chancellor's knowledge which he gained from the initial divorce proceedings, together with his four years' experience with these people, supports his conclusions with respect to custody. In cases of this nature, particular weight is given to the findings of the chancellor, *Cheek v. Cheek*, 232 Ark. 1, 334 S.W.2d 669 (1960).

Id. at 296, 413 S.W.2d at 54. Based on our review of this record, we refuse to substitute our judgment for that of the chancellor. It cannot be said that his decision is clearly against a preponderance of the evidence.

As for the concerns of the dissenting judges, proof of changed circumstances alone does not ordinarily justify a change in custody. In order for custody to be changed, there must not only be proof of a *material* change in circumstances, but that proof must also be accompanied by evidence that the change would be in the child's best interest. *Bennett v. Hollowell*, 31 Ark. App. 209, 792 S.W.2d 338 (1990). In finding no material change in circumstances affecting the best interest of the child, the chancellor could conclude that appellee's association with Boggs had no significant impact on the child, and he could consider that appellant and his

family, but not appellee, had exposed the child to Boggs's presence. With respect to overnight visits with appellee's fiance, the chancellor could observe that this only occurred on several occasions and that the two were to be married in a few weeks. While our courts have never condoned a parent's promiscuous conduct or lifestyle when conducted in the presence of the child, we have recognized the distinction between those human weaknesses and indiscretions which do not necessarily affect the welfare of the child, and that moral breakdown leading to promiscuity and depravity which does render one unfit to have custody of a minor child. *Hoing v. Hoing*, 28 Ark. App. 340, 775 S.W.2d 81 (1989).

Also, that appellee may have violated the court's previous directives does not compel a change in custody. The fact that a party seeking to retain custody of a child has violated court orders is a factor to be taken into consideration, but it is not so conclusive as to require the court to act contrary to the best interest of the child. *Johnson v. Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975). To hold otherwise would permit the desire to punish a parent to override the paramount consideration in all custody cases, i.e., the welfare of the child involved. *Id.* Moreover, to ensure compliance with its orders, a chancellor has at his or her disposal the power of contempt. And, we have said that a court's contempt powers should be used prior to the more drastic measure of changing custody, *Carter v. Carter*, 19 Ark. App. 242, 719 S.W.2d 704 (1986), which is in keeping with the principle that custody is not to be changed merely to punish or reward a parent. *Harvell v. Harvell*, 36 Ark. App. 24, 820 S.W.2d 463 (1991).

Because it cannot be said that the chancellor's decision is clearly erroneous, we can only conclude that the dissenting judges have succumbed to the temptation to reach down from the appellate bench to overturn a decision that is simply not to their own personal liking. However, our sworn duty is to determine, from the record, whether the decision is clearly against the preponderance of the evidence, giving great weight to the superior ability of the chancellor to assess the credibility of the witnesses with whom he is more intimately familiar. From that perspective, we deem it unwise to second-guess the chancellor's decision that appellant failed to present sufficient proof of any material change in circum-

stances and that the child's welfare was not jeopardized by remaining in the custody of appellee.

PITTMAN, JENNINGS, and STROUD, JJ., agree.

ROBBINS, C.J., and CRABTREE, J., dissent.

JOHN B. ROBBINS, Chief Judge, dissenting. With sincerest respect to my colleagues who decided this appeal, I must express my strongest disagreement to the majority's decision today that leaves a little seven-year-old girl in the custody of her alcoholic mother who cannot conform her actions to the conduct ordered by a chancery court.

Change-of-custody proceedings involve two basic inquiries: first, whether there has been a material change of circumstances since the most recent custody order; and, if so, secondly, which parent should have custody with the sole consideration being the best interest of the child. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996). The trial court held in its June 1997 order that "there has been an insufficient change of circumstances to grant Plaintiff's Petition for change of custody and therefore same is hereby denied and dismissed." It is not clear whether the trial court found that appellant failed to meet the threshold test of proving that there had been a material change of circumstances, or whether the trial court found that the threshold test was met, but determined that it was in the best interest of the child that she remain in the custody of appellee. Whichever finding was made, I submit that, for the following reasons, the chancellor and the majority have erred.

As to whether appellant failed to prove that there had been a material change of circumstances since the December 1995 order, which left custody of the child with appellee, there are at least two undisputed changes that have occurred that I submit are both material and significant:

(1) Appellee associated with Johnny Boggs on numerous occasions, including a two-day period while on a drinking binge in March 1997.
(2) Appellee and the child stayed overnight on at least three occasions with her boyfriend at his apartment.

The order of December 11, 1995, was not appealed by either party. Because of appellee's history of having an abusive relationship with Johnny Boggs, the order expressly provided that appellee's custody was conditional and would terminate if she associated with Mr. Boggs. Appellee admitted at trial that she had been with Mr. Boggs on several occasions since entry of that order. While a custody change should never be imposed to punish or made without considering the best interest of the child, surely the violation of a clearly expressed condition of continued custody constitutes such a material change of circumstances as to at least open the door and permit the court to consider what the best interest of the child currently is in the matter of custody. Otherwise, the December 11, 1995, order's proviso was absolutely meaningless and its disregard undermines the integrity of the court.

