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Cynthia E. INGRAM, Phyllis Ingram, and Deborah I. Moll *v.* Bill G. CHANDLER

CA 97-847 971 S.W.2d 801

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

Lawrence W. Fitting, P.A., and *Michael E. Stubblefield, P.A.*, for appellants.

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

D. FRANKLIN AREY, III, Judge. This is a summary-judgment case. The appellants, Cynthia E. Ingram, Phyllis Ingram, and Deborah I. Moll, brought an action to specifically enforce a contract concerning the sale of certain stock in the possession of the appellee, Bill Chandler. The Sebastian County Chancery Court granted appellee's motion for summary judgment, despite having already scheduled a hearing in the matter. Appellants present three arguments for reversal: (1) that the trial court erred by granting summary judgment as a matter of law; (2) that the trial court abused its discretion by granting summary judgment before discovery, without notice, and prior to a scheduled hearing; and (3) that the trial court erred by denying appellants' motion for default judgment. We affirm in part, and reverse and remand in part.

On May 13, 1981, Ralph and Una Irene Ingram, husband and wife, sold their twelve shares of stock in Commercial Underwriters, Inc., to appellee. Appellee agreed to pay $200,000 for the stock, with $35,000 payable at closing and the balance payable with interest at the rate of $1,380.13 per month for twenty years. The sale was memorialized in a contract of purchase ("1981 contract") and a promissory note payable to the Ingrams jointly. Six days later, the Ingrams and appellee executed an escrow agreement with First National Bank of Fort Smith. The bank agreed to hold the 1981 contract, stock certificates, and promissory note as security for the performance of the contract by the parties.

Ralph Ingram died on September 3, 1987. His last will and testament specifically devised all of his stock ownership in Commercial Underwriters, Inc., to his wife, Una Irene Ingram. On September 11, 1990, Una Irene Ingram executed a living trust. It included a distribution of her interest in the sale of Commercial Underwriters, Inc., to three of her stepdaughters, appellants herein.

On April 5, 1993, Una Irene Ingram and appellee entered into an agreement ("1993 agreement") that purported to modify the 1981 contract. The 1993 agreement provided that appellee's obligation to make payments under the promissory note would terminate upon the death of Una Irene Ingram, if she died prior to payment in full of the promissory note. The 1993 agreement recited consideration of "$1.00 and other good and valuable consideration in hand paid, the receipt of which is acknowledged. . ." by Una Irene Ingram.

Una Irene Ingram died on July 19, 1996, with seventy-six payments remaining due under the promissory note. This represented a balance due of $104,889.88. On August 7, 1996, First National Bank delivered the stock to appellee.

On December 31, 1996, appellants filed a complaint in equity to specifically enforce the 1981 contract, impose a constructive trust in their favor for all monthly payments due under the promissory note, set aside the 1993 agreement, require appellee to account for monthly payments on the promissory note, and enjoin appellee from disposing of the stock. Appellants alleged that the 1993 agreement lacked consideration. Appellee filed a motion for summary judgment or in the alternative motion to dismiss for failure to state facts on January 31, 1997, but never filed an answer to the appellants' complaint. Appellants responded to these alternative motions on February 27, 1997.

On that same date, appellants filed a first amended complaint in equity. The first amended complaint essentially sought the same relief as the original complaint, but it added an allegation that the consideration recited in the 1993 agreement was so insufficient and so inadequate as to be unconscionable as a matter of law and equity. Appellee never responded to the first amended

complaint, either by filing a new motion for summary judgment or dismissal, or by filing an answer.

On March 10, 1997, appellee requested that the matter be set on the trial court's contested docket at its earliest convenience. The trial court responded by letter dated March 21, 1997, notifying the parties that the case had been set for hearing on June 5, 1997. It appears from the record that the only motions pending at this time were appellee's alternative motions for summary judgment or dismissal.

At an earlier point in the proceedings, appellants' attempt to take appellee's deposition failed when the trial court granted appellee's motion for protective order. On April 11, 1997, appellants filed a second notice to take appellee's deposition. Appellee filed another motion for protective order on April 14, 1997.

The following day, April 15, 1997, without notice to the parties, the trial court entered its order granting summary judgment for the appellee. In the order, the chancellor stated that there was no issue of material fact and that appellee was entitled to judgment as a matter of law. The court found that appellee's motion for summary judgment should be granted for the following reasons: (1) that the cause of action was barred by the statute of limitations set forth in Ark. Code Ann. § 16-56-105 (1987); (2) that the appellants had no standing to complain of the matters alleged in the complaint, or first amended complaint; and (3) that the consideration stated in the 1993 agreement was conclusive evidence of the sufficiency of the consideration. The Court's order specifically stated that it granted appellee's motion for summary judgment; no mention was made of appellee's motion to dismiss.

Appellants filed a motion for reconsideration and motion for default judgment on April 22, 1997. Appellants noted their ongoing attempts to conduct discovery, and appellee's failure to respond to their first amended complaint. After the trial court denied the motions, appellants brought this appeal.

Our standard of review for an appeal from the grant of summary judgment is well-settled. We need only decide if the granting of summary judgment was appropriate based on whether

the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997). However, if the parties agree on the facts, we simply determine whether the appellee was entitled to summary judgment as a matter of law. *Earp v. Benton Fire Dept.*, 52 Ark. App. 66, 914 S.W.2d 781 (1996).

The rules concerning whether to grant a motion for summary judgment in the first instance are equally well-settled. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ark. R. Civ. P. 56(c). The burden in a summary-judgment proceeding is on the moving party and cannot be shifted when there is no offer of proof on a controverted issue; any doubts and inferences must be resolved against the moving party. *Schultz v. Farm Bureau Mut. Ins. Co.*, 328 Ark. 64, 940 S.W.2d 871 (1997). Where the decision on a question of law by the trial court depends upon an inquiry into the surrounding facts and circumstances, the trial court should refuse to grant a motion for summary judgment until the facts and circumstances have been sufficiently developed to enable the trial court to be reasonably certain that it is making a correct determination of the question of law. *First Nat'l Bank v. Newport Hosp. and Clinic, Inc.*, 281 Ark. 332, 663 S.W.2d 742 (1984).

On March 21, 1997, the trial court set this case for a one-hour hearing on June 5, 1997. Then, without notice to the parties and almost two months prior to the hearing date, the trial court granted appellee's motion for summary judgment. Appellant's second point on appeal questions the propriety of the grant of summary judgment in this context.

"[A] motion for summary judgment should not be granted before the day scheduled for a hearing unless it clearly appears that the non-moving party could not produce proof contrary to the moving party's proof." *Baggett v. Bradley County Farmers Coop.*, 302 Ark. 401, 402, 789 S.W.2d 733, 734-35 (1990); *see*

Ragar v. Hooper, 298 Ark. 353, 767 S.W.2d 521 (1989). Having set this matter for a hearing, the trial court should not have granted summary judgment prior to the hearing unless it clearly appeared that appellants could produce no proof contrary to that advanced by appellee. *See Ragar, supra.* We recognize that if no hearing had been set, it would have been appellants' obligation to request additional time for discovery in their response to appellee's motion for summary judgment. *See Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994). However, we do not see the logic in requiring appellants to request additional time for discovery, when a hearing date has been set and appellants are attempting to complete discovery prior to that hearing date. We are therefore persuaded that this case is governed by *Baggett* and *Ragar.*

The trial court should not have granted appellee's motion for summary judgment prior to the scheduled hearing, unless it clearly appeared that appellants could not produce proof contrary to appellee's proof. In order to apply this rule, we must return to appellants' first point, and determine whether the trial court erred by granting summary judgment on the three issues it specifically addressed in its order.

The trial court first determined that appellants' cause of action was barred by the statute of limitations. It cited Arkansas Code Annotated § 16-56-105 (1987), which applies a three-year statute of limitations to a variety of actions. The trial court did not specify the manner in which it believed the statute should apply. Appellants argue that Arkansas Code Annotated § 16-56-111 (Supp. 1995) should apply; this section sets a five-year statute of limitations for actions on written contracts.

Appellants' first amended complaint seeks to specifically enforce the 1981 contract. Therefore, the five-year statute of limitations contained in § 16-56-111 applies to their complaint. *See Woods v. Wright*, 254 Ark. 297, 493 S.W.2d 129 (1973); *Hunter v. Connelly*, 247 Ark. 486, 446 S.W.2d 654 (1969). This statute began to run after Una Irene Ingram's death in July of 1996, when appellee ceased to make payments under the promissory note. *See Karnes v. Marrow*, 315 Ark. 37, 864 S.W.2d 848 (1993) (when a debt is payable in installments, the statute of limi-

tations runs against each installment from the time it becomes due); *Hunter, supra.*

Appellee contends that § 16-56-105 does apply, because appellants are primarily complaining about the circumstances surrounding the execution of the 1993 agreement. Appellants do appear to seek some relief in their first amended complaint based upon the execution of the 1993 agreement. However, the facts and circumstances surrounding the execution of the 1993 agreement are still at issue; they have not been sufficiently developed to enable the trial court to be reasonably certain that it was making a correct determination concerning the statute of limitations. Therefore, summary judgment was not proper. *See First Nat'l Bank v. Newport Hosp. and Clinic, Inc., supra.*

The trial court also determined that appellants had no standing to complain of the matters alleged in the complaint or first amended complaint. We disagree. Una Irene Ingram provided in her living trust that, after her death, her interest in the sale of Commercial Underwriters, Inc., would be divided equally among appellants. Appellants thus have an interest in enforcing the 1981 contract, and will suffer financially if it is not upheld. Therefore, appellants have standing to bring this action. *See Gladden v. Bucy*, 299 Ark. 523, 772 S.W.2d 612 (1989). Appellee cites cases involving promises of future support; those cases are not controlling, because there is no evidence that any part of the consideration flowing from appellee to Una Irene Ingram consisted of a promise of future support. *See, e.g., Cannon v. Owens*, 224 Ark. 614, 275 S.W.2d 445 (1955)(noting the rule that when a promise of future support is made in good faith, the cause of action for its breach is personal to the promisee and cannot be asserted by his heirs).

Finally, the trial court found that the consideration stated in the 1993 agreement was conclusive evidence of the sufficiency of the consideration for the agreement. The trial court should be affirmed on this point, to the extent that appellants are arguing a lack of consideration. However, the trial court should be reversed and remanded on this point, to the extent that appellants argue that the consideration is so inadequate as to be unconscionable.

Appellee did not seek summary judgment as to this argument, much less meet his burden of proof.

Appellants' original complaint alleges that Una Irene Ingram received no consideration for executing the 1993 agreement. This is contrary to the 1993 agreement's recital of "$1.00 and other good and valuable consideration . . . ." Appellants cannot offer parol evidence to show the complete absence of any consideration. *See United Loan & Inv. Co. v. Nunez*, 225 Ark. 362, 282 S.W.2d 595 (1955)(the recital of consideration in a deed may be varied by parol for every purpose except to show that the deed was without consideration); *Tedford v. Tedford*, 224 Ark. 1035, 277 S.W.2d 833 (1955)(the only effect of a consideration clause in a deed is to estop the grantor from alleging that the instrument was executed without consideration, but for every other purpose it is open to explanation, and may be varied by parol proof). Thus, the trial court's grant of summary judgment is affirmed, as to appellants' allegation in their complaint that there is a complete lack of consideration.

However, in their first amended complaint, appellants added an allegation that the consideration recited in the 1993 agreement was so insufficient and inadequate as to be unconscionable as a matter of law. While the 1993 agreement acknowledges the *receipt* of consideration, it does not specify what that consideration actually was. Because the recital of consideration is in the nature of a receipt, parol evidence may be offered to explain the true consideration of the contract or to show the consideration actually received. *See Pepin v. Hoover*, 205 Ark. 251, 168 S.W.2d 390 (1943); *Guinn v. Holcombe*, 29 Ark. App. 206, 780 S.W.2d 30 (1989).

Thus, the trial court's decision to grant summary judgment as to appellants' first amended complaint, and its allegation of inadequate or unconscionable consideration, must be reversed. It should be noted that appellee never moved for summary judgment with regard to the first amended complaint. Further, appellants were entitled to produce parol evidence concerning the consideration actually received; appellee never

produced any proof on this point. Therefore, summary judgment was improper. *See Schultz, supra.*

Applying the rule articulated in *Baggett* and *Ragar*, it becomes apparent that appellee's motion for summary judgment should not have been granted prior to the day scheduled for the hearing. It is not clear that appellants could not produce proof contrary to appellee's proof, or that appellee was entitled to judgment as a matter of law, except with regard to appellants' allegation that no consideration supported the 1993 agreement. Therefore, with the exception of this sole point, the trial court's grant of summary judgment must be reversed and the case remanded for further proceedings consistent with this opinion.

Appellants' final point on appeal concerns the trial court's denial of their motion for default judgment. The motion was filed after the trial court granted appellee's motion for summary judgment. It appears to us that the trial court considered the motion for default judgment to be moot; it had already disposed of the case based upon statute of limitations and standing concerns. Because we are reversing the trial court's grant of summary judgment, we believe it would be appropriate to return this entire matter to the trial court for further consideration, consistent with this opinion. Therefore, we reverse the trial court's denial of the motion for default judgment, and remand this issue. *See* Ark. Code Ann. § 16-67-325 (1987).

To summarize, the trial court's grant of summary judgment is affirmed with regard to appellants' allegation that no consideration supported the 1993 agreement. Otherwise, the trial court's grant of summary judgment is reversed and remanded for further proceedings consistent with this opinion. We do not consider appellant's argument concerning the denial of their motion for default judgment.

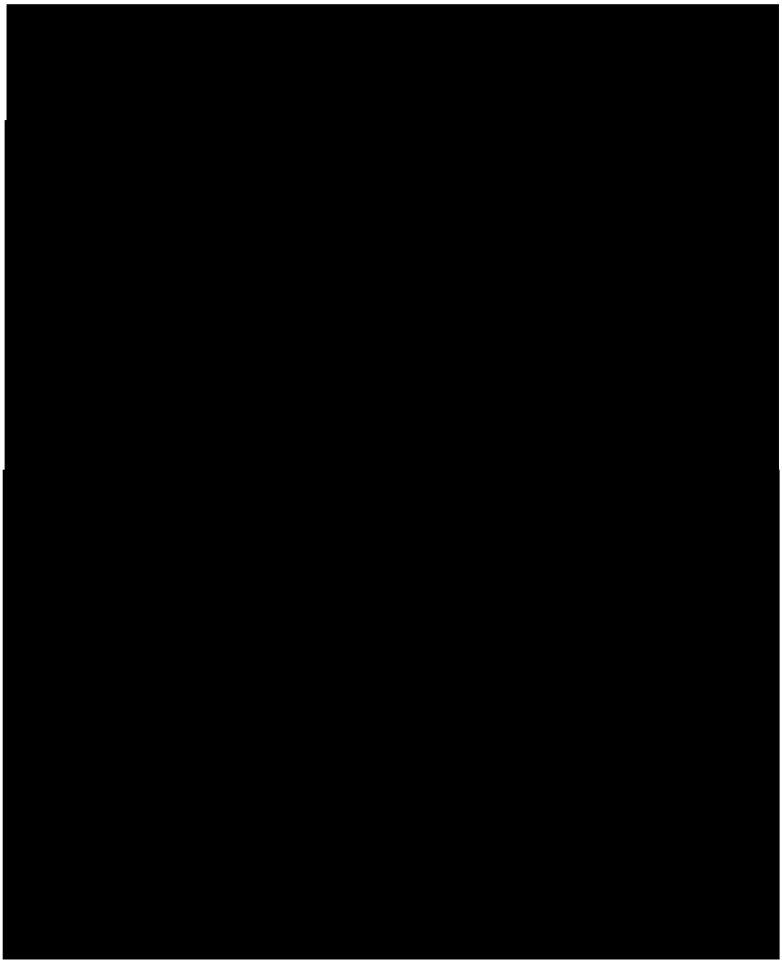
Affirmed in part; reversed and remanded in part.

BIRD and ROGERS, JJ., agree.

Tyson LANDRUM *v.* STATE of Arkansas

CA CR 97-1090 971 S.W.2d 278

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered July 1, 1998



Dunham & Faught, P.A., by: *James Dunham*, for appellant.

Winston Bryant, Att'y Gen., by: *Mac Golden*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Tyson Landrum brings this interlocutory appeal from the trial judge's refusal to transfer his case to juvenile court. At the age of sixteen appellant was charged with breaking or entering pursuant to Ark. Code Ann. § 5-39-202 (Repl. 1997), a Class D felony, and theft of property pursuant to Ark. Code Ann. § 5-36-103 (Repl. 1997), a Class A misdemeanor. The information alleged that appellant and another juvenile had broken into three vehicles and taken property having a value of less than $500.00. Appellant filed a motion to transfer the charges to juvenile court, and, following a hearing, appellant's motion was denied. On appeal appellant argues that the trial court erred in refusing to transfer his case to juvenile court.

Arkansas Code Annotated section 9-27-318 (Supp. 1997) provides in pertinent part:

> (e) In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors:
>
> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
>
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
>
> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

On appeal of a decision to retain jurisdiction or transfer a case to the juvenile court, the trial court's findings will not be reversed unless clearly erroneous. *Davis v. State*, 319 Ark. 613, 893 S.W.2d 768 (1995); *Bell v. State*, 317 Ark. 289, 877 S.W.2d 579 (1994); *Beck v. State*, 317 Ark. 154, 876 S.W.2d 561 (1994); *Vickers v. State*, 307 Ark. 298, 819 S.W.2d 13 (1991); *Porter v. State*, 43 Ark. App. 110, 861 S.W.2d 122 (1993).

At a hearing held on appellant's motion to transfer, appellant testified that he was sixteen years old, was born July 24, 1980, lived with his aunt, previously lived with his grandmother, and had never known his father. His mother lived in Oklahoma, but it had been approximately two years since he had lived with her per-

manently. Appellant said for the last year he had been involved in a program with an adult "father figure," who was supposed to teach him discipline, respect for authority, obedience to the law, and social skills.

Appellant testified that he had only been in trouble with the law once, when he was put on probation in juvenile court for disorderly conduct, and that he had completed his community service and fulfilled all the conditions of his probation. He told the judge that he was a student at Russellville High School, that he would be playing football when he reached the eleventh grade, and that he would make a good-faith effort to comply with whatever requirements are placed on him in juvenile court. Appellant admitted he had been in some trouble at school in the ninth grade but he had been promoted to tenth grade. He said he had been suspended but he "do[es] not get in trouble these days."

On cross-examination appellant admitted that one of the terms of his juvenile court probation had been to apologize to his principal, Rudy Parks, and he said he had apologized to Mr. Parks's face. However, he stated that he had also been ordered to make a written apology, pay a $10 per month probation fee, and pay $35 in court costs, none of which he had done. He said he had moved to Oklahoma at the end of 1996 to live with his mother but moved back to Russellville because the Russellville School District would not send his records to Oklahoma. Appellant also admitted that he had been in two fights while in the tenth grade.

Rudy Parks, principal at Gardner Junior High School, testified that between August 23, 1995, and May 8, 1996, appellant had been reported to him thirty-four times for general disrespect for school rules, tardiness, truancy, fighting, insubordination, and disruptive behavior in the classroom. He denied that appellant had apologized to him as required by his previous juvenile probation. He said appellant dropped out of school in November, 1995, and went to Oklahoma. He said that he had told appellant and his mother several times that the Oklahoma school had to request appellant's school records, and that he had not sent the records to Oklahoma because the Oklahoma school never

requested them. Appellant returned to the Russellville school in January, 1996. During the rest of the school year he was reported twenty times for disciplinary infractions and received twelve suspensions but was never expelled from school.

James Krohn, appellant's juvenile probation officer, testified that appellant was placed on a year of probation on November 21, 1995, for disorderly conduct, a misdemeanor. As conditions of his probation, appellant was supposed to perform thirty-two hours of public service work, make a written apology to Rudy Parks, pay $10 a month probation fee, and pay $35 court costs. According to Mr. Krohn, appellant did none of those things. Furthermore, appellant was supposed to report monthly to his juvenile probation officer, but he reported only once during the entire year. In appellant's favor, Krohn did say that, as far as he knew, no other criminal charges had been filed against appellant until the charges were filed in this case.

In denying appellant's motion to transfer, the trial judge went down the list of things he was required to consider in making his decision and discussed each one. He said the crime of breaking or entering was serious but there was no violence involved. He noted that although appellant did not have a repetitive pattern of adjudicated offenses, appellant had been adjudged delinquent in juvenile court and placed on probation. However, the judge observed that the juvenile court's order of probation "wasn't worth the paper it was written on," because appellant had not done any of the things he was required to do. The judge reviewed appellant's prior history, character traits, and mental maturity, and said that appellant's past conduct did not indicate he would even do the minimal things his juvenile probation had required of him. The judge concluded there was only a marginal chance of rehabilitation because juvenile court had asked very little of appellant before but appellant had not done any of the things asked, and the judge said he doubted appellant would do them in the future. Thus, because of his opinion that juvenile court could not offer anything in the way of rehabilitation for appellant, he denied appellant's motion to transfer.

Appellant argues that the factors set forth in Ark. Code Ann. § 9-27-318(e) mandate a transfer to juvenile court. In support of this argument appellant cites *Blevins v. State*, 308 Ark. 613, 826 S.W.2d 265 (1992), *Banks v. State*, 306 Ark. 273, 813 S.W.2d 267 (1991), and *Pennington v. State*, 305 Ark. 312, 807 S.W.2d 660 (1991). Appellant contends that the denial to transfer in *Blevins* was based on the judge's conclusion that the charge was "too serious" to be handled by the juvenile court and that the decision of the judge in the instant case was based on similar considerations. We do not find appellant's argument persuasive.

In *Blevins*, *supra*, the juvenile was charged with possession of a controlled substance with intent to deliver. The trial judge denied the appellant's motion to transfer his case to juvenile court based on the seriousness of the offense alone. The appellate court reversed citing evidence that appellant was sixteen years old at the time of the incident, he had no prior record, he regularly attended high school, his grades were C's and D's, he had previously participated in the high school's athletic program, and Blevins's mother testified that her son lived at home, and that she had no discipline problems with him. In reversing, our supreme court held that the trial court was incorrect in basing its refusal to transfer solely upon a determination that the crime charged was serious.

We do not find *Blevins* to support appellant's position since it is clear that the trial judge in the case at bar did not base his refusal to transfer solely on the seriousness of the crime charged. In fact, the trial judge said that although he considered the charge to be serious, it did not involve violence. Furthermore, unlike the juvenile in *Blevins* who had no prior criminal record, who lived at home with his mother, and who had no history of disciplinary problems at home or at school, appellant has a prior juvenile record, has a significant record of disciplinary problems at school, wilfully dropped out of school for several months for no apparent reason, and apparently has no significant parental authority.

In *Pennington v. State*, 305 Ark. 312, 807 S.W.2d 660 (1991), the seventeen-year-old appellants were charged with criminal mischief after some tombstones were knocked over in a local ceme-

tery. Their motion to transfer to juvenile court was denied. Following the testimony and arguments of counsel, the trial court acknowledged that the crime involved was not violent in nature, that the act did not appear to be part of a pattern of past or future criminal activity, that the juveniles showed no history of problems "other than problems that most kids go through," and that there was no reason to believe they could not be rehabilitated. However, the trial court ignored its own favorable findings and deferred solely to the prosecutor's judgment in selecting a forum for trial.