I further submit that the other change in circumstances mentioned above is also significant and material. The December 11, 1995, order expressly enjoined the parties from overnight visits with someone of the opposite sex with whom they are romantically involved when the child was present. Since then, appellee admits that on at least three occasions she and the child have stayed overnight with her boyfriend, Thomas Johnston, at his apartment. This did not occur prior to the December 11, 1995, order because appellee and Mr. Johnston did not start dating until December 1995. Again, this contempt for the orders of the court may not be reason enough to change custody, but it should constitute such a material change in circumstances as to permit the trial court to consider anew with whom, in the best interest of the child, custody should be placed.

The foregoing facts are undisputed. Appellee admitted to these at trial. If the trial court found that there were insufficient changes of circumstances to permit reopening the issue of the best interest of the child, such finding was clearly against the preponderance of the evidence, and we are obliged, therefore, as an appellate court to substitute our judgment for that of the chancellor's.

The chancellor's decision could be construed as finding that, while there has been a material change of circumstances since the December 11, 1995 order, it continued to be in the child's best interest to remain in the appellee's custody. If so construed, I sub-

mit that such decision is also clearly against the preponderance of the evidence. The majority opinion has set forth an exhaustive summary of the evidence presented at trial, and I will not recount it here. There is one item of evidence, however, that is notable because of its omission.

Appellee testified that Brent Keeling, a man to whom she was never married, but who fathered her older daughter, stays with appellee in her trailer a week or two at a time, a few times each year. This man not only has mental problems, but is either physically abusive or has shown potential for physical abuse and is antisocial in the extreme. The parties' young daughter is exposed to Mr. Keeling during his visits to appellee's trailer.

The proof at trial clearly showed that the interest of the child would be better served in the custody of her father, especially with the support of his parents who are available to assist in her care. Appellee, an acknowledged alcoholic, admits to a two-day drunken binge in March 1997 during which she blacked out and of which she has very little memory. It is laudable that the trial court and majority wish to be forgiving of the appellee's conduct and not punish her. While I agree that custody should not be removed from appellee with the object of punishing her, we should not allow our grace to place her child at risk. It was to appellee's shame that she relapsed in March 1997 and was rendered unable to care for herself, much less her children. By leaving custody with appellee, it will be to our shame if she experiences another lapse and this seven-year-old child suffers harm as the result. We ought to protect the child from such a distinct possibility.

Appellee has shown by her conduct that she has little, if any, regard for the admonition and orders of the court. It is not in the best interest of the child to be in the custody of such a parent if a better alternative is available. I submit that the heavy preponderance of the evidence shows that it is in the best interest of this child to be in the custody of appellant and his parents. The chancellor's decision, as affirmed by the majority, is clearly erroneous and I would reverse.

CRABTREE, J., joins in this dissent.

EXPRESS HUMAN RESOURCES III/
Spirit Homes, Inc. *v.* Farren A. TERRY

CA 97-1294 968 S.W.2d 630

Court of Appeals of Arkansas
Division III
Opinion delivered April 15, 1998

[redacted]

Anderson, Murphy & Hopkins, L.L.P., by: *Randy P. Murphy* and *David A. Littleton*, for appellants.

Davis & Holiman, by: *Zan Davis*, from appellee.

MARGARET MEADS, Judge. Express Human Resources III and Spirit Homes, Inc., appeal the decision of the Workers' Compensation Commission that Farren Terry is entitled to medical benefits and temporary total disability benefits from an on-the-job injury, although he tested positive for marijuana metabolites two days after the accident. We find no error, and we affirm the Commission's decision.

Appellee was employed by appellant Spirit Homes as a maintenance worker. On March 10, 1996, he was assisting in putting a roof on a new building. A hole had been cut in the roof in order to allow some equipment to be placed in the building. Approximately forty-five minutes after the hole was cut, appellee was injured when he fell through the hole, landing on his back on the floor below. He was taken to Conway Regional Medical Center, where it was determined that he had a radial head fracture, right elbow fracture, right wrist fracture, and T-11 compression fracture, and he was admitted to the hospital. Appellee also consented to a drug-screen urinalysis, which was taken on March 12 while he was still in the hospital. The urine sample tested positive for marijuana metabolites. Appellants controverted the claim after learning of the positive results of the urine test.

A hearing was held before the administrative law judge (ALJ) on October 24, 1996. Based upon the results from the urine sample, the ALJ found that appellants had established the presence of an illegal drug pursuant to Ark. Code Ann. § 11-9-102(5)(B)(iv)(a) (Supp. 1997), thus creating a rebuttable presumption that appellee's injury was substantially occasioned by the use of marijuana under Ark. Code Ann. § 11-9-102(5)(B)(iv)(b). However, the ALJ also found that appellee had rebutted this presumption and had proven by a preponderance of the evidence that marijuana did not substantially occasion the injury, pursuant to Ark. Code Ann. § 11-9-102(5)(B)(iv)(d). She awarded appellee medical benefits and temporary total disability benefits from March 10, 1996, until June 15, 1996.[1] The Commission affirmed and adopted the ALJ's opinion. Appellants' sole point on appeal is that the Commission erred in finding that appellee had rebutted the statutory presumption created by Ark. Code Ann. § 11-9-102(5)(B)(iv).

Prior to the passage of Act 796 of 1993, it was the employer's burden to prove that an employee's accident was caused by intoxication or drug use. *Morrilton Manor v. Brimmage*,

[1] Appellee also received unemployment benefits during this time, and the ALJ noted that he was only entitled to the difference between his unemployment benefits and his temporary total disability benefits during the period of temporary total disability.

58 Ark. App. 252, 952 S.W.2d 170 (1997). However, Act 796 shifted this burden of proof by requiring the employee to prove by a preponderance of the evidence that alcohol or drug use did not substantially occasion the injury, if alcohol or drugs were found in his body after an accident. *Id.*

The relevant statutory provisions provide:

> "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.
>
> . . . .
>
> (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.

Ark. Code Ann. § 11-9-102(5)(B)(iv)(a)-(d) (Supp. 1997).

The standard of review in workers' compensation cases is well-settled. On appeal, this court must determine whether there is substantial evidence to support the Commission's decision. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Id.* The evidence is viewed in the light most favorable to the findings of the Commission and is given its strongest probative value in favor of the Commission's decision. *Barrett v. Arkansas Rehabilitation Servs.*, 10 Ark. App. 102, 661 S.W.2d 439 (1983). The issue is not whether the appellate court might have reached a different conclusion from the one found by the Commission, or even whether the evidence would have supported a contrary finding, but if reasonable minds could arrive at the same decision as the

Commission, the decision must be upheld. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

At the hearing, appellee testified that on the day of his injury, he had worked seven days straight and was in his twenty-eighth hour of overtime. Appellee had been at work since 7:00 a.m. and had a thirty-minute lunch break; the accident occurred at approximately 3:40 p.m. He had carried pressed boards weighing between 150 and 200 pounds for most of the day, and he believed the accident was caused by his fatigue. At the time of the accident, appellee was walking forward, carrying one end of a four-foot by sixteen-foot pressed board with his supervisor, Bobby Cole, who was walking backward. Appellee could not see his feet or the hole, but he believed that Mr. Cole could see the hole because he was in front, guiding their path. Mr. Cole avoided the hole, but appellee fell through it onto the floor below. None of this testimony was controverted by appellants.

Appellee testified that he had not smoked marijuana since March 6, 1996, and denied smoking it on March 7, 8, 9, or 10. He denied being impaired on March 10. He admitted that he had smoked marijuana in the past, probably once every two weeks, and that it might be difficult for other people to detect that he had smoked marijuana. He did not challenge the urinalysis results but offered no explanation as to how the level of marijuana present in his system came to be in his body on March 12, 1996.

Three of appellee's co-workers testified on his behalf. Johnny Morales testified that he had cut the hole and thought it would be covered with decking for safety reasons. He believed that a person who was being safe and was in good mental condition could have an accident such as appellee's. Mr. Morales further testified that he had ridden to work with appellee on the day of the accident, had worked around him during the day, and had eaten lunch with him; to his knowledge, appellee did not smoke any marijuana that day. He further testified that appellee did not appear to be impaired, though he admitted he had no expertise in the detection of marijuana impairment.

Larry Hardin testified that the hole in the roof should have been covered, and he agreed with appellee that a person walking

forward while carrying a four foot by sixteen foot board would not be able to see his feet or a hole in front of him. He also stated that he was around appellee before, during, and after lunchtime, and did not see anything that would cause him to believe appellee was impaired from the use of any intoxicant. Mr. Hardin admitted that he did not know if appellee smoked marijuana, and he did not know what effect, if any, it had on him. Joseph Hooten testified that although he did not go to lunch with appellee, he worked with him "pretty much all day" and did not notice anything that would lead him to believe appellee was impaired.

Dr. Henry Simmons, a toxicologist, reviewed the results of appellee's urine tests. In his deposition, he stated that everything he had reviewed in the case was consistent with marijuana impairment on March 10; however, he also stated that the test results were consistent with appellee *not* being impaired on March 10. Dr. Simmons stated that a person might test positive for marijuana anywhere from two days to six weeks after usage, depending upon whether the individual used marijuana regularly or only one time. He explained this discrepancy stating that chronic marijuana smokers have higher THC body burdens, meaning that the metabolites build up and stay in a chronic smoker's body for a longer period of time than in a person who has smoked marijuana only one time. In addition to the frequency of use, other factors that may affect the test results include metabolic capability and hydrational status. However, he did not take these factors into consideration when reviewing appellee's test results because that information was not available to him. He admitted that based on the tests, he could tell very little about the time frame in which appellee had used marijuana.