Our supreme court reversed and held that this abdication of responsibility on the part of the trial court defeated the purpose of the Arkansas Juvenile Code section 9-27-318, which recognizes the need for careful, case-by-case evaluation when juveniles are charged with criminal offenses and clearly delegates the responsibility for determining which court is most appropriate to the court in which the charges were brought.

■ Here, the trial court gave careful consideration to the factors required to be considered by § 9-27-318(e) in deciding whether a case should be retained in circuit court or transferred to juvenile court, and concluded that, because of the appellant's prior criminal history, his "lack of responsibility and mental maturity," his numerous suspensions from, and willful failure to attend school, appellant's prospects for rehabilitation were poor or nonexistent, and that jurisdiction of the case should be retained in circuit court.

■ Nor do we find *Banks*, *supra*, to support appellant's position. In *Banks* the State charged a juvenile as an adult in circuit court, with four offenses: (1) aggravated robbery, (2) attempted capital murder, (3) theft of property valued at less than $200, and (4) fleeing from arrest. Banks was fourteen years old at the time the alleged offenses occurred and fifteen when the proceedings that were the subject of the appeal occurred. Only one of the offenses charged, aggravated robbery, was listed in Ark. Code Ann. § 9-27-318(b)(1) (Repl. 1991) as an offense for which a fourteen-year-old juvenile could be charged as an adult. The judge denied the motion to transfer to juvenile court and refused

to hear the defendant's witnesses on the factors to consider before ruling on a transfer. The supreme court reversed and remanded the case so the circuit court could again consider the motion and, after hearing evidence on the statutory criteria, rule on the motion to transfer the case to juvenile court.

Appellee cites *Macon v. State*, 323 Ark. 498, 915 S.W.2d 273 (1996), where the appellant, a seventeen year old, was charged in circuit court with two counts of terroristic act and one count of aggravated assault. He moved to transfer his charges to juvenile court, and after a hearing, the trial judge denied his motion. The Arkansas Supreme Court said that proof need not be introduced against the juvenile on each factor, *Davis v. State*, 319 Ark. 613, 893 S.W.2d 768, 769 (1995), and, in making its decision whether to retain or transfer a juvenile's case, the trial court is not required to give equal weight to each of the factors set out in Ark. Code Ann. § 9-27-318(e). *Id.* It also held that where the trial court considered appellant's prior history, noting that he had been convicted and placed on probation before, and concluded that the juvenile rehabilitative programs available would be extremely limited and inappropriate; and where the trial court's findings reflected that appellant's offense was both serious and violent, and therefore fell within the first factor described under Ark. Code Ann. § 9-27-318(e)(1), such proof was sufficient to support the trial court's decision to deny appellant's motion to transfer.

In the instant case, appellant's charges were not for violent crimes. However, the evidence showed that appellant had been adjudicated delinquent in juvenile court and had been placed on probation for a year. During that year he had done nothing he was ordered to do. Furthermore, some of appellant's testimony at the hearing was contradicted by other evidence. Appellant testified that he had completed his community service, but Mr. Krohn said that he had not. Appellant also testified that he had apologized to Mr. Parks face to face, but Mr. Parks said that he had not.

The dissent suggests that the trial judge's decision to deny appellant's motion to transfer is not consistent with his comments from the bench when he announced his ruling and that his comments indicate that the judge applied only a "preponderance of

the evidence" standard instead of the more stringent "clear and convincing" standard required by section 9-27-318(e). We do not interpret the judge's remarks in that way.

The comments of the judge, as quoted in the dissenting opinion, came at the end of a lengthy discussion by the judge during which he analyzed the factors set out in section 9-27-318(e) and applied them to the circumstances of appellant. He concluded that the first factor (the seriousness of the offense and whether violence was employed) did not justify retention of jurisdiction in circuit court. Regarding the second factor (whether the offense is part of a repetitive pattern of adjudicated offenses), the judge noted appellant's prior delinquency adjudication in juvenile court and surmised that the juvenile's lack of success in fulfilling the obligations of his juvenile probation made him a marginal candidate for rehabilitation in other juvenile programs. Finally, in considering the third factor (prior history, character traits, mental maturity and other factors reflecting on prospects for rehabilitation), the judge made it clear that this was the factor that troubled him most. He again referred to appellant's prior failure in the juvenile program, noted that appellant had an extensive history of disciplinary problems at school, and questioned why there was no evidence presented by either appellant or the State as to how appellant might now meet rehabilitation objectives in a juvenile program, considering that he had completely failed to do so in the past. The judge concluded that appellant's past failure in the juvenile justice system was indicative of what could be expected of appellant if his case was transferred to juvenile court.

Only at this point in his discussion did the judge make the statements quoted in the dissenting opinion. Clearly, the judge was expressing the obvious fact that some of the factors weighed in favor of transferring the case to juvenile court, while other factors favored retaining jurisdiction in circuit court. Our supreme court has held that the trial court need not give equal weight to all the factors set forth in § 9-27-318(e), *Jones v. State*, 332 Ark. 617, 967 S.W.2d 559 (1998); nor is it required that all of the factors weigh against appellant. *Ashing v. State*, 288 Ark. 75, 702 S.W.2d 20 (1986). It is obvious that the judge gave greater weight to the third factor than he did to the first and second factors, just as our supreme court has stated that he has the discretion to do. The meaning of the judge's statement, "It's kind of a

draw," is made clear by his subsequent statements in which he expressed, on the one hand, his "gut reaction" to "send him back down there [to juvenile court]," and, on the other hand, his prediction that appellant's prospects for rehabilitation in the juvenile court system are improbable, considering his past failure there. We do not interpret those remarks as indicating any lack of resolve or conviction on the part of the judge to the correctness of his decision.

The accuracy of our interpretation of the judge's remarks is reinforced by his comment that "as far as the court being required to make clear and convincing evidence, I think it weighs in favor of retaining jurisdiction based on the fact that I don't think Juvenile court can do anything for him." From those words it is obvious that the judge knew that he was required to apply a "clear and convincing" standard in determining whether appellant's case should be transferred, and that, in applying that standard, the factors weighed in favor of denying appellant's motion and retaining jurisdiction of appellant's case in circuit court. It is a strained interpretation of the judge's words to suggest, as does the dissent, that the judge applied a "preponderance of the evidence" standard in making his decision.

After a careful examination of the evidence upon which the trial judge's decision was based, we cannot say that the decision is clearly erroneous.

Affirmed.

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

GRIFFEN and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse this case and remand for transfer to juvenile court, because a circuit court's decision to retain jurisdiction of criminal charges against a juvenile must be supported by clear and convincing evidence, and in this case, it most clearly was not. Arkansas Code Annotated section 9-27-318(f) states:

> Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect.

We have defined clear and convincing evidence as:

> evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact-finder *to come to a clear conviction, without hesitance*, of the truth of the facts related. It is simply that degree of proof that will produce in the trier of fact *a firm conviction* of the allegations sought to be established.

First Nat'l Bank v. Rush, 30 Ark. App. 272, 785 S.W.2d 474 (1990) (emphasis supplied).

The trial judge's comments from the bench when he announced his ruling are dispositive of this case:

> *It's kind of a draw situation. My gut reaction is that it's not serious enough and I ought to send him back down there*; but at the same time he's been down there and he hadn't done a thing juvenile court has ordered him to do.
>
> . . .
>
> You know, as far as the court being required to make clear and convincing evidence, I think it weighs in favor of retaining jurisdiction based on the fact that I don't think juvenile court can do anything for him.

(Emphasis added.) If the trial judge found the situation "kind of a draw," the evidence adduced at the hearing obviously inspired no "firm conviction" in the trier of fact.

It is a basic maxim that criminal statutes are to be strictly construed and any doubts are to be resolved in favor of the defendant. *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997); *Leheny v. State*, 307 Ark. 29, 818 S.W.2d 236 (1991). I find that strictly construing the statute, as we must, leads to the conclusion that the trial judge denied this motion to transfer by a bare preponderance of the evidence, not by the far more stringent "clear and convincing" standard mandated by Ark. Code Ann. § 9-27-318(f). This failing, standing alone, mandates reversal of this case.

However, there is another, equally compelling reason for reversal. The trial court is required to consider the following three factors found in Ark. Code Ann. § 9-27-318 (Supp. 1997), when deciding whether to retain jurisdiction or to transfer a case:

> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;

> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
>
> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

Here, the denial of transfer hinged solely on the third, "catchall" factor.

The trial judge correctly recognized that the offense, breaking into three cars, was not sufficiently serious to warrant the denial based on the first factor. As to the second statutory factor, our supreme court has squarely addressed what is meant by a "repetitive pattern of adjudicated offenses" in several cases. In *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997), the juvenile had one prior adjudication of commercial burglary and theft. Although the court affirmed the denial of transfer because of other factors, it had this to say about the second factor:

> [a]ppellant had at least one prior adjudication and at least one attempt at rehabilitation under the juvenile system. One prior adjudication and attempted rehabilitation does not a repetitive pattern make. Thus, we agree with the trial court that the evidence under this factor is neutral.

In this case, Landrum had only one prior adjudication in juvenile court for disorderly conduct, a misdemeanor.

However, the trial court stated that, based on Landrum's failure to comply with conditions of his probation for this misdemeanor offense, the juvenile court officer "hadn't gotten anything done with this guy" and that this failed attempt was an indication that the juvenile court "could not do anything for him." Although Landrum's probation officer testified that he failed to comply with the terms of his probation and only attended a single appointment, there was no evidence of any attempt for nearly a year to either follow up on Landrum or to revoke his probation. See Ark. Code Ann. § 9-27-339 (Repl. 1998). This troubled young man, who had been farmed out first with his grandmother and then with his aunt — no family member spoke up for him at his transfer hearing

— was thus left to his own devices in this half-hearted rehabilitative effort.

Although there was some discussion at the hearing of the C-Step "boot camp" juvenile program, and Landrum testified that he believed that he could complete the course, he was not given the opportunity for this more intensive effort at rehabilitation. However, it is not too late, for Landrum is still only seventeen years old. Consequently, I would reverse and remand this case for immediate transfer to juvenile court.

GRIFFEN, J., joins.

McKAY PROPERTIES, INC. *v.* ALEXANDER & ASSOCIATES, INC.

CA 97-659 971 S.W.2d 284

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

John T. Harmon and *Howell, Trice & Hope, P.A.*, by: *William H. Trice III*, for appellant.

Williams & Anderson, by: *Timothy W. Grooms*, *John E. Tull III*, and *Katharine R. Cloud*, for appellee.

WENDELL L. GRIFFEN, Judge. McKay Properties, Inc., has appealed the decision of the Pulaski County Chancery Court, Fourth Division, which denied counterclaims asserted by McKay Properties against Alexander & Associates, Inc., arising from provisions of a purchase and sale agreement concerning a residential real estate brokerage business. McKay Properties argues that the chancellor committed reversible error by ruling that all obligations between Randy Alexander and John P. McKay, Jr., the principals of the two companies, had been fully performed and that Alexander's obligation to provide John McKay with life and medical insurance had expired. After conducting a *de novo* review of the record, we find no reversible error and affirm the chancellor's decision.

In 1982, Randy Alexander negotiated to purchase the residential real estate brokerage firm known as McKay and Company from John P. McKay, Jr. An agreement was signed on February 1, 1982, that documented the general terms of the sale, and a "Purchase and Sale Agreement" was executed by McKay and Company, Inc., McKay, and Pine Tree Properties (collectively referred to in the agreement as the "Seller") and Alexander (the "Purchaser") for the sale of the assets of McKay and Company to Alexander on March 6, 1982. Under the agreement, the parties stipulated that Alexander would pay McKay $350,000 according to repayment terms prescribed in the agreement, and that McKay would sell to Alexander the exclusive right to use the McKay and Company trade name for thirty years. Paragraph 3 of the agreement provided for assignment of the McKay and Company trade name or any confusingly similar derivatives thereof for thirty years. The consideration for this assignment was stipulated to be $25,000, and the agreement further provided that Alexander could extend the exclusive use by paying $100 per year thereafter. Paragraph 4 of the agreement provides for a two-year prohibition (from the closing date for the agreement) on McKay being employed by or associated with a residential real estate brokerage firm in Little Rock, with one exception not pertinent to this litigation. Paragraph 10(i) of the agreement provides that Alexander

is to provide life and medical insurance for John McKay, but does not specify the period of time during which the insurance is to be provided. Paragraph 10(i) of the agreement states:

> The Purchaser [Randy Alexander] agrees to provide life insurance to John P. McKay, Jr. in the amount equal to the coverage currently in force and to maintain medical insurance on John P. McKay, Jr. providing coverage substantially similar to the coverage provided by the McKay and Company, Inc. insurance on the date hereof; provided, however, the obligations of the Seller [sic] hereunder to pay for life insurance and medical insurance shall not in any year exceed the sum of $6,000.00 for all such coverage. The parties agree to work diligently to obtain like coverage at as low a cost as possible.

Alexander made the final payment under a promissory note that he made in connection with the purchase and sale agreement in January 1994. Insurance payments on behalf of McKay were then discontinued. In 1995, McKay opened a residential real estate firm using the name McKay Properties. He promoted that firm by using a green and white sign with a pine tree logo similar to the one sold to Alexander under the agreement. Alexander's firm, Alexander & Associates, then sued McKay and McKay Properties, Inc., for breach of contract, unfair competition and trademark infringement, and McKay filed counterclaims against Alexander for breach of contract concerning the insurance agreement mentioned at Paragraph 10(i).

The chancellor held a preliminary injunction hearing on the prayer of Alexander and Associates for injunctive relief to prevent McKay from using a green and white sign with a pine tree logo. A full trial and several other hearings were conducted before the chancellor found that John McKay breached the purchase and sale agreement by using a sign that was "confusingly similar" to that sold to Alexander under the trade name provision of the agreement. The chancellor entered a permanent injunction against John McKay and McKay Properties enjoining them from using any confusingly similar trade name and design to that sold to Alexander, awarded attorney's fees to Alexander & Associates, and denied McKay's counterclaims against Alexander for breach of contract arising from the insurance provision of the agreement, for

tortious interference with a contractual relationship, and for trademark infringement.

Appellate review of chancery decisions is *de novo*, and the appellate court does not reverse the findings of a chancellor unless they are clearly against the preponderance of the evidence. *Stewart v. First Commercial Bank*, 59 Ark. App. 47, 953 S.W.2d 592 (1997). Because this appeal involves a contractual dispute, we are obliged to follow the longstanding Arkansas law holding that a contract is to be construed, if possible, by giving meaning to all terms contained in it. *First Nat'l Bank of Crossett v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992).

Although appellant contends that the chancellor erred in ruling that the obligations of the parties in the agreement were fulfilled so that he was not entitled to further payments for insurance, we hold that the chancellor's decision was not clearly erroneous. The March 6, 1982, agreement required Alexander to pay the purchase price of $350,000 by delivery of a promissory note in that amount at closing. The note was satisfied in January 1994. Although appellant argues that the agreement obligated Alexander to pay for insurance on behalf of McKay for thirty years, the time period for initial use of the McKay and Company trade name, nothing in the agreement supports that argument.

We also agree with the chancellor that McKay cannot breach the contract with Alexander by using a prohibited trade name and simultaneously claim entitlement to additional payments under the agreement. Whether one proceeds from the maxim that equity regards as done that which ought to be done, or the maxim that he who seeks equity shall do equity, or the maxim providing that he who comes into equity must come with clean hands, the record in this case clearly shows that McKay opened a competing residential real estate firm using a trade name that was confusingly similar to the trade name that he sold to Alexander under their agreement. Under whatever notion of equity one applies, McKay should be precluded from entitlement to payments for insurance benefits after Alexander had satisfied all other purchase obligations when he had worked to undermine the very trade name that he sold Alexander. *See* John Pomeroy, *Equity Jurisprudence* § 363 (5th ed. 1941).

We also are not persuaded by appellant's argument that the chancellor erred by not determining the duration for Alexander to pay McKay's insurance benefits pursuant to Paragraph 10(i) of their agreement. Contrary to appellant's argument, the chancellor determined that "since the parties are under no further obligation under the terms of the contract, the provision for the payment of insurance premiums has expired" (*See* Conclusion of Law No. 11 in the Chancellor's November 18, 1996, Order for Permanent Injunction, *infra*). The chancellor's reasoning is consistent, by analogy, with the Uniform Commercial Code. Arkansas Code Annotated section 4-1-204(2) (Repl. 1991) provides that what is a reasonable time for taking any action depends on the nature, purpose, and circumstances of such action. Subsection (3) of that statute provides that an action is "taken seasonably" when it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time. The parties did not specify a time period during which Alexander was to provide life and medical insurance benefits for McKay, therefore the chancellor was entitled to construe the agreement to require that the obligation to provide those benefits was for a reasonable time. We cannot conclude that the chancellor did not determine the duration of the period during which Alexander would be liable to provide life insurance premiums for McKay when "Conclusion of Law" No. 11 states, in pertinent part:

> Plaintiff [Alexander] is under no further obligation to Defendant John McKay, Jr., for insurance payments. Plaintiff contends that the insurance provision of the contract was only in effect during the period of time that Plaintiff was obligated under the terms of the Note for the Purchase Price in the contract. The note was satisfied in January of 1994, and Plaintiff ceased making insurance payments. There is nothing in the contract to support Plaintiff's argument that the insurance payments were only to be paid during the duration of Plaintiff's obligation on the Note, nor is there anything in the contract to support Defendants' argument that the term of payment for insurance was 30 years, the period for initial use of the Trade Name. There is no provision in this section of the contract regarding time.
>
> All the obligations of this contract have been fulfilled, including the transfer of real property and tangible assets, the payment of the purchase price, the expiration of the non-competition peri-

> ods, and the entitlement to use of the trade name. *Accordingly, since the parties are under no further obligation under the terms of the contract, the provision for the payment of insurance premiums has expired.* (Emphasis added.)

Although the chancellor did not indicate the precise date when Alexander's obligation to pay the insurance premiums expired, there was no requirement that she do so. The relevant inquiry is whether the chancellor's conclusion comports with a reasonable time for fulfillment of that contractual obligation.

It is understandable that McKay would want to ensure that his ability to obtain life and medical insurance would be protected after he gave up his primary income source at McKay and Company. That concern would certainly have been reasonable when one considers that McKay was precluded from working in the residential real estate field for two years under the terms of the purchase and sale agreement. The agreement also prohibited McKay from advertising, publishing or displaying his name or picture in conjunction with any entity engaged in the residential real estate business unless plain and conspicuous reference was made that McKay was exclusively engaged in the commercial real estate business (Paragraph 3(c)). The chancellor concluded that the parties had fulfilled their obligations under the agreement so that Alexander's obligation to provide the life and medical insurance benefits for McKay had expired when Alexander made the final payment on the purchase price in January 1994, twelve years after the parties executed their agreement. We find no basis in the record to hold that twelve years was not a reasonable time. For ten of those years McKay could have engaged in the residential real estate business without violating the non-competition provision of his agreement with Alexander, to include owning his own residential real estate brokerage firm. If McKay and Company had provided for the life and medical insurance benefits during the time that McKay was associated with that firm and McKay had the right to open his own firm as early as two years after closing the sale to Alexander, it is quite reasonable to conclude that McKay had adequate time and opportunity to arrange for life and medical insurance coverage by 1994.

We are also unpersuaded by appellant's third argument that McKay is entitled to receive life and medical insurance pay-

ments of up to $6,000 per year for as long as the McKay and Company trade name is used by Alexander, his heirs, or assigns. We have already indicated that the chancellor's conclusion of law on this point is not clearly erroneous. We agree that the purchase and sale agreement is silent as to how long the insurance payments were to continue. Nothing in Paragraph 10(i) supports McKay's assertion, and the remainder of the agreement lends no support to that argument which is tantamount to a claim for payment of life and medical insurance benefits for the balance of McKay's lifetime.

It is true that a contract provision is ambiguous if it is susceptible to different interpretations. *Western World Ins. Co. v. Branch*, 332 Ark. 427, 965 S.W.2d 760 (1998). But the chancellor correctly observed that the contract is silent regarding the duration of time for the insurance payments. No ambiguity arises from the parties' failure to specify how long the insurance payments were to be made. Silence concerning time means that no time was specified at all, not that arguably different time periods were contemplated by the contract. We hold that the chancellor's application of a reasonable time analysis was not clearly erroneous.

Affirmed.

STROUD and CRABTREE, JJ., agree.

Michael SMITH, Jr. *v.* STATE of Arkansas

CA CR 98-134 970 S.W.2d 336

Court of Appeals of Arkansas
En Banc
Opinion delivered July 1, 1998

Appellant, pro se.

No response.

PER CURIAM. Michael Smith has filed a motion to substitute Alvin D. Clay as his attorney in place of William R. Simpson, Jr., on the appeal of his conviction in the Pulaski County Circuit Court, Seventh Division. On February 3, 1997, William R. Simpson, Jr., was appointed counsel for appellant by the trial judge, who found that appellant was unable to obtain effective representation of counsel without substantial financial hardship to himself or his family after appellant filed an affidavit of indigency. Accordingly, appellant received a trial transcript paid for by the State of Arkansas.

It now appears that appellant has been able to retain private counsel by whom he is willing to be represented (Alvin Clay). Therefore, we remand the case to the trial judge who entered the finding of indigency so that the cost of the transcript can be assessed against appellant and ordered paid by him. Upon payment of that cost, the trial court is directed to grant appellant's motion for substitution of counsel. Appellant's brief will be due in this court within thirty days from the date that the trial court grants the motion for substitution of counsel.

PITTMAN and ROAF, JJ., would certify to Supreme Court.

Dennis PAYTON *v.* Robin Payton WRIGHT

CA 97-1435 972 S.W.2d 953

Court of Appeals of Arkansas
Division III
Opinion delivered August 26, 1998

Blackman Law Firm, by: *Keith Blackman*, for appellant.

Mooney Law Firm, by: *Christopher R. Thyer*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Dennis Payton and appellee Robin Payton Wright were divorced on September 26, 1994. By agreement of the parties, Mrs. Wright was granted custody of their two minor children, and Mr. Payton was ordered to pay $184.00 per week as child support. On August 8, 1995, Mr. Payton filed a petition that, among other things, sought to reduce his child-support obligation. Following a hearing on September 11, 1995, the chancery court found that there was no sufficient reason to reduce the child support and denied this request. No appeal was taken from that order.

On July 17, 1996, Mr. Payton again filed a petition to reduce his child-support obligation. The chancery court granted Mrs. Wright's motion to limit the evidence in the matter to those events that occurred after September 11, 1995. In an order issued on June 4, 1997, following a hearing on this more recent petition, the chancery court again refused to reduce Mr. Payton's child-support obligation. Mr. Payton appeals from this order.

For reversal, Mr. Payton argues that the chancery court erred in excluding evidence of any changes in his income that occurred prior to September 11, 1995. In addition, Mr. Payton contends that the chancery court clearly erred in determining that he was not entitled to modification of the original child-support order as a result of his reduced income. We agree that the chancellor erred in refusing to consider evidence of Mr. Payton's income at the

time child support was last set on September 26, 1994, and therefore we reverse and remand.