Dr. Simmons also noted that depending upon the frequency of use, a person might remain impaired anywhere from two to twenty-four hours after ingesting marijuana, and that the strength of the marijuana used would also have a bearing on the degree of impairment. He admitted that he could not determine from the tests alone when appellee had last used marijuana, and that the level of metabolites in the urine tests revealed nothing about the extent of appellant's impairment, if any, at the time of the accident. He also opined that he would not anticipate that an isolated

use of marijuana on March 6 would prevent appellee from performing construction work safely four days later.

Appellants argue that appellee did not present sufficient evidence to rebut the presumption that his accident was substantially occasioned by the use of illegal drugs and urge this court to find appellee's denial of impairment to be incredible. They also contend, citing *Weaver, supra,* that appellee's co-workers are not credible because they were not constantly with appellee on the day of the accident and have no expertise in the field of marijuana impairment. Further, appellants argue that Dr. Simmons's deposition states that everything he reviewed in connection with this case was consistent with impairment on the date of the accident.

The Commission, as fact finder, must resolve any conflicts in evidence. *Warwick Elec., Inc. v. Devazier,* 253 Ark. 1100, 490 S.W.2d 792 (1973). It is within the Commission's sole discretion to determine the credibility of each witness and the weight to be given to the testimony, *Johnson v. Hux,* 28 Ark. App. 187, 772 S.W.2d 362 (1989), and it is not required to believe or disbelieve the testimony of any witness. *Green v. Jacuzzi Bros.,* 269 Ark. 733, 600 S.W.2d 448 (Ark. App. 1980). Once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Linthicum v. Mar-Bax Shirt Co.,* 23 Ark. App. 26, 741 S.W.2d 275 (1987). Whether the rebuttable presumption that claimant's injury was substantially occasioned by the use of alcohol or illegal drugs is overcome by the evidence is a question of fact for the Commission. *Weaver, supra.*

The ALJ found appellee's testimony to be credible, and we are bound by that credibility assessment. It is most reasonable to believe that a person in his seventh straight day on the job and in his twenty-eighth hour of overtime would be fatigued. Moreover, although appellee was aware of the hole and knew that he should be careful, the manner in which he had to carry the large boards prevented him from being able to see where he was going. Although his supervisor could see the hole while assisting appellee in carrying the board, he led appellee directly to the hole.

With regard to appellants' contention that *Weaver* requires the ALJ to discount the co-workers' testimony because

they had no training in detecting marijuana impairment, such reliance is misplaced. In *ERC Contr. Yard & Sales v. Robertson*, 60 Ark. App. 310, 961 S.W.2d 36 (1998), rehearing denied, (Supp. Op. delivered on April 8, 1998), this court affirmed the Commission's grant of benefits to an injured worker who had fallen from a scaffold due to an alcohol-withdrawal seizure. Although a small amount of alcohol was found in his body, he denied having consumed any alcohol on the day of the seizure. Both his employer and his girlfriend corroborated that testimony. In both *Weaver* and *ERC*, we affirmed the decision of the Commission because in each case there was substantial evidence to support it. We note that in the case at bar, appellee's testimony alone provides substantial evidence upon which it could be determined that he rebutted the statutory presumption of Ark. Code Ann. § 11-9-102(5)(B)(iv), even had his co-workers not provided corroborating testimony.

As to appellants' argument concerning Dr. Simmons's deposition, the doctor testified that appellee's urine test results supported both impairment *and* non-impairment on the date of the accident. Suffice it to say that the Commission has the duty of weighing medical evidence as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Roberson v. Waste Management*, 58 Ark. App. 11, 944 S.W.2d 858 (1997).

As in all workers' compensation cases, the Commission's decision must be affirmed if there is substantial evidence to support its determination. Here, we find there was substantial evidence on which the Commission could reach its decision.

Affirmed.

ROBBINS, C.J., and GRIFFEN, J., agree.

David McKISSICK *v.* Ed ROLLE, Director of Arkansas Employment Security Department, and J.B. Hunt Transport, Inc.

E 97-212 966 S.W.2d 921

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered April 15, 1998

MARGARET MEADS, Judge. David L. McKissick appeals the decision of the Board of Review which denied him benefits on the basis that he was discharged from last work for misconduct connected with the work. At issue in this case, which is submitted without supporting briefs, is whether the Board's finding of misconduct is supported by substantial evidence. We affirm.