Mark Harris, a supervisor at Dana Corporation in Jonesboro, testified at the hearing on behalf of Mr. Payton. He stated that he is responsible for scheduling twenty-six employees, including Mr. Payton. According to Mr. Harris, business slowed down in September 1995, after which many employees were laid off. He testified that, for a total of eight weeks in the past year, Mr. Payton was on layoff. Mr. Harris acknowledged, however, that as a result of an income protection plan, Mr. Payton was paid benefits during his layoff periods as if he had been working forty-hour weeks. Mr. Harris did not anticipate any future layoffs, but he did state that, "I can see overtime coming down in the near future."

Mr. Payton testified on his own behalf and indicated that he has worked at Dana Corporation for four and one-half years. He stated that, as a result of his reduced hours, his income changed significantly from 1995 to 1996. Mr. Payton testified that he had become accustomed to working extensive overtime hours, and that the layoffs he encountered caused a substantial financial strain. He stated that, as a result of his reduced working hours, he was forced to borrow money and had to cancel his telephone and cable television services.

Mr. Payton was permitted to introduce evidence of his weekly hours worked from September 11, 1995, through the date of the hearing. However, the trial court did not consider the hours that he worked prior to September 11, 1995. A proffered exhibit indicated that Mr. Payton was working many more hours per week in late 1994 and early 1995 than he has been able to work since. The chancery court also allowed Mr. Payton to introduce tax records to show that his annual income for 1996 was just over $30,000.00. However, he was not permitted to introduce evidence of his 1994 and 1995 tax returns, which revealed annual incomes of $50,309.00 and $44,280.00, respectively.

In reaching its decision, the chancery court relied on two financial affidavits filed by Mr. Payton. The first was prepared in September 1995, and indicated a gross weekly income of $435.20, while the second, dated May 1996, revealed a gross weekly

income of $526.00. In his testimony, Mr. Payton acknowledged receiving an hourly pay raise between the filings of his affidavits, but stated that the affidavits were based on a forty-hour work week. He testified that, despite the hourly pay increase, his actual income has decreased because of less overtime being available.

It is settled law that a modification in the amount of child support to be paid must be based upon a change in circumstances. *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993); *Carter v. Carter*, 19 Ark. App. 242, 719 S.W.2d 704 (1986). In considering a petition for modification of child support, it is assumed that the chancellor fixed the proper amount of support in the original decree. *Reynolds v. Reynolds*, 299 Ark. 200, 771 S.W.2d 764 (1989); *Eubanks v. Eubanks*, 5 Ark. App. 50, 632 S.W.2d 242 (1982). The party seeking the modification has the burden of showing a change in circumstances sufficient to require modification. *Roland v. Roland, supra.* While not purporting to constitute the exclusive basis for showing a material change of circumstances, Arkansas Code Annotated section 9-14-107(a) (Repl. 1998) provides that a change in the child-support payor's gross income in an amount equal to at least twenty percent, or more than $100 per month, shall constitute such a material change of circumstances sufficient to petition the court for review and modification pursuant to the family support chart. Furthermore, subsection 9-14-107(c) recognizes that an inconsistency between the child-support amount last ordered and the amount of child support that would result from application of the family support chart to the payor's current income shall likewise constitute a material change of circumstances sufficient to petition the court for review and modification, subject to two exceptions, neither of which is applicable to this case.

In the case at bar, the sole issue before the chancery court was whether Mr. Payton had established a change in his financial condition sufficient to support a modification in child support. The more specific issue for us on appeal, however, is how far back in time could Mr. Payton go with his evidence in proving up a material change in financial circumstances. There are two possibilities here. Either he could go all the way back to when support was last set, *i.e.*, when the divorce decree was entered on

September 26, 1994, or he could go only to September 11, 1995, when the court ruled that as of that time he had failed to show entitlement to a support modification.

We think the following hypothetical situation presented in Mr. Payton's brief is persuasive: A petitioner asks for a reduction in his child-support obligation one year after the support amount was originally set. After viewing the evidence, the chancellor finds that the petitioner has only experienced a fifteen-percent reduction in income and concludes that this does not constitute such a material change in his financial circumstances as to entitle him to a modification. Another year passes during which the petitioner experiences a further reduction in his income, and he again asks for a support reduction. The chancellor views only evidence of the income reduction suffered by the petitioner since he was denied a modification one year earlier and finds that during this year the petitioner has experienced only a fifteen-percent reduction in income. The chancellor concludes that fifteen percent does not prove a material change in circumstances and, again, denies him modification. Assume this scenario is repeated again, and again. If the court does not consider the sum total of the incremental reductions of income, the petitioner may never obtain relief, notwithstanding that his income has dwindled to a small fraction of the amount that he was receiving when support was originally set. We think the better alternative is, and we so hold, that a petitioner seeking modification in child support, whether it is the payor or the custodial parent, may present evidence showing all relevant changes in financial circumstances since the support rate was last set, without being limited to the date of any unsuccessful interim proceeding seeking modification. Consequently, Mr. Payton's burden was to show that a material change in financial circumstances occurred between September 26, 1994 (the date of the divorce decree), and the time that his current petition for modification came before the chancery court.

Mr. Payton's proffered income-tax returns and records of his weekly hours gave credence to his assertion that his income and income potential decreased between the time of the divorce and the present time. Because the chancellor erred when he

refused to consider evidence of Mr. Payton's financial circumstances prior to September 1995, we reverse and remand to the chancery court for a determination of whether a modification of child support is warranted and, if so, to what degree, in light of all the evidence dating back to the date of the divorce decree.

Reversed and remanded.

STROUD and ROAF, JJ., agree.

Patrick B. BROWN *v.* STATE of Arkansas

CA CR 97-1529 972 S.W.2d 956

Court of Appeals of Arkansas
Division III
Opinion delivered September 2, 1998

Ben Seay, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Patrick B. Brown was accused of stealing an amplifier, compact-disc player, and rack-mount mixer from First United Methodist Church in Magnolia, Arkansas. Following a jury trial, he was found guilty of commercial burglary and theft of property, and was sentenced as a habitual offender to twenty-five years in the Arkansas Department of Correction. Mr. Brown now appeals, and his sole argument for reversal is that the trial court erred in permitting the State to

introduce evidence of pawn transactions involving items other than those that were alleged to have been stolen. We affirm.

Prior to the trial, Mr. Brown filed a motion in limine with regard to the disputed evidence. In support of his motion, he asserted that evidence regarding the pawning of other items, such as a television and VCR, were irrelevant and, at any rate, any possible probative value was substantially outweighed by the danger of unfair prejudice. Mr. Brown intimated that introduction of other pawned items would lead the jury to believe that he had also stolen these items, and that this constituted impermissible evidence of other crimes pursuant to Rule 404(b) of the Arkansas Rules of Evidence. The trial court denied the motion in limine, and permitted the State to introduce evidence of all of the pawn transactions.

During the trial, the testimony of a church employee established that someone had forced entry into the church and stolen the three items that Mr. Brown was accused of stealing. Then, over the objection of Mr. Brown, a pawnbroker testified as to a number of transactions involving Mr. Brown and his ex-girlfriend. According to pawn records, Mr. Brown's ex-girlfriend pawned the stolen amplifier and mixer on October 10, 1996, which was just a few days after the church was burglarized. Then, on October 31, 1996, she pawned the stolen compact-disc player. It was also established that, between October 10, 1996, and November 9, 1996, she pawned a VCR, a different compact-disc player, a microwave, and two televisions. The records also revealed that Mr. Brown pawned two of the same items that were pawned by his ex-girlfriend, and that these two items were not the ones that he was accused of stealing. Although the trial court allowed evidence of all of the pawn transactions, it did give the following cautionary instruction to the jury:

> Ladies and gentlemen, [the prosecutor] is eliciting testimony from [the pawnbroker] with respect to a series of transactions. You are only to consider, the only thing at the heart of this case is [*sic*] items that were allegedly stolen from the First Methodist Church. So, anything else that is done is just for purposes of showing, I guess the transactions. But you are not to consider anything but the three that have come from the First United

> Methodist Church and that were allegedly stolen by Mr. Brown. Okay? All right.

Mr. Brown's ex-girlfriend also testified on behalf of the State and acknowledged that she pawned several items during the time period at issue. As for the three items that were alleged to have been stolen, she testified that Mr. Brown brought them to her house, and that they proceeded to a pawnshop with the items shortly thereafter. The ex-girlfriend stated that, after the items were pawned, Mr. Brown informed her that he had stolen them from the Methodist church. As for the other items, she testified that Mr. Brown also brought them to her house, and that afterwards they would pawn them. During a conference outside of the hearing of the jury, Mr. Brown's counsel considered objecting to the ex-girlfriend's statement regarding the other items, but decided not to request a cautionary instruction for fear that it might serve to emphasize that these items were probably stolen also.

For reversal, Mr. Brown argues that the trial court erred in failing to suppress evidence of other pawn transactions, and specifically relies on *Smith v. State*, 19 Ark. App. 188, 718 S.W.2d 475 (1986). In that case, we stated:

> Rule 404(b) permits evidence of other crimes, wrongs or acts in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Such evidence, however, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. Evidence of other crimes must pass two tests to be admissible: (1) the other crimes' evidence must be independently relevant, and (2) must meet the probative value versus unfair prejudice balancing test of U.R.E. Rule 403.

Id. at 191, 718 S.W.2d at 477. Mr. Brown contends that evidence of the other pawn transactions was not relevant to the charges against him, and submits that it was highly prejudicial in that it likely gave the jury the impression that he had stolen all of the items that were pawned.

In its brief, the State asserts that the disputed evidence was admissible to show that Mr. Brown committed the crime charged

and other crimes using the same method of operation. In *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996), we stated:

> Rule 404(b) does not mention modus operandi as one of the bases for introducing evidence of other crimes; however, the list of exceptions to inadmissibility contained in the rule is not an exclusive list but rather represents examples of the types of circumstances where evidence of other crimes or wrongs would be relevant and admissible.

Id. at 196, 925 S.W.2d at 431. In the instant case, the State submits that evidence of the other pawn transactions was relevant to establish that Mr. Brown's mode of operation was to steal electronic equipment and accompany his girlfriend to the same pawnshop and exchange it for cash.

The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Jarrett v. State*, 310 Ark. 358, 833 S.W.2d 779 (1992). We reject the State's contention and find that the trial court abused its discretion in permitting evidence of the other pawn transactions.

In *Diffee v. State*, 319 Ark. 669, 894 S.W.2d 564 (1995), our supreme court held that the two requirements for introducing evidence of an unrelated prior act to show method of operation are as follows: (1) both acts must be committed with the same or strikingly similar methodology, and (2) the methodology must be so unique that both acts can be attributed to one individual. *Id.* at 675, 894 S.W.2d at 567. In the case at bar, the other acts at issue were made in a similar fashion as the crime charged, but were not so unique that they could be attributed to only one individual. Indeed, Mr. Brown's girlfriend was the one who actually pawned the stolen items at issue, and the practice of pawning stolen property is apparently not uncommon in light of the pawnbroker's testimony that he sent a daily fax to the police station in which he reported all items that were pawned at the shop. Therefore, we find that evidence of the other pawn transactions was not admissible to prove modus operandi, or for any other purpose.

Despite the admission of inadmissible evidence, we affirm because the disputed evidence was harmless. We reach this conclusion pursuant to the precedent set by the Arkansas Supreme Court in *Abernathy v. State*, 325 Ark. 61, 922 S.W.2d 723 (1996).

In *Abernathy v. State, supra*, the appellant was charged with murder after he had beaten his girlfriend to death. In an attempt to bolster its case, the State introduced evidence of prior bad acts, and in its opinion on appeal the supreme court outlined the significance of the evidence as follows:

> Despite this overwhelming evidence it had against appellant, the State chose to introduce at trial the testimony of four witnesses regarding alleged prior threats and acts of violence by him. The State's theory was that this evidence was necessary to refute the theory that [the victim's] killing was an accident. We need only discuss the most egregious of this prior-bad-act evidence, which was offered in the form of testimony of Sam Abernathy, appellant's stepbrother. Sam testified that on January 9, 1993, appellant kicked open the front door of his apartment in the middle of the night and shot him in both thighs, causing a compound fracture in one of his legs necessitating surgery. After Sam, who was unarmed, had fallen to the floor, appellant stood over him and kicked him in the head.

The supreme court held that, because the uncharged act perpetrated against Sam Abernathy was not sufficiently similar to the charged offense, the trial court abused its discretion in allowing Sam Abernathy to testify with regard to the prior violent conduct. Nevertheless, the supreme court affirmed pursuant to its conclusion that the error was harmless in light of the overwhelming competent evidence of guilt. Citing *Rockett v. State*, 318 Ark. 831, 890 S.W.2d 235 (1994), the court announced that when the evidence of guilt is overwhelming and the error is slight, it can declare the error harmless and affirm. The court found it significant that the jury was admonished not to consider Sam Abernathy's testimony as evidence of character or proof that the appellant acted in conformity therewith.

In the instant case, there was overwhelming evidence against Mr. Brown given that the three items at issue were confirmed stolen and his ex-girlfriend testified that he admitted to

breaking into the church and stealing them. The evidence also included the testimony of Robert Beal, a friend of Mr. Brown, who testified that he remembered seeing the Kenwood amplifier, which was one of the articles stolen from the church, in Mr. Brown's house; and that he drove Mr. Brown and Victoria Moore with this amplifier to the pawnshop where they went in and pawned it. Moreover, the error in admitting evidence of the other pawn transactions was relatively slight given that it was not established or even directly asserted that these items were stolen, and the jury was admonished to consider only the pawn transactions involving the items that were alleged to have been stolen. Under these circumstances, we find the evidentiary error to be harmless.

In reaching our decision in this case, we are not unmindful of this court's discussion of Rule 404(b) in *Smith v. State, supra.* In that case, we cited *Golden v. State,* 10 Ark. App. 362, 664 S.W.2d 496 (1984), and offered the following analysis:

> The probative value of evidence correlates inversely to the availability of other means of proving the issue for which the prejudicial evidence is offered. In other words, if the state has no other means to prove the issue, then the evidence is highly probative, and that may outweigh its prejudicial effect. However, in cases where the state has other means of proving the issue, then the balance is tipped in favor of it being excluded because of its prejudicial effect.

Smith v. State, 19 Ark. App. at 191, 718 S.W.2d at 477. We recognize the apparent inconsistency in the above language and the precedent set by our supreme court in *Abernathy v. State, supra.* However, the *Abernathy* case presents the most recent authority on this issue. More importantly, any inconsistency between precedents set by the supreme court and the court of appeals must be resolved in favor of the precedent announced by the supreme court, and it is well established that this court is without authority to overrule a decision of the supreme court. *See Roark v. State,* 46 Ark. App. 49, 876 S.W.2d 596 (1994).

Affirmed.

STROUD and ROAF, JJ., agree.

John D. MILLS and Sandra D. Mills, His Wife, and Rachel Susan Sherry *v.* John V. CRONE and Elizabeth Crone, His Wife

CA 98-59 973 S.W.2d 828

Court of Appeals of Arkansas
Division IV
Opinion delivered September 9, 1998

Lewis D. Jones, for appellants.

Davis, Cox & Wright, PLC, by: *Don A. Taylor*, for appellees.

SAM BIRD, Judge. Appellants, John and Sandra Mills and their daughter, Rachel Susan Sherry, appeal a decision of the Washington County Circuit Court that granted summary judgment to appellees, John and Elizabeth Crone, in appellants' negligent-entrustment action. On appeal appellants argue that the trial court erred in (1) granting appellees' motion for summary judgment in that there exists a genuine issue of material fact as to whether John and Elizabeth Crone were liable for negligent entrustment; and (2) granting the motion for summary judgment before discovery was complete. We affirm.

On January 10, 1996, Rachel was a passenger in a car driven by Christopher Crone, appellees' eighteen-year-old son, when she was injured in an automobile accident. On June 19, 1997, appellants filed suit against appellees for Rachel's personal injuries, alleging that appellees were the owners of the 1975 BMW Chris was driving and that appellees had negligently entrusted the vehicle to Chris knowing his ineptitude as a driver because he had a history of careless, reckless, and negligent operation of a vehicle. Appellants further alleged that when the accident occurred, Chris was operating the vehicle in a reckless and dangerous manner; that the vehicle was insured by Southern Farm Bureau Casualty Insurance Company; and that the insurance did not cover the accident because it contained an endorsement to the policy providing that none of the insurance coverages would apply if Chris was driving the automobile. A copy of the endorsement was attached to the complaint.

Appellees answered the complaint on July 9, 1997, specifically denied that they owned the 1975 BMW involved in the accident, and affirmatively pled that the vehicle was owned and operated by Chris. They also denied any negligence.

On August 12, 1997, appellees filed a motion for summary judgment, to which was attached the affidavit of John V. Crone and a copy of the certificate of title to the 1975 BMW showing that it was owned by Chris Crone. In his affidavit, John Crone said his son had purchased the BMW using his own money and "a small sum of money loaned to him" by Mrs. Crone, which Chris

had repaid. The affidavit stated that Chris was responsible for all costs and expenses involved in operating the vehicle except insurance, which Mr. Crone stated he listed on his insurance policy. He alleged he was unaware until after the accident that the policy contained an endorsement that excluded coverage when Chris was driving.

In response to appellees' motion for summary judgment appellants argued that there were justiciable issues in the case, one of which was whether the defendants had a "duty to control" their son, who was a high-school student dependent upon them for his livelihood. In his affidavit, John Mills also alleged that he had personal knowledge that the BMW had been purchased for Chris by his parents while he was a minor, that Chris had been involved in two previous accidents, that the Crones had provided liability insurance for Chris but it had been canceled or not renewed at the time of the accident, and that Chris had received numerous traffic citations for violations.

At a hearing held on October 2, 1997, appellants argued that the motion for summary judgment was premature because discovery was not complete, and that the negligent entrustment occurred at the time the Crones purchased the vehicle for Chris, while he was still a minor, rather than at the time of the accident when he was already over eighteen. Appellees argued that the issue was whether the Crones had a right to control Chris at the time of the accident. From the bench, the trial court held that the negligent entrustment, if any, did not occur when the Crones helped their son purchase the car, and that since the car was owned by Chris and he was not a minor, there had been no entrustment, one of the essential elements of negligent entrustment. Summary judgment was granted.

■ Appellants' first argument challenges the propriety of the summary judgment. Summary judgment is an extreme remedy that should be allowed only when it is clear that there is no genuine issue of material fact to be litigated. *Hawkins v. Heritage Life Ins. Co.*, 57 Ark. App. 261, 946 S.W.2d 185 (1997). The burden of sustaining a motion for summary judgment is on the moving party. *Id.* On appeal we view the evidence in the light

most favorable to the nonmoving party, and decide if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered.

"Negligent entrustment" is established by showing that: (1) the entrustee was incompetent, inexperienced, or reckless; (2) the entrustor knew or had reason to know of the entrustee's conditions or proclivities; (3) there was an entrustment of the chattel; (4) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant; and (5) the harm to the plaintiff was proximately or legally caused by the negligence of the defendant. *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997); *Renfro v. Adkins*, 323 Ark. 288, 914 S.W.2d 306 (1996); *Mann v. Orrell*, 322 Ark. 701, 912 S.W.2d 1 (1995).

Appellants contend that appellees negligently entrusted the BMW to their son when they helped him purchase it approximately seven months before the accident occurred. In support of this argument appellants rely upon *Arkansas Bank and Trust Co. v. Erwin*, 300 Ark. 599, 781 S.W.2d 21 (1989), in which the Arkansas Supreme Court held that negligent entrustment may arise when an incompetent person is given funds to purchase an automobile.

Section 308 of the *Restatement (2d) of Torts* (1965), along with section 390, states the general rule for negligent-entrustment liability.[1] Section 308 provides:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such a person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Comment *a* to section 308 explains:

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[1] Section 390 recognizes that liability may be imposed upon one who supplies chattel for use of an incompetent person. Section 308 limits the application of section 390. *See Broadwater v. Dorsey*, 344 Md. 548, 688 A.2d 436 (1997).

> *a.* The words "under the control of the actor" are used to indicate that the third person is entitled to possess or use the thing or engage in activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.

According to the *Restatement*, one is not liable for negligent entrustment of a thing if he has no right to control its use. *See Zedella v. Gibson*, 165 Ill. 2d 181, 650 N.E.2d 1000 (1995); *American Mut. Fire Ins. Co. v. Passmore*, 275 S.C. 618, 274 S.E.2d 416 (1981); *McCarty v. Purser*, 379 S.W.2d 291 (Tex. 1964); 57A Am. Jur. 2d *Negligence* § 331 at 343 (2d ed. 1989). Therefore, for appellees to be held liable for negligent entrustment, appellants had to show that appellees had the right to control their son's use of the BMW.

In *Sanders v. Walden*, 214 Ark. 523, 217 S.W.2d 357 (1949), the Arkansas Supreme Court stated:

> If the person permitted to operate the car is known to be incompetent and incapable of properly running it, although not a child, the owner will be held accountable for the damage done, because his negligence in intrusting the car to an incompetent person is deemed to be the proximate cause of the damage. In such a case of mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner in intrusting the machine to an incompetent driver, and of the driver in its operation.

214 Ark. at 527-28, 217 S.W.2d at 360. *See also Chaney v. Duncan*, 194 Ark. 1076, 110 S.W.2d 21 (1937).

However, in the instant case, appellees were not the owners of the BMW. The title showed the registered owner of the car to be Chris Crone, and Mr. Crone swore in his affidavit that Chris had purchased the car with his own money and a small amount he borrowed from his mother and paid back. According to Mr. Crone, Chris was responsible for the care and maintenance of the car, and all expenses connected with the car. Furthermore, at the time of the accident Chris was over the age of eighteen,

legally an adult capable of owning real and personal property. *See* Ark. Code Ann. § 9-25-110(a) (Repl. 1998), and Ark. Code Ann. § 9-26-103(a). Simply because the Crones carried the vehicle on their insurance policy did not give them the right to control its use. *See Broadwater v. Dorsey*, 344 Md. 548, 688 A.2d 436 (1997). Therefore, the trial court did not err in granting summary judgment to appellees on the negligent-entrustment issue.

Appellants also argue that the trial judge should not have granted summary judgment until all discovery had been completed. Whether to grant a continuance to allow for further discovery is a matter within the discretion of the trial court. Ark. R. Crim. P. 56(f); *Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995); *Jenkins v. Int'l Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994). In order for this court to reverse the trial court's denial of the continuance, the appellants must show that the trial court abused its discretion, and that the additional discovery would have changed the outcome of the case. *Alexander, supra.* Appellants have not demonstrated that the trial court abused its discretion in granting the summary judgment prior to the completion of all discovery or that additional discovery would have changed the outcome of the case. *See Pinkston v. Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988). Furthermore, appellants cite no authority for this argument, and we will not consider an argument that is not accompanied by authority or convincing argument. *Sims v. First Nat'l Bank, Harrison*, 267 Ark. 253, 590 S.W.2d 270 (1998).