Appellant was employed by J.B. Hunt Transport as an over-the-road truck driver. On June 14, 1996, while driving for his employer, appellant's truck struck a car which was stopped on the side of the interstate in heavy fog, totaling the car. Appellant was not cited for this accident, but the company considered it a major preventable accident and placed him on one year's probation. Appellant was advised in a post-accident review with his employer that in the future, when he encountered adverse weather conditions, he should reduce his speed or stop until conditions improved. Further, appellant was assured there would be no adverse consequences if he had to stop due to bad weather as long as he contacted his fleet manager and kept him informed about the situation. Appellant signed the post-accident review report acknowledging that he was on probation for one year and agreeing to decrease his speed to meet driving conditions. He was cautioned that he was subject to termination in the event of another preventable accident during the probationary period.

Appellant's second accident occurred on April 30, 1997, while he was still within his probationary period. This accident occurred when appellant's truck sideswiped a tanker truck in high

winds on the interstate, and he was cited for careless driving. In his post-accident review following this incident, appellant admitted that he was traveling at fifty-eight or fifty-nine miles per hour. Evidence revealed that the employer's trucks are governed at fifty-nine miles per hour. Although he had been instructed to decrease his speed or to stop during inclement weather, appellant was driving as fast as the truck would travel. Appellant was discharged the day after the second accident occurred.

At the Appeal Tribunal hearing, appellant admitted that he had received copies of the employee's and the driver's manuals, and that he had read and understood them. Relevant portions of the J.B. Hunt Driver's Manual were introduced into evidence at the hearing. Under the heading "Actions Which May Result In Termination Without A Prior Warning," the following is listed: "Major preventable accident or more than one minor preventable accident." Representatives of the employer testified that although they considered the first accident to be major, the company decided to give appellant further training and the opportunity to continue driving.

Additionally, "Receipt of reckless or careless driving citation" is listed under the heading "Actions Which Result In Automatic Termination," in the driver's manual. The record clearly reflects that appellant's ticket from the second accident was for careless driving.

Our standard of review in employment security cases is well-settled. This court reviews the findings of fact of the Board of Review in the light most favorable to the prevailing party, only reversing where the findings are not supported by substantial evidence. *Dray v. Director*, 55 Ark. App. 66, 930 S.W.2d 390 (1996). Substantial evidence is such evidence that a reasonable mind would find adequate to support a conclusion. *Id.* The credibility of the witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review. *Anderson v. Director*, 59 Ark. App. 266, 957 S.W.2d 712 (1997). 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. *Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

Arkansas Code Annotated § 11-10-514(a) (Repl. 1996) provides that an individual shall be disqualified for benefits if he is discharged 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 the right to expect; and, (4) disregard of the employee's duties and obligations to his employer. *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). There is an element of intent associated with a determination of misconduct. Mere good-faith errors in judgment or discretion and unsatisfactory conduct are not considered misconduct unless they are of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or intentional disregard of the employer's interest. *Id.* 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 to decide. *Id.*

Considering the facts of this case, we find that appellant manifested a substantial disregard of both his employer's interest and his own duties and obligations as an employee when he exceeded a safe driving speed under high-wind conditions, particularly since he had been counseled to either slow down or stop during inclement conditions, had agreed in writing to do so, and was on probationary status. We cannot say that there was not substantial evidence to support the Board of Review's determination that appellant was terminated for misconduct connected with the work.

Affirmed.

BIRD, ROGERS, and CRABTREE, JJ., agree.

ROBBINS, C.J., and ROAF, J., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I do not agree with the majority that David McKissick's two accidents in nearly sixteen months of employment constitute "intentional misconduct" as this court has defined it, so as to disqualify him for unem-

ployment benefits. The majority opinion sets forth the circumstances of both accidents and the reasons given by the employer for terminating McKissick. I will not repeat the facts other than to point out that McKissick was terminated after a minor second accident that occurred nearly a year after his first accident. The second accident occurred when a tanker truck attempted to pass McKissick in high winds, and the two trucks sideswiped, causing $699 in damages; McKissick was ticketed for careless driving. However justified his *termination* may have been, these facts fall far short of the standard this court has articulated for misconduct in unemployment cases.

The majority opinion also correctly sets forth our definition of "misconduct" for purposes of unemployment compensation. *See Kimble v. Director*, 60 Ark. App. 36, 959 S.W.2d 66 (1997); *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). However, in *Kimble*, also involving a long-distance truck driver fired for excessive preventable accidents, this court said that five preventable accidents in a six-month period demonstrated a "recurring pattern of carelessness from which the Board was permitted to infer a manifest indifference that constitutes a substantial disregard for her employer's interest."

Here, McKissick's employer discharged him because he had two accidents in a sixteen month period, both caused by his failure to slow down or stop his truck during "inclement weather." The Board found that McKissick was "knowingly driving too fast for conditions" in the second accident, and that his conduct was reckless and manifested an intentional or substantial disregard of his employer's interest.