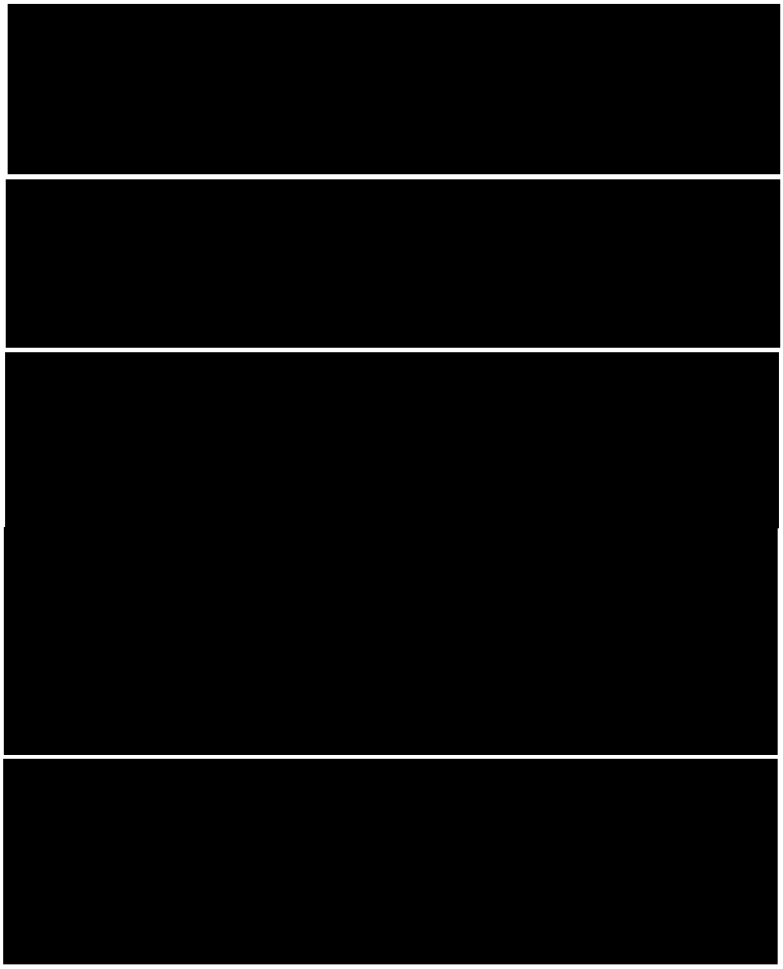
Affirmed.

MEADS and JENNINGS, JJ., agree.

Roger KIMERY *v.* STATE of Arkansas

CA CR 97-1172 973 S.W.2d 836

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered September 9, 1998



Mike Everett, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Bricks of marijuana weighing some six-odd pounds were discovered in appellant Roger Kimery's vehicle. Appellant filed a pretrial motion to suppress this evidence, in which he argued that the stop of his vehicle for a traffic violation was a pretext for conducting a search for drugs. The trial court rejected that argument finding that a search of the vehicle was permitted on grounds of reasonable or probable cause under Ark. R. Crim. P. 14.1. Alternatively, the trial court also upheld the seizure under the plain-view doctrine.

Pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure, appellant entered a conditional plea of guilt to a charge of possession of a controlled substance (marijuana) with intent to deliver, reserving the right to appeal the trial court's denial of his motion to suppress. For reversal, appellant challenges both findings made by the trial court. We find no error and affirm.

The record discloses that on July 21, 1996, Investigator Bryan Malone of the Poinsett County Sheriff's Office received a phone call from a confidential informant who said that appellant had just been to the informant's house and had tried to sell him a quantity of marijuana. Prior to receiving this call, Officer Malone had already obtained a warrant authorizing a search of the appellant's home based on this same informant's purchase of marijuana at the home the previous day. Officer Malone set out to investigate, and Officer Danny Smith accompanied him. They proceeded to the area of the informant's home and met appellant's vehicle travelling down the highway. Officer Malone testified that, although they were in an unmarked patrol car, it was obvious that it was a police car, given the color, the make of the vehicle, and the number (five or six) of antennae on the back of it. He said that, as the vehicles came within fifty yards of one another, appellant "swept" into the driveway of a farmer's shop. Officer Malone activated the blue lights shortly after appellant turned into the driveway. Malone testified that he took this action because appellant had made an illegal turn in that no signal had been used when the turn was made. Admitting that he was also prompted by the information he had just received from the informant, as well as his knowledge of the activities that took place the day before, Malone testified that he would stop any vehicle for making an improper turn, provided he had witnessed the violation occur. The officers turned around and pulled into the driveway as appellant was emerging from his vehicle. In the presence of police officers arriving in a vehicle with flashing blue lights, appellant walked hastily into the farm shop. The officers parked behind appellant's vehicle.

As to the discovery of the contraband, Officer Malone testified that appellant came back outside and that, while he was standing with appellant beside the police car, Officer Smith exclaimed that he had found drugs in appellant's vehicle. Malone was situated a short distance away from appellant's vehicle, and within a few moments he walked over to see what had been found. He saw a large quantity of marijuana in the floorboard of the vehicle. According to Malone, the marijuana was in the form of bricks wrapped in Saran-Wrap material, and there were five to seven

such bricks stacked three-quarters of the way up inside a brown paper bag. The court questioned the officer on two occasions:

> THE COURT: Could you see inside the bag from the outside of the car:
>
> WITNESS: Yes, sir. I'm six foot three and standing up from the vehicle, and when the bag's directly below you, it's pretty easy to see what's inside the vehicle.
>
> THE COURT: But I mean, they hadn't folded the bag over —
>
> WITNESS: No, sir.
>
> THE COURT: — or tried to hide it —
>
> WITNESS: No, sir.
>
> THE COURT: — it was in the floorboard of the car?
>
> WITNESS: Yes, sir.
>
> THE COURT: That's kind of dumb.
>
> WITNESS: Yes, sir.
>
> . . .
>
> THE COURT: Was it a regular size grocery sack? A brown paper poke?
>
> WITNESS: Yes, sir.
>
> THE COURT: And the top was open, and you could just see down into it?
>
> WITNESS: Yes, sir.
>
> THE COURT: Passenger side floorboard?
>
> WITNESS: Yes, sir.

Officer Malone also testified that the paper bag had not been folded at all, that it was not even crinkled, and that it was almost like new.

Ricky Scott was at the farm shop that day and testified on appellant's behalf. He said that appellant had been there a few minutes before the officers stopped and that the officers had driven by the shop twice before stopping. He did not recall seeing the marijuana, saying that he was minding his own business.

Charles Strange was also at the shop, working on a lawn mower. He testified that, while standing outside and talking with appellant, the officers pulled into the driveway but then drove back out onto the road, and then turned around and came back to the shop. Looking inside appellant's vehicle from the driver's side, he saw a black plastic garbage bag. He said that he could not see what was inside the bag.

Appellant testified that the marijuana bricks were inside a plastic garbage bag that was tied at the top and sitting on the passenger-side floorboard. He said that the contents of the bag could not be seen.[1]

While this appeal was pending and during the course of our deliberations, the supreme court decided the case of *State v. Earl*, 333 Ark. 489, 970 S.W.2d 789 (1998), an appeal brought by the State upon the trial court's grant of a motion to suppress evidence. There, Hezile Earl had been stopped by a police officer who had observed Earl's vehicle run a stop sign. Reportedly, Earl was uncooperative and belligerent, so the officer conducted a search of the passenger compartment of the vehicle for weapons and found a prescription bottle containing a suspicious substance that proved to be crack cocaine. Earl was then arrested.

On these facts, the supreme court reversed the order of suppression. After first observing that generally the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred, the court based its reversal on the provisions of Rules 4.1 and 5.5 of the Arkansas Rules of Criminal Procedure. Under Rule 4.1, an officer has the authority to arrest a person without a warrant if the officer has reasonable cause to believe that the person has committed *any* violation of the law in the officer's presence. Rule 5.5 states that "[t]he issuance of a citation in lieu of arrest or continued custody does not affect the authority of a law enforcement officer to conduct an otherwise lawful search or any other investi-

[1] The record reflects that the marijuana was kept in a box. In a footnote in his brief, appellant asserts that the marijuana was inside a black plastic bag when the exhibit was opened at the hearing. However, when we inspected the exhibit, there was no black plastic bag in evidence.

gative procedure incident to an arrest." Construing these rules together, the court held that where an officer has probable cause to arrest pursuant to Rule 4.1, he may validly conduct a search incident to arrest of either the person or the areas within the person's immediate control under Rule 5.5. Since the officer had the power to arrest Earl for a traffic violation, the court reasoned that the officer could lawfully conduct the search, without need of further justification.

When we examine the facts of this case, we believe that the court's holding in *State v. Earl* is dispositive. Officer Malone initiated the stop because appellant turned off the road without signalling. Since the officer had the authority to arrest appellant for this traffic violation, he also had the authority to conduct a search as incident to an arrest. As a search incident to arrest, the police may search the passenger compartment of the automobile, and containers found within the passenger compartment may be searched whether they are opened or closed. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995) (*citing New York v. Belton*, 453 U.S. 454 (1981)).

Although appellant has argued that the stop was invalid because no actual traffic violation occurred, that is not the issue. The question of whether an officer has probable cause to make a traffic stop does not depend upon whether the defendant is actually guilty of the violation that was the basis for the stop. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998). All that is required is that the officer had probable cause to believe that a traffic violation had occurred. *Id.* Whether the defendant is actually guilty of the traffic violation is for a jury or court, and not an officer on the scene. *Id.* Arkansas Code Annotated § 27-51-403(a) (Repl. 1994) provides that "[n]o person shall turn a vehicle from a direct course upon a highway unless and until the movement can be made with reasonable safety and then only . . . after giving an appropriate signal in the manner provided in subsection (b) in the event any other vehicle may be affected by the movement." Subsection (b) requires that a signal of intention to turn right or left be given continuously during not less than one hundred feet traveled by the vehicle before turning. The record reflects that appellant made an abrupt turn without signalling to

nearby, oncoming traffic. We believe there was sufficient cause for the officer to believe that a violation of the statute had occurred.

We also reject appellant's argument that the stop was a pretext for a drug search. In *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994), the supreme court said that an ulterior motive does not in itself render an arrest pretextual when there is a valid overt reason to make the arrest. The court quoted an example from Professor LaFave to illustrate this point: "[I]f the police stop X's car for minor offense A, and they 'subjectively hoped to discover contraband during the stop' so as to establish serious offense B, the stop is nonetheless lawful if 'a reasonable officer would have made the stop in the absence of the invalid purpose.'" 1 Wayne R. LaFave, *Search and Seizure* § 1.4 at 22 (Supp. 1994). We also quoted this section of the professor's treatise in *Miller v. State*, 44 Ark. App. 112, 868 S.W.2d 510 (1993), a case in which a narcotics officer who discovered contraband during a traffic stop testified that he had stopped the appellant's vehicle in hopes that he would find drugs. In affirming, we wrote that police searches are to be tested under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved. We also observed that:

> The test is whether a "reasonable officer" would have made the traffic stop absent his ulterior motive. The Constitution does not prohibit officers assigned to work on particular types of offenses to refrain from arresting those who commit offenses outside the officers' area of specialty.

Id. at 116, 868 S.W.2d at 512. Applying the standard of objective reasonableness in the case at bar, we cannot conclude that the stop was invalid as a matter of pretext. *See also, e.g., Whren v. United States*, 517 U.S. 806 (1996).

Although Rules 4.1 and 5.5 were not urged as a basis to sustain the officer's actions at the trial level, we recognize that we can affirm a trial court if it reached the right result, but for a different reason. *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1998). While we find no merit to appellant's contentions concerning Rule 14.1 and the plain-view exception, our affirmance

based on *State v. Earl, supra,* makes it unnecessary to further delve into those issues.

Affirmed.

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

William M. CASWELL *v.* STATE of Arkansas

CA CR 97-1574 973 S.W.2d 832

Court of Appeals of Arkansas
Division III
Opinion delivered September 9, 1998

Ben Seay, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Ass't Att'y Gen., and *Pamela Epperson*, Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar under the supervision of *Kelly K. Hill*, Deputy Att'y Gen., for appellee.

JOHN F. STROUD, JR., Judge. This is a revocation case. In March 1990, appellant, William M. Caswell, was sentenced to ten years in the Arkansas Department of Correction with an addi-

tional five years' suspended imposition of sentence. In 1996 the State filed a petition to revoke the suspended imposition of sentence, alleging that appellant had violated the terms of the suspension by leaving the scene of an accident involving injuries and property damage. Following a hearing on the petition the court revoked appellant's suspended imposition of sentence. On appeal, appellant argues that the trial court erred 1) in permitting hearsay evidence that violated the confrontation and due process clauses of the United States Constitution, and 2) in denying him the right to dismiss his attorney. We find no prejudicial error and affirm the trial court's revocation of appellant's suspended imposition of sentence.

For his first point of appeal, appellant contends that the trial court erred in permitting the investigating officer to testify about what John and Danna Ward told him, thereby violating the confrontation and due process clauses of the United States Constitution. The Wards were passengers in appellant's car and were injured in the accident. We agree that the trial court erred in allowing the testimony but find that the error was harmless.

■ First, the State argues that this point was not properly preserved for appeal. We disagree and find that appellant's objection was sufficient to preserve the constitutional issue. In *Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990), the appellant objected to a police officer's testifying about his discussions with another person because the other person was not present and could not be cross-examined. We concluded that the objection was adequate to raise the issue of the confrontation clause. We observed that although the rules of evidence, including the hearsay rule, are not strictly applicable in revocation proceedings, the right to confront witnesses is applicable. *Id.*

■ Here, Kelly Stewart, the officer investigating the accident, was the only person to testify at appellant's revocation hearing. The following colloquy occurred when the State asked Stewart what John and Danna Ward told him at the accident scene:

> [APPELLANT'S COUNSEL]: Your Honor, I would object to that being hearsay, although I do recognize that the rules of evidence

> do not apply on revocation hearings if he testifies as to what a victim in this case stated *without the ability of the defense to cross examine that particular victim then that would deprive the defendant of a fair hearing.*
>
> [PROSECUTOR]: Your Honor, the rules of evidence do not apply. We would ask the Court to make a ruling.
>
> THE COURT: The rules of evidence do not apply and also I believe the officer may state to the Court what his investigation revealed at the scene so it is overruled.
>
> [OFFICER KELLY DON STEWART]: I talked to a Mr. Ward, who was bleeding from the head. I asked him what had happened and he said they were riding with Mr. Caswell, Mr. Mike Caswell, and he lost control of the vehicle. I asked him where he was, I thought maybe he had gone to the phone or something, they said he had — last time they saw him he was going down below the bridge and was in the woods. I called for additional officers and we searched the area for approximately two hours and were unable to locate Mr. Caswell.
>
> . . .
>
> The other passenger in the vehicle that I talked to besides Mr. Ward was his wife, Danna Ward. I talked to her.
>
> Q. And what did she relate to you had happened?
>
> [DEFENSE COUNSEL]: *Your Honor, I object again for the reasons previously stated, that this is hearsay.*
>
> THE COURT: The objection is so noted and overruled.
>
> [OFFICER STEWART]: She basically said the same thing that her husband John did, that they were east bound on 82 and Mr. Caswell lost control of the vehicle for some reason and that he had left the scene.

(Emphasis added.) Defense counsel's objection was sufficient to preserve this constitutional issue for appeal.

■ ■ Second, in *Goforth v. State*, 27 Ark. App. 150, 152, 767 S.W.2d 537, 538 (1989)(emphasis added) (citations omitted), we explained:

Although in a revocation hearing a defendant is not entitled to the full panoply of rights that attend a criminal prosecution, he is entitled to due process. Because due process is a flexible concept, each particular situation must be examined in order to determine what procedures are constitutionally required.

In *Gagnon v. Scarpelli*, the United States Supreme Court held that in a revocation proceeding the accused is entitled to "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *This holding has been codified at Ark. Code Ann. § 5-4-310(c)(1) (1987) which states:*

> *The defendant shall have the right to confront and cross examine adverse witnesses unless the court specifically finds good cause for not allowing confrontation.*

In a probation revocation proceeding the trial court must balance the probationer's right to confront witnesses against grounds asserted by the State for not requiring confrontation. *First, the court should assess the explanation the State offers of why confrontation is undesirable or impractical. A second factor that must be considered, and one that has been focused on by a number of courts, is the reliability of the evidence which the government offers in place of live testimony.*

Here, the State offered no explanation for why confrontation was undesirable or impractical, and the trial court did not engage in the balancing exercise set forth in *Goforth*. Moreover, the trial judge noted that he did not understand why at least one of the Wards was not present. In allowing the officer to testify about what the Wards had said, the trial court violated appellant's constitutional right to confront the witnesses against him.

However, the denial of the right to confront witnesses may be harmless error. *Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990). In *Jones*, we quoted from *Delaware v. Van Arsdall*, 475 U.S. 673 (1986):

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. *These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.*

Jones, 31 Ark. App. at 26, 786 S.W.2d at 853 (emphasis added).

Here, under the circumstances of this case, the error was harmless. Appellant turned himself in the day after the accident and talked with Officer Stewart. At the revocation hearing, Officer Stewart testified, "I asked him why he left, he said he just — he was afraid, you know, I guess for fear he would be locked up. I am not sure, he just said he was afraid, got scared and ran." There was no objection raised with respect to this testimony, and although it does not have appellant actually stating that he was the driver, that fact can certainly be conclusively inferred. Moreover, Officer Stewart testified that the vehicle was titled in appellant's name.

Consequently, even though the trial court erred in admitting the officer's testimony concerning what the Wards had told him, the error was harmless because it was, in effect, cumulative to the evidence presented by Officer Stewart concerning what appellant had told him. That is, there was sufficient evidence presented at the hearing to establish that appellant was the driver, even disregarding the hearsay testimony about the Wards.

For his second point of appeal, appellant contends that the trial court erred in denying his request for a new attorney, which was made at the revocation hearing. We find no error.

In *Thorne v. State*, 269 Ark. 556, 560, 601 S.W.2d 886, 889 (1980) (citations omitted), the supreme court explained:

> It is clear that the question of a continuance is within the discretion of the trial judge and not every denial of a request for more time violates due process or Constitutional mandates. The burden is on the appellant to show that there has been an abuse of discretion. The right to choose counsel may not be manipulated or subverted to obstruct the orderly procedures of the Court or to interfere with the fair, efficient and effective administration of justice. In each such situation the Court must look at the particular circumstances of the case at bar and the issue must be decided on a case by case basis.

The factors to be considered by the trial court were briefly outlined in *Leggins v. State*, 271 Ark. 616, 618-19, 609 S.W.2d 76, 78 (1980):

> Although a defendant must be offered a reasonable opportunity to obtain competent counsel, once competent counsel is obtained, any request for a change must be considered in the context of the public's interest in a reasonably prompt and competent dispensation of justice. If such a change would require the postponement of trial because of inadequate time for a new attorney to properly prepare a defendant's case, in denying or granting the change, *the court may consider such factors as the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to defendant.*

(Emphasis added.)

Here, appellant sought a continuance so that he might seek other counsel because he was not pleased with the services of his attorney. No other reason was given beyond a vague assertion of displeasure that "I haven't seen anything that he's done except bring me up here and set me over there on that stool over there and not tell me nothin'." Moreover, no other counsel was identified, and the request was made on the day of the revocation hearing for the asserted reason that appellant had been in jail and could do nothing while there. Although appellant's father was present at the hearing and said that he had the ability to borrow money to retain private counsel for his son, he had not done so. Finally, the only prejudice asserted by appellant was that there was a "tremendous breakdown" in the relationship between appellant and his attorney, appellant was not presented the opportunity to represent himself or seek another attorney, and appellant was in jail and did not have access to witnesses or law books. In short, appellant has not demonstrated that the trial court abused its discretion in denying his request.

Affirmed.

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

Benny HAWKINS and Claudia Hawkins *v.* HERITAGE LIFE INSURANCE COMPANY

CA 98-45 973 S.W.2d 823

Court of Appeals of Arkansas
Division III
Opinion delivered September 9, 1998

Ponder & Jarboe, by: *Dick Jarboe*, for appellants.

Wood & Lockhart, PLC, by: *W. Kirby Lockhart*, for appellee.

JOHN F. STROUD, JR., Judge. This insurance case is before us on a second appeal from circuit court. The appeals arose from the trial court's granting two separate motions for summary judgment in favor of appellee, Heritage Life Insurance Company. Appellants are Benny and Claudia Hawkins, whose son Dwayne Hawkins collapsed while playing football for Pocahontas High School on November 4, 1988, was hospitalized, and died approximately one month later. He was insured under an interscholastic activities rider to the school's blanket accident policy, which had been issued by appellee. Appellants filed a claim for the policy's $25,000 maximum medical expense benefit. Appellee denied coverage on the grounds that the death was not "accident-related."

On October 4, 1993, appellants filed suit against appellee, seeking medical benefits plus a twelve-percent penalty, interest, and attorney's fees. On June 4, 1996, the trial court granted appellee's motion for summary judgment on the basis that appellants had failed to demonstrate a compensable "injury" as defined by the policy. The trial court also found that appellants had failed to establish that a sudden burst of physical activity or contact proximately caused Dwayne's collapse. Appellants appealed the summary judgment, and we reversed and remanded for trial in *Hawkins v. Heritage Life Ins. Co.*, 57 Ark. App. 261, 946 S.W.2d 185 (1997).

Following the remand to circuit court, appellee filed a second motion for summary judgment, asserting that appellants failed to file their complaint within the contractual limitation period of three years. The circuit court granted the motion and dismissed

appellants' complaint with prejudice. Appellants appeal the trial court's granting of summary judgment, contending that the five-year statute of limitation for actions on writings under seal applied to their action rather than the three-year contractual limitation contained in the policy. They argue that appellee waived the three-year limitation set out in the policy, and that the policy is ambiguous with respect to the time period for filing suit. We affirm.

In the first appeal of this case, we set forth the well-settled standard of review in summary-judgment cases. Summary judgment is an extreme remedy that should only be allowed when it is clear that there is no genuine issue of material fact to be litigated. *Id.* The burden of sustaining a motion for summary judgment is on the moving party, and, on appeal, we must view the evidence in the light most favorable to the nonmoving party. *Id.* It is our task to decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Id.*

The accident policy that is the subject of this appeal includes the following provisions:

> LEGAL ACTION: . . . . No such action may be brought after three years from the time written proof was required to be given.
>
> CONFORMITY WITH STATE STATUTES: If, on the Effective Date, any provision of this contract is in conflict with the laws of the state in which the Insured Person resides on that date it will be considered to conform to the minimum requirements of those laws.

Appellants' first argument is that by virtue of the "conformity" provision, appellee has agreed to the statutory five-year limitation on written contracts imposed by Arkansas Code Annotated section 16-56-111(b) (1991) and has waived the contractual three-year limitation. Therefore, appellants contend that the trial court erred when it gave effect to the contractual limitation. We do not agree.

Relying upon *Ferguson v. United Commercial Travelers of America*, 307 Ark. 452, 821 S.W.2d 30 (1991), appellant proposes that parties in Arkansas are not free to contract for a limitation period shorter than that required by the applicable statute of limitations. In *Ferguson*, a trial court had granted summary judgment because suit had not been brought within the contractual three-year period of limitation; the *Ferguson* appellant argued on appeal that the ruling was in error because the insurer had waived the contractual limitation period and was subject to our five-year statute of limitations for actions for writings under seal pursuant to Arkansas Code Annotated section 23-74-11(b) (1987).