It should be emphasized, however, that the inclement weather at issue in the respective accidents was markedly different. The first accident occurred in heavy fog; the second in high winds. This significant difference in weather conditions supports a finding, not of a "recurring pattern" but rather of a one-time error in judgment. I find this conclusion particularly inescapable because the second accident occurred when another professional truck driver was attempting to pass McKissick. Surely, all at-fault

accidents will involve a violation of law and, in the case of a professional truck driver, a disregard of the employer's rules. However, McKissick's accident record in his sixteen months of employment simply does not present evidence of misbehavior of such a degree or recurrence as to fall within our definition of misconduct, and I would reverse for an award of benefits.

ROBBINS, C.J., joins.

Christopher WARD *v.* Linda Mae Ward McCORD

CA 97-1122 966 S.W.2d 925

Court of Appeals of Arkansas
Division III
Opinion delivered April 22, 1998

James Howard Smith, for appellant.

Helen Rice Grinder, for appellee.

MARGARET MEADS, Judge. Christopher Ward has appealed from an order of the Faulkner County Chancery Court denying his motions to dismiss and for summary judgment, and granting appellee Linda Mae Ward McCord's petition for a new trial on the ground that appellant committed fraud on the court during their divorce action in 1986. Appellee asserted in her petition that appellant had concealed $42,000 in marital funds from her. In her order granting a new trial, the chancellor stated:

> This case should be reopened and [appellee] should be granted a new trial, because [appellant] committed a fraud on the court, and because due diligence by [appellee] would not have uncovered the balance in the disputed savings account. The parties' daughter, Teresa L. DeBolt, was under the control of the [appellant]. While the divorce case was pending, [appellant] moved the disputed $42,000.00 savings account into an account with the daughter's name and social security number on it. Because she was under the control of the [appellant], the daughter would not have revealed any information to the [appellee]. Had the [appellant] asked the daughter to do so, the daughter would have consented to moving the account again in order to conceal it

> from the [appellee]. The [appellee] did not file any interrogatories or do any other discovery in the 1986 divorce case, but even if she had done interrogatories or other discovery the [appellee] still would not have uncovered the disputed account.

On appeal, appellant argues that: (1) he did not commit fraud in 1986, and (2) even if he did commit fraud, the fraud was intrinsic, rather than extrinsic, the type of fraud required to vacate a judgment under Ark. R. Civ. P. 60(c)(4). In other words, if appellant defrauded appellee, rather than the court, he argues, the divorce decree cannot be set aside. We have no doubt that appellant did commit fraud against appellee; however, it is not the sort of fraud for which a judgment can be set aside. Therefore, we reverse the chancellor's decision and dismiss this action.

The parties were married in 1960 and had four children. Appellant was an officer in the Air Force, and appellee, who did not graduate from high school, worked as a waitress. By the summer of 1984, the parties had saved approximately $62,000 in joint accounts at the Little Rock Air Force Base Federal Credit Union. That summer, appellee informed appellant that she wanted a divorce, but appellant was able to talk her out of it. Appellant then withdrew $38,000 from the parties' joint accounts and deposited it into an account in his name at the credit union. On May 27, 1986, appellee filed for divorce and informed appellant that she had done so. Appellant immediately went to the credit union and transferred the money in this account, which had increased to $42,000, into an account held in his name and that of the parties' daughter, Teresa DeBolt. This account carried Teresa's address and social security number. Appellant informed Teresa of his actions, and Teresa kept quiet about the account for six years.

On June 30, 1986, the parties entered into a property settlement agreement which provided that each party would keep their own personal effects and that appellant would retain the marital home and be responsible for its debt. The agreement further provided that appellee would retain the sum of $19,000, her IRA of $8,610, and specific items of household furniture; and that appellant would retain the balance of the checking and savings accounts, the remaining IRA, and household items not specifically

given to appellee. The agreement concluded with paragraph 11, which provided: "Each party acknowledges that this is a fair agreement and that it is not the result of any fraud, duress, or undue influence exercised by either party upon the other and further acknowledge [sic] that they have read and understand each and every provision."

In September 1992, Teresa informed appellee of the $42,000 account. On June 11, 1993, appellee filed a petition to set aside the property settlement agreement on the ground that appellant had fraudulently concealed this account from her and had conveyed the funds to Teresa in order to defeat her marital property rights. Appellant responded with motions to dismiss and for summary judgment. In support of his motions, appellant filed his affidavit, wherein he admitted that in August of 1984, he had withdrawn $38,000 from the parties' savings and had placed it in an account in his own name. He stated that he had informed appellee of this action. He also admitted that on May 27, 1986, he had moved the $42,000 that had accumulated in this account into a new account held in his name and that of his daughter, Teresa. He also stated that, during negotiations for the property settlement, he had given appellee a "bottom line figure" for an uncontested divorce: appellee could only have the IRA in her name and $19,000 of their savings. He stated that appellee had considered this proposal and had asked for an additional $1,500 for their son Jeff's braces, to which appellant agreed.

Appellant also filed the parties' son Michael's affidavit. Michael stated that his mother had admitted to him, during negotiations for the property settlement, that she knew appellant had more money and that she might be entitled to a portion of his retirement pay but that she did not care because she wanted out of the relationship as soon as possible.

In response to appellant's motions, appellee filed her own affidavit, in which she stated that throughout the parties' marriage, she was not fully aware of their financial situation because appellant had withheld this information from her. She also said that she had been afraid of appellant and had been under his domination. She stated that when she filed for divorce in 1986, appellant

had told her that he would go to jail before he saw her receive any part of his retirement income. Appellee testified that she was not aware of the $42,000 until September 1992, when Teresa revealed its existence to her.

Appellee also filed Teresa's affidavit. She stated that after her parents' separation, her father had asked her for a favor. She stated that she had agreed to help him hide some money from her mother in a joint account with his and her names, using her social security number. She also said that her father informed her that he had asked a friend employed with the credit union to "put a lock on it" so no one could locate the account.

On December 6, 1993, Chancellor Watson Villines issued a letter order in which he stated: "Although the Court came very near to granting the Motion For Summary Judgment, it will be denied at this time so the Court can hear all of the evidence on this matter." On June 30, 1994, appellant again moved for summary judgment. Appellant argued that appellee had failed to exercise due diligence in the divorce action and that the court lacked jurisdiction to reopen the case under Rule 60(c). The depositions of appellee and Teresa were also filed.

In her deposition, appellee testified that during negotiations, appellant had given her a piece of paper with their assets purportedly listed thereon and stated: "[T]his is what we have; this is what I'm going to agree to, and I will not let you have my retirement." The $42,000 account was not listed on this piece of paper. Appellee also testified that she was afraid of appellant but was tired of arguing with him. She stated that when she went to the credit union for information about their assets, the credit union refused to provide any information to her. Appellee added that even if the credit union had provided her with information, it would have never occurred to her to ask about any accounts in her daughter's name. She admitted that she had informed her lawyer, Phil Stratton, that she could not obtain information from the credit union and had assumed that he had sought that information. She said that when she signed the property settlement agreement, she believed that the $19,000 she received was half of the parties' assets.

Appellee filed the affidavit of her former attorney, Mr. Stratton, in which he stated:

> 3. . . . The existence of marital funds in Mr. Ward's name was not disclosed to me by anyone involved. Anything as important as marital funds would have been pursued vigorously had I known the funds existed.
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> . . . .
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> 5. As I remember, Mrs. Ward was adamant in foregoing any interest in her husband's military retirement plan but I believe she would have pursued all other marital property rights and had I known Mr. Ward had not made full disclosure of all marital assets that fact would have been presented to the court for her to pursue or to disclaim.

In August of 1994, Judge Villines denied appellant's second motion for summary judgment, and soon after, appellant filed a notice of appeal. This court dismissed appellant's appeal in CA94-1362 on March 9, 1995. On March 13, 1995, appellant again filed a motion in which he argued that appellee could not prove that she was diligent in uncovering the existence of the bank account, and that even if appellant's actions were fraudulent, they were intrinsic fraud and not the type of fraud required to vacate a judgment. Appellant requested that the court enter findings of fact and conclusions of law. After Judge Villines's untimely death in 1995, Karen Baker was appointed to serve out the remainder of his term. On August 12, 1996, Judge Baker entered an order dismissing this action without prejudice for lack of prosecution.

On January 31, 1997, appellee again filed a petition to set aside the property settlement agreement, alleging the same grounds as before. Appellant again filed motions to dismiss and for summary judgment. The affidavits previously filed were refiled. Chancellor Linda Collier (who was elected to the position formerly held by Judge Villines) heard arguments of counsel on April 3 and April 23, 1997. In her order entered June 2, 1997, she denied appellant's motions to dismiss and for summary judgment and granted appellee a new trial because of appellant's fraud upon the court.

Appellant argues that the chancery court had no jurisdiction to grant a new trial because appellee was not diligent in the divorce proceeding in discovering the existence of the $42,000 account and because the evidence does not establish that he fraudulently withheld information about the account from appellee. Appellant also argues that even if his actions did amount to fraud, they were intrinsic fraud rather than extrinsic fraud and the chancery court lacked jurisdiction to vacate the judgment under Ark. R. Civ. P. 60(c)(4) (1997). Because appellant's actions amounted to intrinsic fraud, we hold that the chancery court lacked jurisdiction to reopen the case and set aside the divorce decree.

Rule 60(c)(4) provides:

> (c) *Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days.* The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days after the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
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> . . . .
>
> (4) For fraud practiced by the successful party in obtaining the judgment.