A life insurance policy issued by a fraternal organization in *Ferguson* was identical in part to the policy we now consider: it specified that legal action was subject to a three-year limitation period, and that any provisions in conflict with applicable state statutes would be amended to conform with the minimum statutory requirements. The *Ferguson* court addressed the issue of conflicts between statutory and contractual statutes of limitations as follows:

> It has long been the rule in Arkansas that parties are free to contract for a limitation period which is shorter than that prescribed by the applicable statute of limitations, so long as the stipulated time is not unreasonably short and the agreement does not contravene some statutory requirement or rule based upon public policy.

307 Ark. 452, 455, 821 S.W.2d 30, 32.

A statute applicable at the time the *Ferguson* suit arose provided that no life benefit certificate issued by a fraternal benefit society could have a limitation period of less than two years. The supreme court ruled that because the shorter three-year contractual limitation period of the policy did not conflict with the minimum two-year requirement of Arkansas law governing fraternal organizations, the provision for conformity with minimum requirements of state statutes did not expressly waive the contractual three-year limitation period and there was no need to amend the contractual limitation period.

In the case at bar, the insurance company is not a fraternal benefit society and consequently the general five-year Arkansas statute of limitations applies. Appellant concludes that appellee has expressly waived the limitation period of five years by providing that provisions of the policy in conflict with our state laws will be considered to conform to our minimum statutory requirements. That argument, however, misses the point. Arkansas Code Annotated section 16-56-111(b) establishes a maximum, not a minimum. *See East Poinsett Co. School v. Union Standard*, 304 Ark. 32, 800 S.W.2d 415 (1990).

Arkansas Code Annotated section 16-56-111(b) (1987) provides that actions on writings under seal shall be commenced within five years after the cause of action shall accrue, and not afterward. We think that the law enunciated in *Ferguson* is that in the absence of a provision otherwise, there is a five-year limitation to bring actions on writings under seal. But clearly, parties in Arkansas have the right to contract for something less than the statutory five-year limitation period as long as the lesser filing period is reasonable. Here, appellants have not shown that the contractual limitation was unreasonable or in contravention of public policy.

Appellant's second argument is that the insurance policy is ambiguous with respect to whether the five-year statutory limitation or the three-year contractual limitation should apply. An identical argument was rejected by the *Ferguson* court, which stated that "the mere fact that the contractual limitation is shorter than a general statutory limitation does not create an ambiguity." 307 Ark. 452, 455, 821 S.W.2d 30, 32.

In summary, there is no merit to appellants' arguments that an insurance policy's provision for conformity with state statutes 1) waives shorter contractual limitations, or 2) creates ambiguity. Appellants have presented no evidence that the three-year limitation of the policy is unreasonably short, or that it contravenes a statutory requirement or rule based upon public policy. Therefore, we affirm.

Affirmed.

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

Billy Fred STINNETT *v.* STATE of Arkansas

CA CR 98-128 973 S.W.2d 826

Court of Appeals of Arkansas
Division I
Opinion delivered September 9, 1998

Rush, Rush & Cook, by: *David L. Rush*, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. Billy Fred Stinnett brings this appeal from the Logan County Circuit Court's order revoking his probation and sentencing him to ten years in the Arkansas Department of Correction. Appellant asserts two points for reversal. First, appellant contends that the circuit court's original sentence of probation, entered after he pled guilty to two Class Y felonies and a Class C felony, was void *ab initio* because it imposed a sentence without incarceration. Second, appellant argues that the State failed to provide substantial evidence to revoke his probation. We disagree and affirm both the trial court's revocation of probation and the subsequent imposition of sentence.

While it is difficult to determine, drawing upon appellant's abstract, the exact nature of the original sentence imposed by the trial court, it is ascertainable that appellant was charged, by Felony Information, with two counts of Delivery of a Controlled Substance, Methamphetamine, Class Y felony, occurring on or about August 16 and August 19, 1994. On June 9, 1995, appellant entered a plea of guilty to the two counts of Delivery of a Controlled Substance, a violation of Ark. Code Ann. § 5-64-401 (Repl. 1995), as well as a plea of guilty to the Possession of Drug Paraphernalia, a Class C felony and violation of Ark. Code Ann. § 5-64-403 (Repl. 1995). The trial court sentenced appellant to ten years' supervised probation, fined him a civil penalty of $2,500, and suspended his driver's license.

During the probationary term, the State filed a "Petition to Revoke" the appellant's probation citing appellant's alleged admission to having used marijuana and methamphetamine, and further, that the appellant had failed to attend drug treatment as required of him by his probation officer. On November 24, 1997, pursuant to the State's Petition, the circuit court conducted a revocation hearing and found that the appellant had violated the terms of his probation. Appellant moved the court to strike the original plea of guilty since, as appellant argued, the court's original sentence of probation was invalid under Arkansas sentencing law. The trial court denied the motion and sentenced appellant to serve 120 months in the Arkansas Department of Correction.

I.

[redacted] We consider, initially, appellant's contention that because probation is an invalid and unauthorized sentence for Class Y felony violations, that such a sentence is void *ab initio*, and thereby precludes the trial court from revoking it. Citing *State v. Williams*, 315 Ark. 464, 868 S.W.2d 461 (1994); *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986); *Lambert v. State*, 286 Ark. 408, 692 S.W.2d 238 (1985); and *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985), appellant argues that "[i]t is clear that a probationary sentence is not authorized for a class Y felony." However, these cases cited by appellant do not explain the current state of the law but, instead, address either the state of the law prior to the passage of Act 192 of 1993 or the application of law as it applies prospectively or retroactively. Regardless of which rationale appellant so chose to base his present argument, neither bears upon the disposition of this case. Here, appellant was charged and sentenced under Act 192 of 1993. As the State provided in response, and to which we agree, Act 192 of 1993 removed the minimum sentencing requirements mandated by the predecessor statute. Thus, the original sentence imposed upon appellant was legal and in all respects valid.

[redacted] In *Elders v. State*, 321 Ark. 60, 900 S.W.2d 170 (1995), our supreme court stated:

> Prior to sentencing, Elders urged the circuit court to apply Act 192 of 1993 retroactively. Act 192 amended Ark. Code Ann. §§ 5-4-104(e)(1) and 5-4-301(a)(1) (Supp. 1991), to permit suspension and probation as alternative sentences in cases of delivery of cocaine. The circuit court refused to do this because Act 192 was not in effect at the time of the commission of the offense. The court sentenced Elders to ten years in prison pursuant to the statutes that existed at the time of the sale of the cocaine.

Id. at 64, 900 S.W.2d at 172. The *Elders* decision is dispositive of appellant's argument here since appellant's offense and plea occurred after the effective date of the Act. Because the supreme court has already determinatively spoken upon the issue, we need

not venture further in placing our interpretative gloss upon these statutes.

II.

Next, appellant argues that the State neglected to prove, by a preponderance of the evidence, that the appellant had inexcusably failed to comply with a condition of his probation. The appellant argues that he was having car trouble, going through a divorce, working, and having problems with drugs. The state has the burden of proving that the appellant violated the terms of his probation, as alleged in the Petition to Revoke Probation, by a preponderance of the evidence. We will reverse the trial court's decision to revoke probation only if it is clearly against the preponderance of the evidence. *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992).

In this case, the State alleged that the appellant failed to report to both the probation officer and to drug treatment as ordered by the probation officer.[1] A condition of the appellant's probation was to report to the probation officer as directed. Despite the justifications offered by appellant, we cannot say that the judge's determination that the appellant failed to report to the drug treatment center or the probation officer, even though the period of absence was relatively limited (twenty days), was clearly against the preponderance of the evidence. We therefore affirm.

AREY and NEAL, JJ., agree.

[1] Appellant was ordered to attend drug treatment after admitting to the use of methamphetamine and marijuana.

John FELGATE *v.* STATE of Arkansas

CA CR 98-192 974 S.W.2d 479

Court of Appeals of Arkansas
Division III
Opinion delivered September 16, 1998

[redacted]

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Sam Hilburn* and *Dorcy Kyle Corbin*, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant John Felgate was convicted in a bench trial of DWI and failing to submit to a Breathalyzer test. As a result of his convictions, he was fined $1,000.00, and his driver's license was suspended for six months. Mr. Felgate now appeals from his DWI conviction, arguing that there was insufficient evidence to support the verdict.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

Officer Robert Stanley Jones testified first on behalf of the State. He stated that, at about 2:00 a.m. on November 22, 1996, he met Mr. Felgate's Jeep on an Arkadelphia street and noticed that a headlight was out. Officer Jones turned around, pursued the Jeep, and after following it for a short while he decided to make a stop. Prior to the stop, Officer Jones did not observe erratic driving, although he did notice that the Jeep crossed the center line a couple of times.

When the stop was made, Officer Jones informed Mr. Felgate that one of his headlights was not working, at which time Mr. Felgate raised the hood of his Jeep and attempted to correct the problem by adjusting some loose wiring. Officer Jones

noticed that Mr. Felgate smelled of alcohol and was unsteady on his feet, but did not ask him if he had been drinking. Shortly thereafter, Officer Richie Smith arrived at the scene, and Officer Jones noticed that, while he was questioning Mr. Felgate's girlfriend, Officer Smith was subjecting Mr. Felgate to field sobriety tests. Based on Officer Smith's observations, Mr. Felgate was placed under arrest and transported to the police station.

Officer Smith testified that, while at the scene of the arrest, he asked Mr. Felgate if he had been drinking, and Mr. Felgate replied that he had had one mixed drink. According to Officer Smith, he administered three sobriety tests before making the decision to arrest Mr. Felgate on suspicion of DWI. While at the police station, Officer Smith advised Mr. Felgate of his rights regarding the administration of a Breathalyzer test, and Mr. Felgate refused to take the test after being asked to do so.

Kim Bryan, Mr. Felgate's girlfriend, testified that she was riding in the passenger's seat of Mr. Felgate's Jeep during this incident. According to her testimony, she arrived at his fraternity house at about midnight, and the couple proceeded to eat at the Waffle House sometime thereafter. She acknowledged that she had been drinking beer, but maintained that she was unaware that Mr. Felgate had been drinking at all.

Mr. Felgate's roommate at the fraternity house also testified on Mr. Felgate's behalf. He stated that he saw Mr. Felgate mix one screwdriver on the night in question, and that he was certain that this was the only drink that Mr. Felgate could have consumed while he was at the fraternity house before driving to the Waffle House. Mr. Felgate testified on his own behalf, and he also indicated that he consumed just one drink on the night of his arrest. He estimated that the drink probably contained less than two ounces of vodka, and explained that he refused to take the Breathalyzer test because it was his understanding that "if you drink one drink, . . . you are going to fail it anyway."

For reversal, Mr. Felgate contends that his DWI conviction was not supported by substantial evidence. Pursuant to Ark.

Code Ann.§ 5-65-103(a) (Repl. 1997), it is unlawful for any person who is intoxicated to operate a motor vehicle. "Intoxicated" is defined by Ark. Code Ann. § 5-65-102(1) (Repl. 1997), which provides:

> (1) "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians[.]

Mr. Felgate submits that, in the case at bar, there was no evidence produced to demonstrate that his actual driving skills were impaired or that his driving created a substantial danger to himself or others.

In support of his argument, Mr. Felgate notes that Officer Jones admitted that, prior to the stop, nothing led him to believe that the driver of the Jeep posed a danger to others on the highway. Moreover, although Officer Jones executed the stop of Mr. Felgate's vehicle, he did not ask whether Mr. Felgate had been drinking and did not make the decision to have him arrested. Officer Jones's testimony regarding Mr. Felgate's driving was corroborated by Mr. Felgate's girlfriend, who testified that he was not driving erratically before the stop, and that he appeared to be normal.

Mr. Felgate also argues that Officer Smith's testimony was inconclusive because, although he stated that the three sobriety tests led him to believe that Mr. Felgate was intoxicated, he could not remember specifics about the tests. Officer Smith's explanation for failing to give more specific testimony was that the incident occurred a long time ago and that he had since thrown away his field notes.

Finally, Mr. Felgate contends that the trial court erred in stating that his failure to submit to the Breathalyzer test had a "great impact" on how it decided the case. Mr. Felgate points out that, at the time of his arrest, he was only twenty years old and

could have been successfully prosecuted under Ark. Code Ann. § 5-65-303 (Repl. 1997) if he had registered only .02% on a Breathalyzer test. He submits that one drink might have resulted in such a reading, and therefore argues that his refusal to take the test offered little to prove that he had committed DWI, the offense with which he was charged. Mr. Felgate further notes that, during the time that he was arrested and refused the Breathalyzer test, there was no evidence that he exhibited glassy eyes, slurred speech, or staggering.

We find that there was substantial evidence to support Mr. Felgate's DWI conviction. At the scene of the arrest, both police officers smelled alcohol on Mr. Felgate's breath, and Mr. Felgate admitted that he had consumed alcohol on the evening at issue. Although Officer Smith could not recall the specifics regarding the sobriety tests, he indicated that he administered the horizontal-gaze-nystagmus test, ABC's test, and finger-to-nose test, and that Mr. Felgate failed all three. Moreover, it was Officer Smith's recollection that the vehicle smelled of alcohol, and that it appeared that a drink had been spilled on the interior and partially disposed of on the ground outside of the Jeep. Finally, there was evidence that Mr. Felgate crossed the center line prior to the stop and was unsteady on his feet after being stopped by Officer Jones.

Mr. Felgate argues that the trial court erred in placing great weight on his refusal to submit to a Breathalyzer test during its deliberation of his guilt, because that fact does not prove any element of the offense of DWI. Furthermore, he argues that his reluctance to be tested was because he could have been found guilty of violating Ark. Code Ann. § 5-65-303 (DUI) if the test reflected a blood-alcohol level of as much as .02%. First, we note that refusal to be tested is admissible evidence on the issue of intoxication because it may indicate the defendant's fear of the results of the test and consciousness of guilt. *Medlock v. State*, 332 Ark. 106, 964 S.W.2d 196 (1998); *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990). As to Mr. Felgate's argument that he refused the Breathalyzer test because of his concern about DUI exposure rather than DWI, we recognize that, because Mr. Felgate

was twenty years of age at the time, it is conceivable that part of his motive for refusing the test was to avoid any positive blood-alcohol reading at all. However, his abstract does not reflect that he made this argument before the trial court. Therefore, we cannot now consider the argument as it is being raised for the first time on appeal. *Harris v. State*, 320 Ark. 677, 899 S.W.2d 459 (1995). Notwithstanding his failure to make this argument before the trial court, we note that in *Hill v. State*, 366 So.2d 318 (Ala. 1989), which was cited with approval in *Medlock v. State*, *supra*, and *Spicer v. State*, *supra*, the Alabama Supreme Court addressed an analogous contention as follows:

> Any circumstance tending to show the refusal was conditioned upon factors other than consciousness of guilt may properly be considered by the jury in determining the weight to attach to the refusal. Therefore, the evidence of Hill's refusal to submit to a chemical test for intoxication was relevant and properly admitted. Whether his refusal was due to the desire for consultation with his physician or attorney or to the fear of bodily harm, rather than consciousness of guilt, was best determined by the jury.

Hill v. State, 366 So.2d at 321. Similarly, whether Mr. Felgate's refusal to submit to a chemical test for intoxication was due to a consciousness of guilt of DWI, or whether it was out of fear of conviction for DUI, was a matter for the court sitting as fact-finder to weigh and determine.

We conclude that the evidence before the trial court constituted substantial evidence to support Mr. Felgate's conviction for DWI.

Affirmed.

STROUD and ROAF, JJ., agree.

Christopher TAYLOR *v.* STATE of Arkansas

CA CR 97-1495 973 S.W.2d 840

Court of Appeals of Arkansas
Division I
Opinion delivered September 16, 1998

Dana R. Davis, for appellant.

No reponse.

D. FRANKLIN AREY, III, Judge. The Mississippi County Circuit Court revoked appellant Christopher Taylor's probation, and sentenced him to twenty years in the Arkansas Department of Correction. Appellant brings this appeal from the revocation of his probation. Appellant's attorney has filed a motion to withdraw as attorney of record, an abstract, and a brief, seeking to withdraw pursuant to Ark. R. Sup. Ct. 4-3(j). We find that the abstract and brief submitted by appellant's attorney are not in compliance with Rule 4-3(j) and *Anders v. California*, 386 U.S. 738 (1967). Accordingly, we order rebriefing.

The abstract is deficient. *See* Ark. R. Sup. Ct. 4-2(a)(6). Although appellant pled guilty to an earlier charge of battery, and received a term of ten years' supervised probation, the terms and conditions of appellant's probation are not abstracted. Likewise, the petition for revocation filed by the State, which led to the revocation appealed from, is not sufficiently abstracted; the abstract indicates that the petition "alleg[es] violations of [appellant's] terms and condition of probation," but those alleged violations are not abstracted. Because this appeal involves the revocation of appellant's probation, we must know the terms and conditions of his probation, and which of those terms and conditions were allegedly violated.

Further, the brief fails to cite any authorities, and contains absolutely no argument. "The mere assertion by counsel that the appeal is without merit is insufficient." *Bigham v. State*, 36 Ark. App. 22, 23, 820 S.W.2d 462 (1991). We note that appellant's probation was revoked following a bench trial. Thus, even if appellant did not question the sufficiency of the evidence below, that issue may be raised on appeal. *See Witherspoon v. State*, 322 Ark. 376, 909 S.W.2d 314 (1995); *see also Petty v. State*, 31 Ark. App. 119, 788 S.W.2d 744 (1990) (considering the sufficiency of the evidence in a "no merit" appeal, even though that issue was not raised in the bench trial). Appellant's attorney should set forth the State's evidence and explain its sufficiency for the revocation of appellant's probation. *Cf. Skiver v. State*, 330 Ark. 432, 954 S.W.2d 913 (1997) (requiring such a discussion when the denial of a motion for directed verdict was mentioned).

Appellant's attorney is directed to file a new brief on or before October 19, 1998. In accordance with Rule 4-3(j)(2), appellant will then have thirty days from that date to raise any additional points.

Rebriefing ordered.

NEAL and CRABTREE, JJ., agree.

Jackie HARRIS *v.* Sandra WHIPPLE

CA 97-1522 974 S.W.2d 482

Court of Appeals of Arkansas
Division II
Opinion delivered September 16, 1998

Richard A. Hutto, for appellant.

Appellee, pro se.

WENDELL L. GRIFFEN, Judge. Jackie Harris, a landlord, has appealed the decision of the Pulaski County Circuit Court finding that she converted appellee Sandra Whipple's personalty and that she was liable to appellee for damages for retaining the property. Appellant raises two points on appeal: 1) the trial court erred in not applying the landlord lien statute to her retention of the property; and 2) the trial court erred in finding the property had not been abandoned. We reverse and remand the trial court's ruling.

In February 1995, appellee's boyfriend, David Schaefer, agreed to lease a trailer from appellant, with the lease running from March to August 1995. Appellee and her children moved into the trailer with Schaefer, with appellant's knowledge. Schae-

fer and appellee failed to pay rent for August 1995, and began moving out of the trailer on or about August 24. Appellee later returned to the trailer to retrieve her new washer, dryer, and her children's clothes, but the locks on the trailer door had been changed. Appellant posted a notice to vacate sign on the door of the trailer. Four days later, appellant returned to the property, took possession of the property remaining at the premises, and began cleaning the trailer.

Appellee filed suit against appellant, who responded by claiming a landlord's lien on the property and that she was entitled to retain the property until appellee paid the amount due under the lease. The matter went to trial on August 15, 1997, and the trial court found that appellee owed appellant $666.00, but that appellant had wrongfully retained the property. The trial court awarded appellee $2,730.54 plus interest, representing the value of appellee's property, the amount due her for a utility bill, and a laundry bill minus the amount owed to appellant for unpaid rent and damage to the trailer. Appellant seeks reversal of that ruling.

Appellant's first argument is that the trial court erred in not applying the landlord lien statute to her retention of the property. Arkansas Code Annotated section 18-16-108 (Supp. 1997) states:

> Upon the voluntary or involuntary termination of any lease agreement, all property left in and about the premises by the lessee shall be considered abandoned and may be disposed of by the lessor as the lessor shall see fit without recourse by the lessee. All property placed on the premises by the tenant or lessee is subjected to a lien in favor of the lessor for the payment of all sums agreed to be paid by the lessee.

We will not set aside findings of fact by a circuit judge sitting as a jury unless they are clearly erroneous. Ark. R. Civ. P. 52(a); *Mid-Century Ins. Co. v. Miller*, 55 Ark. App. 303, 935 S.W.2d 302 (1996).

We agree with appellant's assertion of error. Appellee admitted that she owed $65.00 in rent for the month of July, and that

she also owed rent for August and September, at $225.00 for each month. Appellee admitted that there was some damage caused to the trailer which appellant estimated at $150.00. The total of this amount is $665.00. Appellee also testified that she and Schaefer had moved from the trailer, that they did not intend to continue living there, but that she had not completely removed her belongings from the trailer. Appellee claimed expenses for property remaining at the trailer, an electricity bill, and for her laundry bill after appellant took possession of her washer and dryer. Appellee valued the washer and dryer at $500, the electricity bill at $497.04 (from appellant's alleged use after appellee left the premises), and her laundry bill at $25.00 a week for two years at $2,400.00.

The trial court erred by ruling that section 18-16-108 did not apply, and in ruling that appellee had not abandoned the property left in the trailer. The trial court simply deducted the greater expense from the lesser, without finding that appellee had abandoned the property, or applying the applicable statute. The landlord lien statute provides that all property left in and about the leased premises by the lessee *shall* be considered abandoned and may be disposed of by the lessor as the lessor sees fit without recourse by the lessee, upon the voluntary or involuntary termination of any lease agreement. The word "shall," when used in a statute, means that the legislature intended mandatory compliance with the statute unless such an interpretation would lead to an absurdity. *Campbell v. State*, 311 Ark. 641, 846 S.W.2d 639 (1993); *Loyd v. Knight*, 288 Ark. 474, 706 S.W.2d 393 (1986). By leaving the washer, dryer, and various items of clothing in the trailer when she moved, appellee abandoned the property to whatever disposition that appellant made of it. We are bound to follow the statute in this case.

Indeed, there was no proof that appellee intended to remain in the trailer after she moved most of her belongings from it. There is no proof that she ever attempted to reoccupy the trailer, or that she manifested an intent to do so after moving most of her belongings. The record shows, instead, that appellee moved her family and most of their belongings from the trailer. She did

not give notice to appellant that she was moving, and left items in the trailer without informing appellant on when she would return for them. Under the circumstances, the provisions of the statute clearly applied, and the trial judge erred by ruling that the statute was inapplicable.

Therefore, the trial court also erred when it assessed damages against appellant for the value of the washer and dryer. The applicable statute clearly authorized appellant to dispose of the abandoned property as she saw fit, without recourse from appellee.

Further, we find no basis for the trial court's action of awarding $2,400 in damages to appellee for the value of laundry bills during the twenty-four-month period after she moved from the trailer. Appellee abandoned the washer and dryer. Appellant acted according to the statute when she entered the trailer and disposed of the washer and dryer. Doing so did not expose her to liability for damages because appellee had left them in the trailer.

Finally, we find no legal authority for the determination that appellant, as landlord, became liable to appellee for $497.04 for a utility bill. Appellee testified that the electric bill was in her name. She had not been sued for the debt and had not paid it as of the trial date. Although appellee testified that she instructed that the electricity be discontinued to the trailer, there is no proof in the record that appellant took action to keep the electricity on.

The judgment for appellee is reversed; we remand this case to the trial court for entry of judgment for $665.00 in favor of appellant.

Reversed and remanded.

ROGERS and PITTMAN, JJ., agree.

George William THOMPSON *v.* Melinda B. THOMPSON

CA 98-80 974 S.W.2d 494

Court of Appeals of Arkansas
Division II
Opinion delivered September 23, 1998

Gunn, Sexton, Canova & Platt, by: *Jane Watson Sexton*, for appellant.

Law Office of Curtis E. Hogue, by: *Curtis E. Hogue*, for appellee.

JOHN MAUZY PITTMAN, Judge. The parties in this child-custody case entered into an agreement, approved by the court, providing for joint custody of the parties' two-year-old child with physical custody alternating on a week-to-week basis. Within two months' time, the agreement had become unworkable, and appellee filed a petition to change custody. After a hearing, the chancellor found that a material change in circumstances had occurred and that it was in the child's best interest to vest full custody in the appellee. Appellant was granted liberal visitation comprising one-half of the child's free time until the child enters kindergarten, and was ordered to pay child support in the amount of $95.00 per week. From that decision, comes this appeal.

For reversal, appellant contends that the chancellor erred in finding a material change in circumstances, in finding that it would be in the child's best interest to grant custody to appellee rather than to appellant, and in ordering appellant to pay child support of $95.00 per week in the absence of any proof of appellant's income.

Appellant's first two arguments are directed to the sufficiency of the evidence to support the chancellor's findings. In chancery cases, we review the evidence *de novo*, but we do not reverse the findings of the chancellor unless it is shown that they are clearly contrary to the preponderance of the evidence. *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). In child-custody cases, we give special deference to the superior position of the chancellor to evaluate the witnesses, their testimony, and the child's best interest. *Larson v. Larson*, 50 Ark. App. 158, 902 S.W.2d 254 (1995). In custody cases, the primary consideration is the welfare and best interest of the children involved; other considerations are secondary. *Id.*

We first address appellant's contention that the chancellor erred in finding a material change in circumstances. A material change in circumstances affecting the best interest 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. *Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998). Here, the parties testified that they had never adhered to the joint-custody schedule provided for in their agreement and the decree, but had instead alternated custody several times each week. Most significantly, the record shows that the parties could not or would not cooperate regarding the child's health care. Appellant made an appointment for the child to be seen by an allergist; appellee canceled the appointment without notice to appellant. Without consulting appellant, appellee then made a new appointment with a different physician whose competence was questioned by appellant. This failure to cooperate regarding health care was also evident with regard to the child's inoculations; it appears that appellee failed to provide requested inoculation records to appellant, who ignored appellee's oral assurances that the child's inoculations were up to date. Appellant telephoned appellee from the health clinic and informed her that he was there to have the child inoculated; appellee told appellant that this was unnecessary and began cursing. Appellant nevertheless proceeded to have unnecessary inoculations administered to the child. Further unnecessary inoculations would have been administered had appellee not appeared at the clinic with the inoculation records in time to prevent them.

■ ■ Joint custody or equally divided custody of minor children is not favored in Arkansas unless circumstances clearly warrant such action. *Drewry v. Drewry*, 3 Ark. App. 97, 622 S.W.2d 206 (1981). The mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of an award of joint custody, and such an award is improper where cooperation between the parents is lacking. 24 AM. JUR. 2d *Divorce and Separation* § 990 (1983). We have reversed awards of joint custody where it was clear that the parties were not working in concert to raise the child. *Hansen v. Hansen*, 11 Ark. App. 104, 666 S.W.2d 726 (1984). In the case at bar it is clear that the parties have fallen into such discord that they are unable to cooperate in sharing the physical care of the child, and we hold that the chancellor did not err in finding that this constituted a material change in circumstances affecting the child's best interest sufficient to warrant modification

of the joint-custody decree. *See* 2 Homer H. Clark, Jr., *The Law of Domestic Relations* § 20.9, at 554 (2d ed. 1987).

Next, appellant contends that the chancellor erred in awarding custody of the parties' child to the appellee because the evidence established that appellant had been the child's primary caretaker since the parties' divorce. We do not agree. First, we note that less than two months elapsed from the time of the parties' divorce to the filing of the petition to change custody. Second, although the fact that a parent had been the child's primary caretaker is relevant and worthy of consideration in determining which parent should be granted custody, *see Milum v. Milum*, 49 Ark. App. 3, 894 S.W.2d 611 (1995), it is not in and of itself determinative: the unyielding consideration in determining child custody is the welfare and best interest of the child. *Brown v. Cleveland*, 328 Ark. 73, 940 S.W.2d 876 (1997). Here, there was evidence that appellee was better positioned to be the child's primary caretaker at present than was the appellant: appellee testified that she had quit her job so as to be able to care for the child during the day, while appellant worked daytime hours and was not able to do so.

Personal observation is of great value to a court that is called upon to choose between mother and father in a custody case. *See Holt v. Taylor*, 242 Ark. 292, 413 S.W.2d 52 (1967). Chancellors in such cases must utilize, to the fullest extent, all their powers of perception in evaluating the witnesses, their testimony, and the best interests of the children. We know of no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as much weight as those cases involving minor children. *Riddle v. Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989). Giving proper deference to the chancellor's superior opportunity to observe the parties, we cannot say that he erred in awarding custody to the appellee.

Finally, appellant contends that the chancellor erred in ordering him to pay child support in the amount of $95.00 per week. We agree. Although the amount of child support a chancery court awards lies within the sound discretion of the chancellor and will not be disturbed on appeal absent an abuse

of discretion, reference to the family-support chart is mandatory. *Anderson v. Anderson*, 60 Ark. 221, 963 S.W.2d 604 (1998). The chart itself establishes a rebuttable presumption of the appropriate amount of child support to be paid by the noncustodial parent, which can only be disregarded if the chancery court makes express findings of fact stating why the amount of child support set forth in the support chart is unjust or inappropriate. *Id.* Here, there was no evidence of appellant's income. The absence of evidence of income makes it impossible to reference the family-support chart. Because a determination of appellant's income and reference to the support chart are necessary before we can determine whether the presumptive amount is, as appellant argues, unjust or inappropriate, we reverse the chancellor's order of child support and remand for further proceedings to determine the propriety of (and, if necessary, amount of) child support.

Affirmed in part; reversed and remanded in part.

ROGERS and GRIFFEN, JJ., agree.

Julius SILVERMAN *v.* STATE of Arkansas

CA CR 98-52 974 S.W.2d 484

Court of Appeals of Arkansas
Division II
Opinion delivered September 23, 1998

Maxie G. Kizer, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

TERRY CRABTREE, Judge. Julius Silverman brings the present appeal, a challenge to the sufficiency of the evidence, from a Jefferson County Circuit Court jury trial convicting him of rape. For his points on appeal, Silverman presents two main arguments: first, appellant challenges the reliability of the State's conclusions as drawn from the DNA results; and second, appellant challenges the method and timeliness of the eyewitness identification used by the State. Finding no merit in these contentions, we affirm the conviction of the trial court.

In October of 1995 the victim was employed as a nurse at the Tucker Women's Unit under the Department of Correction. For commuting convenience, the victim had moved in with a friend at the Bachelor Officers' Quarters (BOQ), a dormitory-type residence for employees of the prison. At approximately 6:30 a.m., on October 6, 1995, the victim left the dormitory to drive her roommate to Pine Bluff. Upon returning alone to the BOQ some time around 7:30 a.m., the victim saw appellant, an inmate, relaxing in the lobby area. The victim began a conversation with appellant, during which, he revealed his name and reasons for his presence at the BOQ.[1] The victim asked appellant to attend to the ventilation problems she was having in her room and remained in the lobby while he checked. After appellant returned and disclosed the absence of any noticeable irregularities, the victim went to her room, undressed, and began smoking cigarettes. The victim testified that she also checked the lobby and parking lot and, upon not seeing anyone, began to shower.

The victim further testified that an intruder then entered her unlocked dorm room, reached into, and pulled her out of the running shower. The intruder managed to cover his face and force the victim onto her roommate's bed where he then penetrated her vagina with his penis. While the victim did not appear

[1] Appellant was an inmate of Tucker prison who had earned the privilege of working maintenance at the BOQ with limited supervision.

to form a positive identification of the assailant during the attack, she was able to see his profile and ascertain that he was a black male, taller than she.

After the attack and upon the assailant leaving, the victim dressed and drove herself to the Tucker prison to report what she thought to be an attempted rape.[2] There, she told the investigators that the perpetrator's shirt would be wet since he had pulled her out of the shower. Although the victim did not immediately label appellant as the rapist, she did so during subsequent interviewing with the authorities. The ensuing investigation uncovered a wet Department of Correction guard shirt in one of the BOQ rooms and a pair of wet boxers and wet towels behind the commode in Silverman's cell.

The victim was later shown a photo lineup from which to attempt to identify the assailant. Though Silverman's picture was among those she reviewed, the victim was unable to make a positive identification. A year later, during an in-person lineup, the victim identified appellant as the rapist.

At trial, DNA evidence was presented by the State in an attempt to link the appellant to the crime. Both Silverman and the State presented expert testimony on the DNA testing procedures and the resulting conclusions. Although the experts differed as to the weight and accuracy to be accorded the results, both experts agreed that the appellant could not be ruled out as the attacker.

At the close of the State's case-in-chief, appellant moved for a directed verdict. The motion was denied. The jury found the appellant guilty of rape and sentenced him to ten years in the Arkansas Department of Correction to run concurrently with any sentence the appellant was serving. Appellant challenges both the trial court's denial of the motion for a directed verdict and the subsequent conviction of rape.

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[2] The victim originally contemplated the attack to be only an attempted rape since she believed that the attacker had failed to maintain an erection or ejaculate.

We treat the denial of motions for a directed verdict as a challenge to the sufficiency of the evidence. *Johnson v. State,* 326 Ark. 3, 929 S.W.2d 707 (1996). Evidence is sufficient to support a conviction if the trier of fact can reach a conclusion without having to resort to speculation or conjecture. *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992). In order for circumstantial evidence to be sufficient, it must exclude every other hypothesis consistent with innocence. *Davis v. State*, 317 Ark. 592, 879 S.W.2d 439 (1994). Such a determination is a question of fact for the factfinder to determine. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). Finally, when reviewing the sufficiency of the evidence, it is only necessary for an appellate court to ascertain that evidence which is most favorable to appellee, and it is permissible to consider only that evidence which supports the guilty verdict. *Johnson, supra* (citations omitted).

For his first point, appellant attacks the reliability of the DNA results and their concomitant statistical probabilities. Silverman argues that the testing procedure, used by the State in this case, was unreliable since the underlying DNA samples were mixed. At trial, Silverman presented a DNA expert who had reviewed the State's results and testified that the State's deductions were not entirely consistent with the test results. Silverman also presented lab results from a independent DNA laboratory to reveal inconsistencies with the State's sampling and conclusions. Specifically, appellant challenged the statistical probabilities offered by the State as they related to the results drawn from the tests. While appellant presented evidence at trial bearing on the reliability of the DNA evidence, on appeal, appellant fails to cite any legal authority supporting his position that this evidence is now insufficient.

Reconciling conflicts in the testimony and weighing the evidence are matters within the exclusive province of the jury and the jury's conclusion on credibility is binding on this court. *Ashley v. State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987). Jurors are allowed to draw upon their common knowledge and experience in reaching a verdict from the facts directly proved. *Id.*

In *Moore v. State*, 323 Ark. 529, 547, 915 S.W.2d 284, 294 (1996), the Arkansas Supreme Court determined that DNA evidence was no longer 'novel scientific evidence' and therefore not subject to the preliminary hearing called for in *Prater v. State*,

307 Ark. 180, 820 S.W.2d 429 (1991). While, in cases involving DNA evidence, the trial court must still make a preliminary inquiry into the reliability of the expert's methodology, appellant does not raise this issue on appeal nor mention whether such a preliminary inquiry was in fact ever held. Instead, it appears, appellant chose to challenge the reliability of testing at trial. In *Moore*, the court upheld the trial court's determination that:

> any challenge to the conclusions reached by the state's expert, including statistical probability of whether the test results constituted a match, would appropriately be made at trial, by cross-examination of the state's experts and presentation by the defendant of his own experts to express differing opinions about the results of the [DNA] tests and statistical probability of a match.

323 Ark. at 547, 915 S.W.2d at 294.

Here, appellant had ample opportunity to present expert testimony challenging the State's DNA conclusions, as well as sufficient liberty to cross-examine the State's experts. In *Johnson v. State*, 326 Ark. 430, 447, 934 S.W.2d 179, 187 (1996), our supreme court refused to revisit issues concerning the battle of experts over statistical probabilities since they were matters for litigation and cross-examination. So, too, do we decline that invitation. The conflicting testimony of experts was for the jury to consider, and we cannot now say that the jury's conclusion of guilt was not supported by the evidence.

For appellant's second point on appeal, Silverman challenges the method of lineup identification used by the victim in naming the appellant as the attacker. Again, appellant fails to provide this Court with any legal precedent supporting his argument that this method of identification is insufficient to sustain a conviction. Though the victim did not pick appellant out of a lineup until approximately one year after the rape and though the victim stated that her attacker had to be appellant because he was the only person she saw prior to the attack, these arguments are matters of credibility and weight to be afforded the evidence — matters within the province of the jury.

Affirmed.

MEADS and ROAF, JJ., agree.

Maudie BAKER *v.* FROZEN FOOD EXPRESS TRANSPORT

CA 98-200 981 S.W.2d 101

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered September 23, 1998
[Substituted Opinion Upon Denial of Rehearing
delivered December 9, 1998.]

[redacted]

Marc I. Baretz, for appellant.

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

MARGARET MEADS, Judge. Appellant appeals from a decision of the Arkansas Workers' Compensation Commission, which held it

did not have jurisdiction over her claim and dismissed her claim for benefits.

In March 1995, Maudie Baker, an Alabama resident, was employed as an over-the-road truck driver for appellee Frozen Food Express Transport (FFE), a Texas company. In the performance of her job duties, appellant traveled the forty-eight contiguous states and Canada. She sustained an injury on June 24, 1995, at a truck stop in Earle, Arkansas, when her truck was hit by another truck attempting to park. Appellant notified FFE, and a wrecker took her truck back to Texas. Appellant rode with the wrecker driver. Appellant received medical treatment and indemnity and medical benefits through August 23, 1996, under the Conwell Voluntary Employee Benefit Plan, which provided benefits for employees who sustained injury due to an accident in the course and scope of their employment.[1] On August 26, 1996, Conwell denied appellant's request for an extension of benefits and notified her that any further medical treatment would have to be approved by her health insurance carrier. Subsequently, appellant filed a claim for workers' compensation benefits in Arkansas seeking temporary total disability and medical expenses. At the hearing on appellant's claim, FFE contended that Arkansas has no jurisdiction.

Appellant testified that she resides in Alabama and was hired in Georgia by FFE, whose main office is in Dallas, Texas. She said she had occasion during her employment to drive through Arkansas twice a week from March until June. There were other FFE trucks on the road in Arkansas, and there was a designated fuel stop in West Memphis at which other FFE drivers were present. The accident occurred while appellant was in her employer's truck parked at a truck stop in Earle, Arkansas, taking a DOT-mandated eight-hour break. She testified further that she thought she was making a delivery in Arkansas, but could not remember where, and that FFE had a drop yard (a yard full of both empty and loaded FFE trailers) in Arkansas, but she could not tell the law judge where the yard was. The yard has no supervisory personnel and is strictly a place where a driver goes to pick up a trailer.

On June 30, 1997, the law judge issued an opinion which denied and dismissed appellant's claim on the finding that the Arkan-

[1] Texas allows an employer to provide an alternate payment for workers' compensation, and appellee does not have workers' compensation available through the State of Texas.

sas Workers' Compensation Commission had no jurisdiction over her claim. The law judge relied upon *International Paper Co. v. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971); *McKeag v. Hunt Transp, Inc.*, 36 Ark. App. 46, 818 S.W.2d 581 (1991); and *Patton v. Brown & Root, Inc.*, 31 Ark. App. 141, 789 S.W.2d 745 (1990), and stated:

> In short, the respondent-employer is not localized in Arkansas, and it does not have an office or facility which exercises general supervision and control over its employees in Arkansas. The contract of hire between the claimant and the respondent-employer was made in Georgia. Although the respondent—employer has trucks traveling on highways in Arkansas and occasionally making delivers [sic] in Arkansas, the Court's decision in *McKeag, supra*, compels a conclusion that these activities are not sufficient to link the claimant's employment with the State of Arkansas. Moreover, the respondent-employer has not engaged in sufficient activity in the State of Arkansas for this State to regulate the actual enterprise of the company. Thus, even though the claimant's injury may have occurred in Arkansas, this is not sufficient to establish a link between the claimant's employment and Arkansas. Therefore, I find that the statutory presumption of jurisdiction in this State has been rebutted and that a preponderance of the evidence fails to establish that the Arkansas Workers' Compensation Law can be applied to this claim.

The full Commission affirmed and adopted the law judge's opinion.

For reversal, appellant first argues that the Commission has jurisdiction over her claim because her injury occurred in Arkansas. Neither party has cited us to any case in which the sole connection to the State of Arkansas was the place of injury, and appellee admits there is not a single case directly on point.

■ ■ The question of whether the Workers' Compensation Commission has jurisdiction of a claim is a mixed question of fact and law; as far as the factual determinations are involved, the findings of the Commission are conclusive if supported by substantial evidence. *International Paper Co. v. Tidwell, supra.* 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. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

■ The purpose of our workers' compensation laws is to pay benefits to legitimately injured workers who suffer an injury arising out of and in the course of their employment. Ark. Code Ann. § 11-9-101(b) (Repl. 1996). Under prior law in existence before the

effective date of Act 796 of 1993, "employment" was defined as "every employment carried on in the state" (Ark. Code Ann. § 11-9-102(3)(A) (1987)), and under prior decisions the application of the act was limited to harms arising out of employments carried on in Arkansas. *Patton, supra.* The courts found that the employment and not merely the employee must be connected to Arkansas. *McKeag, supra*; *Patton, supra.* Further, under prior law the statutory provisions were liberally applied. Ark. Code Ann. § 11-9-704(c)(3) (Supp. 1991); *Patton, supra.* Under the new law, "employment" is defined as "every employment in the state," Ark. Code Ann. § 11-9-102(12)(A) (Repl. 1996), and "administrative law judges, the commission, and any reviewing courts shall construe the provisions of [the Arkansas Workers' Compensation Law] strictly." Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996).

Here, appellant is an Alabama resident, who was hired in Georgia by appellee, a Texas company. FFE is neither localized nor does it maintain an office exercising general supervision and control over its employees while in Arkansas. Although appellant testified that she "thought" she was making a delivery in Arkansas, that is not a strong enough link with Arkansas to cause our workers' compensation law to be applied in this case. *McKeag, supra.* Neither do we think, under a strict construction of our workers' compensation law, that having a designated fuel stop in West Memphis, trucks on the road in Arkansas, and a drop yard without supervisory personnel provide that link. Thus, under the facts of this case, the statutory basis needed for the Commission's jurisdiction is lacking.

We recognize that appellant has argued that *McKeag, supra,* is distinguishable because the employment-related injury in the instant case occurred in Arkansas. However, we do not think that requires us to reverse the Commission's decision. *McKeag* cited *International Paper Co. v. Tidwell,* 250 Ark. 623, 466 S.W.2d 488 (1971), where our supreme court liberally interpreted our statute and held that the Commission had jurisdiction not only because an employment contract was made in Arkansas but also because the employer was localized or maintained an office exercising general supervision and control over its employees in Arkansas. In holding that the Commission had jurisdiction, our supreme court articulated the State's interest in protecting its residents and emphasized the interest Arkansas has in the welfare of its residents, in minimizing the likelihood of their becoming public charges or objects of local charity, in having a procedure for a remedy readily available to its residents, and in secur-

ing compensation to physicians and hospitals in Arkansas which might not otherwise be available to a claimant. We simply note that none of these interests are present in the instant case.

Appellant next argues that appellee failed to present any evidence to rebut the statutory presumption of jurisdiction. Arkansas Code Annotated section 11-9-707(a) (Repl. 1996) provides that in any proceeding for the enforcement of a claim for compensation, a prima facie presumption shall exist that the Workers' Compensation Commission has jurisdiction. 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). Here, the Commission found that the statutory presumption of jurisdiction had been rebutted, and we believe there is substantial evidence to support its conclusion.

At the hearing, the ALJ said that in determining whether the Arkansas Workers' Compensation Commission had jurisdiction, he would consider such things as where the employer was located, where the contract of hire was entered into, and any business conducted in this state by the employer. Appellant's own testimony established that she resides in Alabama, she was hired in Georgia, and FFE's main office is in Dallas, Texas. She stated that there were at least 500 drivers working for FFE when she was hired, and she would see on average three other FFE drivers when she stopped at the designated fuel stop in West Memphis. The designated fuel stop was not owned by FFE but was simply where drivers were allowed to stop and fuel their trucks, and there were designated fuel stops all over the country. During her employment with FFE, appellant traveled not only across Arkansas but throughout the contiguous forty-eight states and Canada. Moreover, the exhibits introduced in evidence reflect that the employer's payroll account and its voluntary employee injury benefit plan are administered in Texas. We agree with the Commission that this evidence is sufficient to rebut the statutory presumption.

Finally, appellant argues that she has met her burden of proving an injury. However, we need not reach this issue in light of our finding that the Commission had no jurisdiction over appellant's claim.

Affirmed.

ROAF, CRABTREE, PITTMAN, AREY, and JENNINGS, JJ., agree.

Torrence Taber CHEATHAM *v.* STATE of Arkansas

CA CR 98-174 974 S.W.2d 490

Court of Appeals of Arkansas
Division IV
Opinion delivered September 23, 1998

John W. Walker, P.A., by: *Austin Porter, Jr.*, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Deputy Att'y Gen., for appellee.

MARGARET MEADS, Judge. Appellant was tried by a jury and convicted of the crime of manslaughter. He was sentenced to serve ten years in the Arkansas Department of Correction. On appeal, he argues that his trial fell outside the speedy-trial limitations and that the charges against him should have been dismissed.

On April 11, 1996, appellant was arrested on the charge of first-degree battery of a one-year-old infant, who was hospitalized in critical condition. The infant died on April 12 while appellant was incarcerated. Appellant was released on $10,000 bond on April 15.

On May 17, 1996, appellant was charged with second-degree murder for the death of the infant; on May 21 he was arrested on that charge and allowed to remain free on the previous bond, and the initial charge of battery was nol prossed. On January 29, 1997, the State filed the charge of first-degree murder against appellant. On February 19, appellant pleaded "not guilty," and trial was set for May 14, 1997.