Rule 60(c) allows judgments to be set aside and new trials granted for the same reasons as could previously be done under Ark. Stat. Ann. §§ 27-1906 and 29-506. *Garrett v. Allstate Inc. Co.*, 26 Ark. App. 199, 762 S.W.2d 3 (1988). Comment 1 in the Reporter's Notes to Rule 60 provides:

> This rule is substantially different from FRCP 60. Its purpose is to substantially retain existing Arkansas law on the subject. The Court feels that the adoption of FRCP 60 would detract from the stability of final judgments and that the changes which would be made in Arkansas law are highly undesirable. The distinction between intrinsic and extrinsic fraud as a basis for relief from a judgment is considered an important and desirable one.

In *Parker v. Sims*, 185 Ark. 1111, 51 S.W.2d 517 (1932), the supreme court explained the type of fraud that will warrant the setting aside of a judgment:

> The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed. It must be a fraud practiced upon the court in the procurement of the judgment itself.

185 Ark. at 1116, 51 S.W.2d at 519-20 (citations omitted).

Therefore, the fraud for which a decree will be canceled must consist in its procurement and not merely in the original cause of action. *First Nat'l Bank v. Higginbotham Funeral Serv., Inc.*, 36 Ark. App. 65, 818 S.W.2d 583 (1991). It is not sufficient to show that the court reached its conclusion upon false or incomplete 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. Accord Arkansas State Highway Comm'n v. Clemmons*, 244 Ark. 1124, 428 S.W.2d 280 (1968); *Williams v. Purdy*, 223 Ark. 275, 265 S.W.2d 534 (1954); *McGuire v. Smith*, 58 Ark. App. 68, 946 S.W.2d 717 (1997); *Smart v. Biggs*, 26 Ark. App. 141, 760 S.W.2d 882 (1988). The party seeking to set aside the judgment has the burden of showing that the judgment was obtained by fraud, and the charge of fraud must be sustained by clear, strong, and satisfactory proof. *First Nat'l Bank v. Higginbotham Funeral Serv., Inc., supra.* Whether the procurement of a judgment amounted to fraud upon the court is a conclusion of law. *Hardin v. Hardin*, 237 Ark. 237, 372 S.W.2d 260 (1963).

The distinction between extrinsic and intrinsic fraud applies to actions seeking to set aside divorce decrees. In *Alexander v. Alexander*, 217 Ark. 230, 229 S.W.2d 234 (1950), the supreme court reversed a chancellor's decision vacating an order of child support in a divorce decree and held that it was error to vacate the decree on the ground that the plaintiff had led the defendant to believe that the child had been adopted although, in fact, the

adoption had not been completed. In doing so, the court quoted the United States Supreme Court's explanation of extrinsic fraud:

> In the leading case of *United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93, examples of acts which constitute extrinsic or collateral fraud are mentioned as follows: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, — these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing . . . . On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

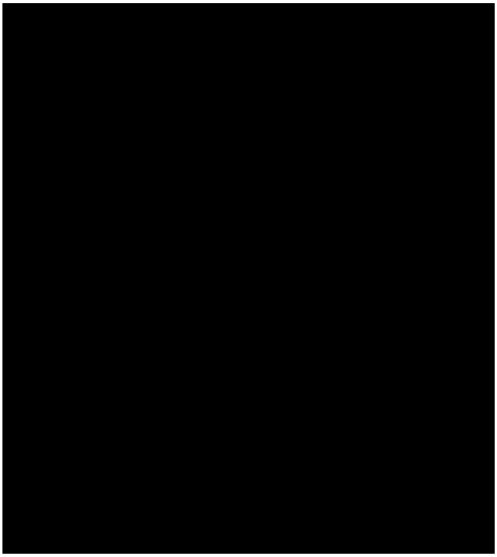
217 Ark. at 235, 229 S.W.2d at 236. The court further noted that the appellant had obviously believed in good faith that the adoption proceedings had been completed but added:

> However, if she knowingly and falsely testified at the original hearing such action would have amounted to intrinsic fraud and does not involve such extrinsic or collateral fraud as is required to modify or vacate the original decree. The burden was upon appellee in the original hearing to meet the issue of his liability for the child's support and he had ample time and opportunity to do so. There would be no end to litigation if he is permitted to retry the same issue in a subsequent proceeding when there is an absence of fraud practiced upon the court in the procurement of the original decree.

217 Ark. at 236, 229 S.W.2d at 237. *See also Makin v. Makin*, 244 Ark. 310, 424 S.W.2d 875 (1968).

Based upon the foregoing authority, we hold that appellant's actions, even if they did amount to fraud, were intrinsic and not extrinsic. The extent of the parties' marital property

clearly was an issue before the chancery court when the divorce decree was entered in 1986. Although an injustice may very well have been done to appellee in 1986, we hold that this case must be reversed and dismissed because the chancery court lacked jurisdiction to set aside the divorce decree.

Reversed and dismissed.

ROGERS and CRABTREE, JJ., agree.