Appellant filed a motion to dismiss on April 28, 1997, alleging that for speedy-trial purposes he should have been tried no later than April 11, 1997, which was one year after the date of his initial arrest for first-degree battery. The trial court denied appellant's motion, finding that for purposes of speedy trial the time began to run on May 21, 1996, when appellant was arrested for the death of the infant. The court reasoned that on April 11, 1996, all the elements of the crime of murder had not been consummated because the victim had not yet died. Appellant was tried by a jury on July 29, 1997, for first-degree murder and convicted of the lesser charge of manslaughter.

Appellant argues on appeal that the trial court erred in finding that his trial did not fall outside the speedy-trial limitations. According to appellant, the sole issue for decision is whether the time for speedy trial commenced on April 11, 1996, when he was

arrested for first-degree battery, or on May 21, 1996, when he was arrested for second-degree murder.

Arkansas Rule of Criminal Procedure 28.2 provides:

> The time for trial shall commence running, without demand by the defendant, from the following dates:
>
> (a) from the date the charge is filed, except that if prior to that time the defendant has been continuously held in custody or on bail or lawfully at liberty to answer for the same offense or an offense based on the same conduct or arising from the same criminal episode, then the time for trial shall commence running from the date of arrest . . . .

Appellant says that he had been "'lawfully at liberty' since April 15, 1996, to answer for an offense 'based on the same conduct' and for an offense 'arising from the same criminal episode.'" Therefore, he argues, the time for trial commenced to run on April 11, when he was arrested for battery. We do not agree.

In *Tackett v. State*, 294 Ark. 609, 745 S.W.2d 625 (1988), appellant Tackett caused a crash of the vehicle driven by Lesa Diffee, who was injured but later recovered. Denise Barrentine, who was also injured, went into a coma, and Nancy House was killed instantly. On March 30, 1983, appellant was charged with manslaughter in the death of Ms. House. He was later tried on that charge, convicted, and sentenced to serve eight years in the Arkansas Department of Correction; his conviction was affirmed on appeal. *Tackett v. State*, 12 Ark. App. 57, 670 S.W.2d 824 (1984). On March 2, 1987, Ms. Barrentine died, and on April 29, 1987, appellant was charged with manslaughter in her death. Appellant argued that he had been denied a speedy trial because he was arrested in 1983 on a charge "arising out of the same conduct which actually dealt with injury to Ms. Barrentine." Our supreme court rejected this argument, citing *State v. Anderson*, 616 P.2d 612 (Wash. 1980), *cert. denied*, 459 U.S. 842 (1982), and held that the speedy-trial rules cannot go into effect until all of the elements of the crime have been completed.

In *Anderson*, the appellant was arrested on June 25, 1977, and charged with second-degree assault in regard to some injuries to

his stepdaughter. He was booked into jail and arraigned on June 27. The child died on August 6, 1977. On August 8, Anderson was charged with first-degree murder and manslaughter in the first degree, and was served with process while still incarcerated on the charge of second-degree assault. Meanwhile, the State was granted a voluntary dismissal of the second-degree assault charge. Anderson was tried on October 11, 1977, and convicted of first-degree murder. On appeal, he argued that because the first-degree murder charge was a crime based on the same conduct or arising from the same criminal episode as the second-degree assault, the time for speedy-trial commenced to run on June 27, 1977, when he was arraigned on the assault charge.[1] Anderson relied on the *ABA Standards Relating to Speedy Trial* § 2.2 (Approved Draft, 1968), which provide:

> When time commences to run:
>
> The time for trial should commence running, without demand by the defendant as follows:
>
> (a) from the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer *for the same crime or a crime based on the same conduct or arising from the same criminal episode,* then the time for trial should commence running from the date he was held to answer . . . .

616 P.2d at 615-16 (emphasis in original).

The Supreme Court of Washington stated Anderson "misapprehends" the standards, and the standards do not contemplate that the speedy-trial time would be counted prior to the final act which made the crime complete. The court held that the speedy-trial standards cannot go into effect until all the elements of the crime have been completed.

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[1] CrR.3.3 of the Washington rules provided at that time that a criminal charge should be brought to trial within ninety days following the preliminary appearance. *State v. Striker*, 557 P.2d 847 (1976).

Rule 722(d) of the *Uniform Rules of Criminal Procedure*, 10 U.L.A. 154 (1992 Special Pamphlet) is based upon Standard 2.2. That rule provides:

> (d) *When time begins to run.* The time for trial begins to run, without demand by the defendant, on the date an information charging the crime or, if the crime was then chargeable, charging a crime arising from the same conduct or same criminal episode, is filed under Rule 231(f) [or, if the prosecution is initiated by indictment, on the date an indictment charging the crime is returned], unless:
>
> (1) the information [or indictment] was dismissed on motion of the defendant . . . or
>
> (2) the defendant is to be retried . . . .

The Comment to the rule notes that the words "if the crime was then chargeable" are added to prevent situations such as a murder trial's time running from the filing of an assault information long before the victim died.

Other states have decided in conformity with this rule. In *State ex rel. Lee v. Rose*, 277 So. 2d 66 (Fla. Dist. Ct. App. 1973), Oscar Lee was involved in an automobile accident in which a pedestrian was injured. He was arrested on the charge of driving while intoxicated on June 22, 1972, and was admitted to bail and released that same day. On July 19, the pedestrian died, and on August 21, Lee was charged with manslaughter. On October 11, Lee voluntarily appeared at jail and was released on bond. On December 29, Lee filed a motion for discharge which the trial judge denied, finding that the time for speedy trial began July 19, 1972, the date the victim died. On appeal, Lee contended that June 22, 1972, the date of his original arrest, was the date that triggered the speedy-trial time.

The Florida speedy-trial rule stated:

> The time periods established by this section shall commence when such person is taken into custody as a result of the conduct or criminal episode giving rise to the crime charged. . . .

277 So.2d at 67. The Florida District Court of Appeal considered the question of when the 180-day time period began to run and held that the time began to run not on the date the victim died, as held by the trial judge, but on October 11, the date Lee voluntarily surrendered for the crime of manslaughter. The court stated that on June 22 the conduct or criminal episode gave rise only to the misdemeanor offense, and that until the pedestrian died, the conduct or criminal episode did not give rise to the charge of manslaughter. Therefore, it was not possible to charge Lee with manslaughter unless and until death occurred. *See*, *State ex rel. Branch v. Wade*, 357 So. 2d 473 (Fla. Dist. Ct. App. 1978) (once the time period begins to run, it runs as to charges arising from the alleged criminal conduct which could be brought against the accused at that time).

In *Mejia v. State*, 734 S.W.2d 98 (Tex. Ct. App. 1987), the appellant argued that the trial court erred in overruling his motion to set aside the indictment under the provisions of the Texas speedy-trial act. That act provides:

> Sec. 1. A court shall grant a motion to set aside an indictment, information, or complaint if the state is not ready for trial within:
>
> (1) 120 days of the commencement of a criminal action if the defendant is accused of a felony.
>
> . . . . .
>
> Sec. 2 . . . [A] criminal action commences for purposes of this article when an indictment, information or complaint is filed in court, unless prior to the filing the defendant is either detained in custody or released on bail or personal bond to answer for the *same offense or any other offense arising out of the same transaction, in which event the criminal action commences when he is arrested.*

734 S.W.2d at 99 (emphasis in original).

Appellant Mejia was arrested on July 27, 1984, after an automobile collision resulted in the hospitalization of the victim. Appellant was released on July 29 without charges being filed. On August 14, 1984, he was charged with misdemeanor driving while intoxicated. On August 15, he was arrested and released on bond.

On September 22, the victim died. On September 25, the driving while intoxicated charge was dismissed, and a felony complaint was filed charging Mejia with involuntary manslaughter. He was arrested September 26 on the felony, posted bond, and was released. He was subsequently convicted by a jury. On appeal, he argued that his arrest on July 27, 1984, was the commencement of the criminal action. The Texas Court of Appeals considered when the 120-day time period began to run and held that the offense of involuntary manslaughter did not arise out of the driving while intoxicated incident, because appellant could not have been charged with the offense of involuntary manslaughter until after the victim died on September 22, 1984. "Then and only then did the offense arise." 734 S.W.2d at 101. The court pointed out "[t]he Speedy Trial Act cannot begin to run on an offense that has not yet ripened into an offense." 734 S.W.2d at 102.

Under the authority cited above, we hold that the speedy-trial rules do not commence running until all the elements of the charged offense have been completed. Because the victim in this case had not died on April 11, the date of appellant's arrest for first-degree battery, all the elements of murder had not been completed, and the speedy-trial rules could not run from that date. We are not unmindful of the cases cited by appellant in his brief. However, those cases involve situations where the elements of the second charge were complete at the time of the original arrest.

Appellant also has argued on appeal that even if the speedy-trial time commenced on May 21, 1996, his trial on July 29, 1997, fell outside the one-year speedy-trial limitation. Ark. R. Crim. P. 28.1(b) (1998). Appellant acknowledges that the delays occasioned by his request and the State's request for a continuance should be excluded, but says that even considering these exclusions, trial was held on the 366th day. He contends on appeal that July 28, the 365th day, was the last day on which he could be tried. We disagree.

Appellant's trial took place on July 29, 1997, which was 434 calendar days after his arrest on May 21, 1996 for murder. From our review of the record, the following excludable periods of delay are allowed under Ark. R. Crim. P. 28.3 and can be used by the State in calculating appellant's speedy-trial time:

May 12, 1997 until July 22, 1997 (Cheatham's writ of prohibition)	71 days
July 22, 1997 until July 29, 1997 (State's continuance for expert witness)	7 days 78 excludable days

Trial was originally set for May 14,1997. However, on May 12, the Court heard and denied appellant's motion to dismiss, which was based on an alleged speedy-trial violation. At the conclusion of that hearing, defense counsel announced his intent to file a writ of prohibition seeking to prohibit trial, again based on the alleged speedy-trial violation. The writ was filed May 13 and was subsequently denied by the supreme court. Due to the writ, trial was continued at appellant's request to July 22. The seventy-one-day period from May 12 until July 22 is excludable as a period of delay resulting from a continuance granted at the request of appellant or his counsel. *See* Ark. R. Crim. P. 28.39(c); *Rhodes v. Capehart*, 313 Ark. 16, 852 S.W.2d 118 (1993).

Additionally, when trial was continued from May 14 to July 22, an expert witness for the State who would have been available May 14 was not available July 22. The State's request for a continuance on this basis was not opposed by appellant, and the court continued the case to July 29. This seven-day period from July 22 until July 29 is excludable pursuant to Ark. R. Crim. P. 28.3(d)(1).

Thus, we find that appellant's trial was held on the 356th day and was not violative of our speedy-trial limitations.

Affirmed.

JENNINGS and BIRD, JJ., agree.

Randy HYATT *v.* STATE of Arkansas

CA CR 98-182 975 S.W.2d 433

Court of Appeals of Arkansas
Division II
Opinion delivered September 30, 1998

[redacted]

Booth & Honeycutt, PLC, by: *J. Marvin Honeycutt*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Randy Hyatt appeals from his conviction at a jury trial of rape, for which he was sentenced to thirty years in the Arkansas Department of Correction. He contends that the trial court erred in allowing the prosecuting witness to testify concerning other instances of sexual abuse by appellant. We affirm.

Appellant was charged with having raped his thirteen-year-old daughter on January 24, 1997. At trial, the victim testified that she began living with her mother and appellant approximately three years prior to the trial, or two and one-half years prior to the offense for which appellant was being tried. Before that, the victim had lived with her grandmother. At some point, the family moved to Oregon for several months and then moved back to Arkansas. The victim testified that, on January 24, she and her family went to Wal-Mart. When they returned home, appellant told her that he needed to talk to her in her bedroom about her grades. Once in the bedroom, appellant told her to take off all of her clothes, which she did. He then removed his clothes and penetrated her vagina with his finger and his penis. Afterwards, appellant told her to get dressed, which she did. Over appellant's objection, the victim was also allowed to testify that, while they lived in Oregon, appellant began touching her private areas under her clothing. She stated that this would occur about once a week. She further testified that, after returning to Arkansas, appellant continued to touch her in the same places. Eventually, appellant began to remove the victim's clothes and have intercourse with

her. According to the victim, this activity continued periodically until the episode for which appellant was prosecuted.

■ ■ On appeal, appellant contends that the trial court erred in permitting the victim to testify about any acts of sexual misconduct by appellant other than that which occurred on January 24. He argues that the evidence was unrelated to the charged offense in time, location, and nature, and was introduced only to show his poor character in violation of Ark. R. Evid. 404. We find no error.

Rule 404(b) provides:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Munson v. State*, 331 Ark. 41, 959 S.W.2d 39 (1998). Were this not a case involving the sexual abuse of a child, the evidence of appellant's other bad acts might well be inadmissible character evidence under Rule 404. *See Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994). However, our courts have long recognized a "pedophile exception," which allows proof of "similar acts with the same child or other children in the same household when it is helpful in showing a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship." *Id.* at 197, 884 S.W.2d at 950 (citations omitted). Such evidence not only helps to prove the depraved sexual instinct of the accused, *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998), but is also admissible to show the familiarity of the parties and antecedent conduct toward one another and to corroborate the testimony of the victim, *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987) (citing *Williams v. State*, 103 Ark. 70, 146 S.W.2d 471 (1912)).

The fact that some of appellant's prior misconduct occurred in Oregon up to as much as two and one-half years before the charged offense does not necessarily render the evidence inadmissible. *See Greenlee v. State, supra* (evidence of multiple prior sexual offenses that occurred in Oklahoma admitted in Arkansas rape case); *Munson v. State, supra* (two and one-half years between prior conduct and charged offense); *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996) (eleven years between prior conviction and charged offense). Nor was the evidence in this case inadmissible simply because some of the prior conduct did not rise to the level of rape. *See Greenlee v. State, supra* (evidence of indecent exposure and lewd molestation offenses admitted in rape prosecution). In line with our supreme court's statement in *Free v. State, supra*, of the purpose behind admitting this type of evidence, one text writer explains the point as follows:

> The "entire picture" theory is important in sex offense litigation. The theory is sometimes used to admit uncharged aspects of the sexual relationship between the victim and the perpetrator. Such evidence is particularly relevant when the perpetrator engages in a course of progressively more intrusive sexual conduct with the child. The perpetrator may begin with seductive talk or brief touching, and progress over weeks or months to sexual intercourse, fellatio, and similar invasive acts. When the defendant is charged with a single incident of invasive sexual contact, the jury sometimes needs information about the entire course of the relationship to fairly evaluate the victim's credibility.

2 J. Meyers, *Evidence in Child Abuse and Neglect Cases*, § 8.25, pp. 483-84 (3d ed. 1997) (footnotes omitted). From our review of the record in this case, we cannot conclude that the trial court abused its discretion in admitting the evidence of appellant's prior sexual misconduct toward the victim.

Affirmed.

ROGERS and GRIFFEN, JJ., agree.

SWIFT-ECKRICH, INC. *v.* Sheila BROCK

CA 98-262 975 S.W.2d 857

Court of Appeals of Arkansas
Division I
Opinion delivered September 30, 1998

[redacted]

Bassett Law Firm, by: *Curtis L. Nebben*, for appellant.

Scott Hunter, for appellee.

WENDELL L. GRIFFEN, Judge. Swift-Eckrich, Inc., appeals from the opinion and order of the Arkansas Workers' Compensation Commission filed on November 12, 1997, which awarded Sheila Brock benefits for permanent partial impairment to the body as a whole. The appellant raises the sole issue that there is no substantial evidence in the record to support this award. We affirm. Brock was struck by a vehicle in her employer's parking lot on December 1, 1994. She was knocked unconscious and has no memory of that event. CT scans taken during her hospitalization revealed cerebral edema and interhemispheric hemorrhage. Neuropsychological testing by Dr. Michael Inman was done in

February 1995 and March 1996. The testing was interpreted by Dr. Inman, who concluded that Brock sustained residual defects in verbal memory, higher level balance, and that she sustained loss of smell and taste secondary to cranial nerve damage. Based upon those factors, Dr. Inman concluded that Brock had sustained permanent physical impairment of five percent to the body as a whole. Brock returned to her pre-injury job and wage. The employer accepted her injury and treatment as compensable, but controverted the permanent impairment rating.

A hearing was held before the Administrative Law Judge (ALJ) on February 5, 1997, where the ALJ found that, as a result of her compensable injury, appellee sustained a five percent permanent partial impairment to the body as a whole. The ALJ found that the impairment was supported by appellee's trauma, which caused a loss of consciousness, a concussion, interhemispheric hemorrhage, cerebral edema, partial lateral meniscus tear, and other "residual problems." The ALJ denied wage-loss disability and vocational rehabilitation benefits because appellee had successfully returned to her pre-injury occupation and was earning the same wages.

The appellant timely appealed this award of permanent partial disability benefits to the Arkansas Workers' Compensation Commission. Appellant argued that the findings of the ALJ were not objective and measurable findings of any permanent impairment, but only demonstrated the compensable injury. Appellant also argued that the five percent rating of impairment was not in accordance with the guidelines specifically adopted by Rule 34 of the Arkansas Workers' Compensation Commission. The Workers' Compensation Commission affirmed the decision of the ALJ, and found that appellee Brock sustained cognitive dysfunction and impairment due to the brain trauma.

In reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences in the light most favorable to the Commission's findings and affirm if supported by substantial evidence. *Arkansas Dept. of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993).

Substantial evidence exists "if reasonable minds could have reached the same conclusion." *Kuhn v. Majestic Hotel*, 324 Ark. 21, 23, 918 S.W.2d 158, 159 (1996)(quoting *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 127-28, 890 S.W.2d 253, 253-54 (1994)). Matters of credibility are exclusively within the Commission's domain. *Id.* Even where the basis of credibility is "specious at best," such a matter is for the Commission's determination. *Williams, supra.* Where there are contradictions in the evidence, the Commission is allowed to reconcile the evidence and does not have to reject the testimony nor consider a claimant's testimony as uncontroverted. *Williams, supra.* The authority of the Commission to resolve conflicting evidence also extends to medical testimony. *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. *Reeder v. Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion, and is not required to reject medical testimony simply because the doctor describes the bases for his opinions as subjective. *Id.* There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. *Id.*

■ ■ Appellant argues that Brock's problems stem from underlying psychiatric problems, and that the injuries are not permanent impairments "supported by objective and measurable physical or mental findings" as required by Arkansas Code Annotated section 11-9-704(c) (Repl. 1996). Objective findings are defined as "those which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16) (Supp. 1997); *see University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997); *see also Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992)(holding that objective findings are based upon observable criteria perceived by someone other than claimant). Thus, the claimant's pain and other verbal responses to clinical tests may not be considered. *Duke v. Regis Hairstylists*, 55

Ark. App. 327, 935 S.W.2d 600 (1996).[1] Appellant argues that because Brock's problems are psychiatric, Chapter 14 of the *AMA Guidelines to the Evaluation of Permanent Impairment*, 4th ed., determines what will constitute sufficient objective findings. Appellant contends that the medical testimony used the incorrect standards of an earlier edition, and, therefore, is insufficient.

On the other hand, Brock argues that because her injury involved a physical trauma to the brain, Chapter 4 of the *Guidelines* determines what will constitute sufficient objective findings, and that Chapter 4 was properly used in this case.

The Commission is to determine the credibility of the medical evidence and may review the basis for the opinion. *See Foxx* and *Reeder*, *supra*. The Commission found that Brock's cognitive dysfunction and impairments were caused by actual physical trauma to the brain, and looked to Chapter 4 of the *Guidelines* in finding impairment. Its opinion emphasized the CT scans, which showed cerebral edema and interhemispheric hemorrhaging. In reviewing the basis for the medical opinion, the Commission found that the evidence was sufficiently objective to support a finding of impairment under Chapter 4 of the *Guidelines*, and it cannot be said that the Commission erred in making that determination.

Appellant claims that this evidence demonstrates a compensable injury, but does not constitute objective findings of impairment. Appellant seems to argue that Brock's compensable injury is not the major cause of any permanent impairment, which prevents awarding of permanent benefits. *See Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996). Arkansas Code Anno-

[1] Although this court has previously found that objective findings included diagnoses developed by physicians "based on results obtained from clinical tests which reveal consistent and repeated responses to specific stimuli," *Keller*, 40 Ark. App. at 98, 845 S.W.2d at 17, such holdings are no longer valid in light of the strict interpretation of the statute which defines objective findings as those not under the voluntary control of the patient. *Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996). Objective findings did not exist in *Duke* where the findings were based upon patient responses to stimuli even where the tests had built in safeguards against patient fabrications. Objective findings did exist in *Daniel v. Firestone*, 57 Ark. App. 123, 942 S.W.2d 277 (1997), where the doctor observed a "fibrous mass" in the patient's body.

tated section 11-9-102(5)(F)(ii)(a) (Repl. 1997) provides that "[p]ermanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." "[M]ajor cause" is that which is more than half of the cause. Ark. Code Ann. § 11-9-102(14).

Although Brock's complaints of pain and headaches are indications over which she has voluntary control, and are not to be considered as objective findings, her intracranial bleeding, cranial nerve damage with loss of smell and taste, and the results of her CAT scan are objective findings according to *Duke, supra.* Conflicting evidence as to whether something is a major cause is a question of fact accorded the Commission, *Blytheville v. McCormick*, 56 Ark. App. 149, 939 S.W.2d 855 (1997). Here, the Commission found that Brock's injuries were a result of head trauma, not underlying mental problems. It cannot be said that the Commission's decision was not based on substantial evidence.

Affirmed.

NEAL and STROUD, JJ., agree.

GRAND STATE MARKETING *v.* EASTERN POULTRY DISTRIBUTORS, INC.

CA 97-1569 975 S.W.2d 439

Court of Appeals of Arkansas
Division II
Opinion delivered September 30, 1998

Floyd A. Healy, for appellant.

Christopher O. Parker, for appellee.

TERRY CRABTREE, Judge. This case concerns a contract for the sale of 858 cases of frozen chicken. The seller, appellant Grand State Marketing, filed suit to recover $11,668.80 due on the contract. The buyer, appellee Eastern Poultry Distributors, Inc., answered that it had revoked acceptance of appellant's product because some of the cases contained a cut of chicken inferior to that which was specified in the contract. The trial judge agreed that the goods were nonconforming and entered an order allowing appellee to deduct lost profits, transportation and storage charges, and attorney's fees from the amount owed on the contract. We affirm.

On February 26, 1996, appellee purchased 34,320 pounds of frozen chicken from appellant. The chicken was packaged in 858 forty-pound cartons and priced at $.34 per pound. According to two of appellee's traders, Joe Reed and Joe Rogers, they were assured by appellant that the poultry was split fryer breasts and no more than six to eight months old. After the sale, appellee in turn sold the chicken to Western Box Beef in Portland, Oregon, for $.64 per pound. Approximately two weeks later, Western Box Beef rejected 521 of the 858 cases (20,840 of 34,320 pounds). Appellee stopped payment on its check to appellant and notified appellant that the rejected cases contained pieces rather than split breasts and were dated 1994 rather than 1995. When appellant refused to accept a return of the 521 cases, appellee sold them to a buyer in Chicago for $.42 per pound.

On May 13, 1996, appellant sued appellee for the $11,668.80 contract price. Appellee claimed it was entitled to offset its lost profits on the 521 cases, storage charges incurred in Portland, and freight charges incurred in transporting the 521 cases from Portland to Chicago. After a nonjury trial, the judge found that the goods were nonconforming. He allowed appellee to deduct from the contract price $4,584.80 in lost profits; $328 in storage charges; $1,868.70 in freight charges; and, pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1994), $678.15 in attorney's fees.

Appellant's first argument on appeal is that appellee did not properly revoke acceptance of the goods. This argument is based

upon the fact that appellee's representatives did not look at a sample of the chicken before purchasing it. In support of its argument, appellant relies on the following section of the Uniform Commercial Code, contained in Ark. Code Ann. § 4-2-608(1)(b) (Repl. 1991):

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:
>
> . . . .
>
> (b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

The above-quoted statute allows a buyer to revoke acceptance of a "lot or commercial unit." A "commercial unit" is defined in Ark. Code Ann. § 4-2-105(6) (Repl. 1991) as follows:

> "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

The frozen chicken in this case was packaged in forty-pound cartons and was priced at $.34 per pound. Division of the product into cartons did not materially impair "its character or value on the market or in use," and a carton is similar to a "bale, gross, or carload" as referred to in the statute. Therefore, each carton constituted a commercial unit and appellee could properly accept some cartons and reject or revoke its acceptance of others. *See, e.g., Badger Produce Co., Inc. v. Prelude Foods Int'l, Inc.*, 130 Wis.2d 230, 387 N.W.2d 98 (1986) (in a sale involving 1,000 boxes of seafood, each box was a commercial unit). Additionally, when goods are sold by the pound, or other unit of weight, that unit of weight may be considered a commercial unit. *See Figueroa v. Kit-San Co.*, 123 Idaho 149, 845 P.2d 567 (1992) (product sold per

ton); *Askco Eng'g Corp. v. Mobile Chem. Corp.*, 535 S.W.2d 893 (Tex. Civ. App. 1976) (product sold per pound).

Turning now to the evidence in the case, it is undisputed that, before concluding the sale, Darrell Glen, appellant's chairman of the board, advised appellee's representatives that they could view a sample of the chicken. In fact, Glen called the storage facility where the chicken was located and gave the facility authority to release a sample. However, according to Joe Reed, both appellant and appellee wanted to move the chicken quickly, and there was no time to view a sample. Additionally, Reed said, it would have been hard to tell which cartons were conforming and which were not without looking at all 858 of them. Therefore, instead of looking at samples, Reed specifically advised Glen that he would rely on Glen's assurance that the chicken was 1995 production split fryer breasts. That testimony was confirmed by Joe Rogers.

Section 4-2-608(1)(b) does not always require a buyer to view the product prior to acceptance. It allows revocation if the buyer's acceptance of goods has been induced by the seller's assurances. Arkansas case law has recognized a buyer's right to revoke acceptance under such circumstances. *Dopieralla v. Arkansas La. Gas Co.*, 255 Ark. 150, 499 S.W.2d 610 (1973); *Parker v. Johnston*, 244 Ark. 355, 426 S.W.2d 155 (1968). Although Glen denies making any assurances with regard to the production date of the chicken, and denies making any quality assurance other than that the chicken was "wholesome," Reed and Rogers testified unequivocally that Glen assured them the poultry was 1995 production split fryer breasts. We view the evidence and all reasonable inferences therefrom in the light most favorable to the appellee. *Brady v. Bryant*, 319 Ark. 712, 894 S.W.2d 144 (1995). Given the testimony of Reed and Rogers regarding their reliance on Glen's assurances, we find no infirmity in appellee's revocation of acceptance.

Next, appellant argues that appellee did not provide sufficient proof of the product's nonconformity. In particular, appellant claims that (1) the record is void of evidence indicating

that the 521 rejected cases were anything other than that represented by appellant; (2) that appellee failed to prove its damages; and (3) that appellee did not prove why Western Box Beef rejected the product. Before beginning our analysis of this issue, we note that, when a circuit judge is sitting as fact-finder, we will not reverse his findings unless they are clearly erroneous. *Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997). Whether goods are nonconforming is a question of fact. *O'Neal Ford, Inc. v. Early*, 13 Ark. App. 189, 681 S.W.2d 414 (1985). Nonconformity is to be determined within the framework of the facts in each particular case. *Frontier Mobile Home Sales, Inc. v. Trigleth*, 256 Ark. 101, 505 S.W.2d 516 (1974). The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the appellee. *Brady v. Bryant, supra.*

For a buyer to revoke his acceptance of a lot or commercial unit on the basis of nonconformity, the nonconformity must substantially impair the value to the buyer. *O'Neal Ford, Inc. v. Early, supra. See also* comment 2, Ark. Code Ann. § 4-2-608 (Repl. 1995). Appellee successfully proved, through the testimony of Joe Reed, that the value of the goods in this case was substantially impaired. According to Reed, upon rejection of the 521 cases, Western Box Beef, as justification for its rejection, sent appellee a copy of a label from a nonconforming package. The label read "Frying Chicken Parts Breast Portions With Back Portions" and was dated 1994. Reed testified that 1994 production chicken had less value than 1995 production. He also said that the cut of chicken reflected on the label was a less desirable commodity than split fryer breasts. This was disputed by Darrell Glen. Glen testified that there was no difference between split fryer breasts and the cut of chicken shown on the label. Because the trial judge found that the goods were nonconforming, he obviously believed Reed's testimony. Decisions regarding the credibility of witnesses are to be made by the trier of fact. *Ozark Auto Transp., Inc. v. Starkey*, 327 Ark. 227, 937 S.W.2d 175 (1997). In particular, when a technical term is used, the trier of fact may determine in what sense the term was used. *Les-Bil, Inc. v. General Waterworks Corp.*, 256 Ark. 905, 511 S.W.2d 166 (1974).

Regarding proof of damages, the burden of proof is on the party claiming damages, and such proof must consist of facts, not speculation. *Marine Servs. Unlimited, Inc. v. Rakes*, 323 Ark. 757, 918 S.W.2d 132 (1996). If it is reasonably certain that profits would have resulted had the contract been carried out, then the complaining party is entitled to recover lost profits. *Tremco, Inc. v. Valley Aluminum Prod. Corp.*, 38 Ark. App. 143, 831 S.W.2d 156 (1992). The loss may be determined in any manner which is reasonable under the circumstances. *Id.* Incidental damages such as transportation and storage charges are also recoverable. *See* Ark. Code Ann. § 4-2-715 (Repl. 1991). Appellee proved through documentary evidence and testimony that it lost profits when it sold the rejected chicken at a price of $.42 per pound rather $.64 per pound. It also proved the amount of and necessity for the storage and freight charges. We find no failure of proof as to damages.

Finally, we conclude that there was no need to resort to speculation and conjecture to determine why Western Box Beef rejected the product. The company sent appellee a package label as justification for its rejection of the 521 cases. Reed testified that Western Box Beef had not before or since rejected an order from appellee. The package label sent to appellee reflected a product different than what appellee had represented it to be when it sold the chicken to Western Box Beef. Following the rejection, appellee was forced to sell the product at a reduced price.

Based upon the foregoing, we affirm the trial court's judgment.

Affirmed.

MEADS and ROAF, JJ., agree.

SPARKS REGIONAL MEDICAL CENTER *v.*
Donna SMITH

CA 97-1478 976 S.W.2d 396

Court of Appeals of Arkansas
Division II
Opinion delivered October 7, 1998

Warner, Smith & Harris, PLC, by: *G. Alan Wooten* and *Kathryn Stocks Campbell*, for appellant.

Law Offices of Charles Karr, by: *Charles Karr*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellee in this tort case, Donna Smith, sued the appellant, Sparks Regional Medical Center, alleging that, while she was a patient at Sparks on July 2, 1994, she was sexually assaulted by an employee assigned to bathe her. Appellee asserted that appellant had been negligent in hiring the employee, Jeff Chavez, because he previously had been discharged by another hospital for sexually harassing a patient. Appellee further asserted that appellant had been negligent in failing to properly supervise Mr. Chavez because appellant knew that Mr. Chavez had sexually harassed other patients while employed by appellant. The jury found in favor of appellee and awarded her damages in the amount of $80,000. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in denying its motions for directed verdict at the close of the trial and for judgment notwithstanding the verdict after the verdict was returned. Appellant argues that it was not responsible for the intentional criminal conduct of Mr. Chavez because Mr. Chavez was acting outside the scope of his employment when he sexually assaulted appellee. We affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Medlock v. Burden*, 321 Ark. 269, 900 S.W.2d 552 (1995). Our standard in reviewing the sufficiency of the evidence is well settled: (1) the evidence is viewed in a light most favorable to the appellee; (2) the jury's finding will be upheld if there is any substantial evidence to support it; and (3) substantial evidence is evidence of sufficient force and character to induce the mind of the fact finder past speculation and conjecture. *Id.* Similarly, where a motion for judgment notwithstanding the verdict is denied, we must also determine whether the verdict is supported by substantial evidence. *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993).

Viewing the evidence, as we must, in the light most favorable to the appellee, the record reflects that, before he was hired by appellant, Mr. Chavez was discharged by St. Edward Mercy Medical Center for sexually abusing patients. Criminal charges were filed against him based on one of those incidents. After being terminated by St. Edward, Mr. Chavez applied in July 1993 for a position at the appellant hospital. He did not list St. Edward as a prior employer on his application, and, although a five-year gap in Mr. Chavez's employment history appeared on his application for employment with appellant, appellant neither investigated the matter nor performed a background check. Mr. Chavez was hired by appellant and, after beginning his employment, was seen by other employees of appellant who had worked with him at St. Edward and were aware of the incident resulting in his dismissal. In January 1994, a fellow employee reported that two female patients in the psychiatric ward informed him that Mr. Chavez had engaged in sexual contact and conversation with them in their rooms. Appellant placed Mr. Chavez on probation in a disciplinary-action report that stated:

> Jeff, as you are aware, this is an extremely serious situation. This behavior would certainly result in immediate termination if verified by those patients involved. At this time, I am placing you on probation as there is still some variation in the report by the patients involved. Jeff, you must understand that any occurrence of this nature *will* result in immediate termination. I would advise you to consider very carefully the areas in which you agree

> to work — do not put yourself in a position that might result in a repeat of this.

Although Mr. Chavez was placed on disciplinary probation, his work activities at the hospital were not altered or restricted. Approximately six months later, on July 2, 1994, Mr. Chavez entered the hospital room of appellee, who was recovering from surgery to correct complications arising out of a heart catheterization. Mr. Chavez announced that he had been assigned to bathe appellee, and he did so against her express wishes and protestations. He pushed her gown up to her breasts, bathed only her vaginal area, and left her in a wet bed when he was finished. Appellee suffered extreme psychological trauma, anxiety, and distress as a result of the incident. Appellant concedes that Mr. Chavez's act was criminal and that it resulted in a conviction of first-degree sexual abuse.

Appellee proceeded below on the theories of respondeat superior, negligent hiring, and negligent supervision. Appellant argues that the evidence was insufficient to support a verdict for appellee on any of these theories. We limit our discussion to the sufficiency of the evidence to support a finding of negligent supervision because we find that issue to be dispositive.

Appellant contends that this case is controlled by *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997). We do not agree. *Porter* involved a claim against an employer when a radiology technician in his employ sexually assaulted a patient during an ultrasound examination. Although the facts of *Porter* and the case at bar are not dissimilar, the supreme court's discussion focused on the question of whether the employer was vicariously liable under the respondeat superior doctrine for the technician's criminal conduct. The supreme court held that no vicarious liability arose because the technician was not acting within the scope of his employment when he assaulted the patient. Although issues were presented regarding the separate theory of negligent supervision, the supreme court declined to address them because the appellant in *Porter* (whose burden it was to show error) failed to offer any convincing argument or authority in support of his contention. Consequently, while *Porter* does indeed stand for the proposition that an employer is not *vicariously* liable for the intentional,

unexpectable, criminal acts of his employees, it says nothing about an employer's liability for his *own* negligent failure to supervise such an employee.

The distinction between the theories of respondeat superior and negligent supervision has been described as follows:

> Employers are subject to direct liability for the negligent hiring, retention, or supervision of their employees when third parties are injured by the tortious acts of such unfit, incompetent, or unsuitable employees. In order to recover, the plaintiff must show that the employer knew, or in the exercise of ordinary care should have known, that its employee's conduct would subject third parties to an unreasonable risk of harm.
>
> This theory is completely separate from the respondeat superior theory of vicarious liability because the cause of action is premised on the wrongful conduct of the employer, such that the employer's negligence was the proximate cause of the plaintiff's injuries.
>
> * * * *
>
> In addressing the risk created by exposing the public to potentially dangerous individuals, employer liability does not, in most jurisdictions, depend upon the scope of employment requirement of respondeat superior. Therefore, the claim provides a remedy to third parties who otherwise would not be able to recover under respondeat superior because of the scope of employment requirements.

27 AM. JUR. 2d *Employment Relationship* § 472 (1996).

Arkansas recognizes the tort of negligent supervision. *See American Automobile Auction, Inc. v. Titsworth*, 292 Ark. 452, 730 S.W.2d 499 (1987). Even where the employee commits an intentional tort, the victim may proceed against the employer under the theory of negligent supervision of the employee who committed the tort. *Id.* In *St. Paul Fire & Marine Insurance Co. v. Knight*, 297 Ark. 555, 764 S.W.2d 601 (1989), the supreme court reversed a verdict against an employer for negligently retaining an employee where the employer had no information that would have led it to conclude that the employee might be predisposed to commit violent acts against anyone. In the case at bar, however, we think that the evidence would support a finding that appellant

had sufficient information to conclude that there was a distinct danger that Mr. Chavez would pose a danger to female patients; appellant itself characterized the report of Mr. Chavez's sexual abuse of the psychiatric patients as "extremely serious" but took no action to protect other patients from such abuse. Under these circumstances, we think that there was sufficient evidence to support a finding that appellant had been negligent in supervising Mr. Chavez following the report of his abuse of the psychiatric patients, and we affirm.

ROGERS and GRIFFEN, JJ., agree.

Michael Scott CAMPBELL *v.* Bonnie CAMPBELL

CA 97-380 975 S.W.2d 869

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered October 7, 1998

Appellant, pro se.

Susan M. Johnson, for appellee.

JOHN F. STROUD, JR., Judge. Bonnie and Michael Scott Campbell were divorced in November 1993, and Mr. Campbell was granted custody of their daughter and son. Ms. Campbell subsequently filed a motion to modify custody on the basis of changed circumstances. Her motion was granted after a hearing in December 1996. At that time, the younger child, the son, was eight years old. Mr. Campbell filed a motion for reconsideration that was denied, and this appeal ensued.

Mr. Campbell, a third-year law student when custody was changed, proceeds *pro se* in the appeal. He contends that "the chancellor abused his discretion in determining that it was in the best interest of the minor children to be placed in the permanent custody of appellee when it was clearly against the preponderance of the evidence." From a review of the record *de novo*, we find that a material change in circumstances did occur, and for the reasons set forth below, we affirm the chancellor's decision that it was in the best interest of the children to change custody to Ms. Campbell.

The principles governing the modification of custody are well-settled. In all such cases, the primary consideration is the best interest and welfare of the child, and all other considerations are secondary. *Watts v. Watts,* 17 Ark. App. 253, 707 S.W.2d 777 (1986). Custody awards are not made or changed to gratify the desires of either parent, or to reward or punish either of them. *Id.* In determining matters of child custody, a chancellor has broad discretion, which will not be disturbed unless manifestly abused. *Id.* The original decree is a final adjudication that one parent or the other was a proper person to have care and custody of the child, *id.*; custody should not be changed unless conditions have altered since the decree was rendered or material facts existed at the time of the decree but were unknown to the court, and then only for the welfare of the child. *White v. Taylor*, 19 Ark. App. 104, 717 S.W.2d 497 (1986). The burden of proving such a change is on the party seeking the modification. *Watts v. Watts,* 17 Ark. App. 253, 707 S.W.2d 777. Although this court reviews chancery cases *de novo*, we will not disturb the findings of the

chancellor unless they are clearly against a preponderance of the evidence. *Id.* Since the question of preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor. *Id.* This deference to the chancellor is even greater in cases involving child custody. *Id.* In those cases, a heavier burden is placed on the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony, and the child's best interest. *Id.* We have often stated that we know of no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as great a weight as those involving minor children. *Id.*

Ms. Campbell, who previously had been hospitalized for depression, testified that this illness was due to the break-up of her marriage, Mr. Campbell's seeing another woman, and the first custody fight. She stated that her treating physician released her in March 1994 and that she no longer suffered depression. She testified that she had been assistant manager of Briarwood Apartments for three years and that she had a new job with ERC Properties as district manager of four properties containing two hundred units each.

Dr. Phillip Barling, a psychologist, interviewed the children at the court's request concerning allegations made by Ms. Campbell in her motion for change of custody. He also visited with Mr. Campbell. He submitted a report to the chancellor and testified at the hearing. He stated that Ms. Campbell had previously asked him to see the children, but he had told her that he could not do so without permission of Mr. Campbell or the court.

Dr. Barling testified that he did not feel that the children were in physical danger but that he was concerned about their emotional functioning. He described Michael at the time of the interview as fearful and visibly upset, even to the point of crawling up onto the doctor's lap and crying. He said Michael was very concerned that his father would be angry with him for what he said in the interview, and Dr. Barling saw Michael as being overwhelmed by "the whole situation."

Dr. Barling also testified that Nicole told him that she had figured out she could avoid trouble by just staying in her room and reading. Her notion of staying out of trouble by isolating herself caused him some concern that she was developing coping patterns that could cause more problems later on. Dr. Barling stated, "While Michael was more obviously emotionally distraught, I was concerned really about both children."

The children's teachers and Mr. Campbell's friends testified regarding the children's relationship with their father and their impressions of the children. The teachers described both children as good students; Michael as a happy, wonderful boy; Nicole as happy, mature, responsible, and well-adjusted; and Mr. Campbell as a supportive father who visited the school often and was very involved with his children. Friends attested that Mr. Campbell and his children had a good, loving relationship.

Mr. and Ms. Campbell and their witnesses testified that the respective parents had loving family relationships with the children. The parties also testified regarding their noncompliance with an order in their divorce decree that they not have overnight guests of the opposite sex when the children were present. Ms. Campbell testified that she lived with her boyfriend, David Garner, and had done so for two years before the hearing. She stated that the relationship was stable and beneficial, and that the couple planned marriage. Mr. Campbell testified that although a girlfriend had stayed overnight with him on occasion, the children were never aware of it because she slipped out of the window early in the mornings. He admitted to being arrested in front of his children for disorderly conduct when he poured beer on the girlfriend, who was attending the county fair with another man.

During the hearing, the chancellor interviewed the children in chambers. At the conclusion of all the evidence, the chancellor announced the following findings from the bench:

> [A]fter hearing the parties and their witnesses and having considered the evidence and after having lengthy conversation with the children in chambers, Court's findings are that . . . in all probability I would not change custody in this case if it were not for Michael's overwhelming desire to be with his mother, *I am*

> *convinced that because of Michael's desire to be with his mother that his best interest can only be served by placing him with her.*
>
> While I believe Nicole's best interest would not be harmed if she were left in the custody of her father, the Court believes it is in both children's best interest to stay together.
>
> Accordingly, I am awarding custody of both children at this time to their mother, subject to visitation set out in the Court's standard visitation order in the father.
>
> This is a painful decision for the Court because in many ways, the Court believes that the children's father has done an outstanding job in raising these children . . . .
>
> However, *after lengthy interview with the children I find Michael to be as Dr. Barling did, a tearful, stressed, almost frightened little boy who desperately wants to be with his mother.* When I reminded Michael how hard his father had tried to be a good father to both him and his sister [he started] crying and said, "He's not going to let us go to Mom."
>
> In summary, this little boy wants and needs his mother for whatever reason and *I am convinced not to grant this desire would be emotionally damaging if not devastating to him.*
>
> *My job is to do what is in the children's best interest,* not their parents['], no matter how much sympathy I may have with one of those parents. . . .

(Emphasis added.)

After the order was announced, appellant's counsel asked, "Are you not making any provision that Ms. Campbell has to either marry this man or separate from his household? Are you condoning and going to allow, through your order, that the children be over there . . . ." The chancellor replied, "I'm going to be watching that. That is a concern of mine . . . . Ms. Campbell can conduct herself accordingly."

Within days of the order, Mr. Campbell filed a motion for reconsideration based on two statements allegedly made by Michael at the conclusion of the hearing when the parties were leaving the courtroom on December 19, 1996. The motion stated that Michael had handed his father a note which read, "I am sorry I lied and spyed [*sic*]"; and that the bailiff had heard Michael tell his mother, "I guess I get my cellular phone now." Mr. Campbell's motion contended that the chancellor erred in basing his

decision on the desires of an eight-year-old child, especially in view of the two statements. Responding to the motion, Ms. Campbell stated that Michael had not had a chance to hand his father anything in the courtroom, that the deputy had not been close enough to hear clearly, and that Ms. Campbell had given Michael a $15 set of walkie-talkies, which looked like cell phones, as a Christmas present. The chancellor denied Mr. Campbell's motion, stating that even if Michael's statements were true, they were not sufficient reasons for reconsideration.

A guardian *ad litem* appointed for the children submitted a report to the court that is not a part of the record. The record includes only a letter from the chancellor to the guardian, written after Mr. Campbell's motion for reconsideration was denied, which responds to the guardian's apparent disagreement with the chancellor's decision to change custody to Ms. Campbell. The letter includes the following:

> I felt that placing Michael back in the custody of his father would run the risk of Michael having an emotional breakdown, notwithstanding the fact that Michael might not have any justifiable reason for feeling such stress and emotional anxiety. However, it is obvious that the feelings of anxiety and stress are not necessarily logical ones. I felt that Michael needed to be removed from his present environment and the fact that his mother's home does not furnish a perfect environment is regrettable, but I still believe it is one that will be less stressful for Michael and less dangerous to his emotional health than his father's. It may be that Michael's placement will not be successful, but I am convinced that the evidence justifies giving it a try.
>
> I wish the choices in child custody decisions were black and white, but unfortunately, they seldom are. Mrs. Campbell has limitations as a custodian, . . . but at least for the time being I believe Michael's emotional health will be better served in her home than in his father's.
>
> As far as the children being placed in "what has traditionally been considered an unwholesome environment" and the court "essentially giving a stamp of approval to the arrangement," I had to balance the positive and negative factors in both homes when making my decision. The fact that Mrs. Campbell is not married to Mr. Garner was a negative factor which weighed against her receiving custody. The statement that the court has given a

> stamp of approval to her living arrangement reveals a lack of appreciation for the difficulty the court experienced in weighing all of the factors that went into the court's decision. As far as giving Mrs. Campbell a time table to get married, I am simply not prepared to state that I will remove custody from her if she is not married within a given length of time, notwithstanding the fact that I have put her on notice her remaining unmarried while custodian of the children puts her custodianship at risk.

We now turn to the point of appeal as stated by appellant: "that the chancellor abused his discretion in determining that it was in the best interest of the minor children to be placed in the permanent custody of appellee when it was clearly against the preponderance of the evidence." In support of this sole point of appeal, appellant makes several arguments, including: 1) that the appellee was not in a more stable emotional condition since the last custody hearing; 2) that although Michael might have been distressed the day of the hearing, there was more than ample evidence that he had been happy and well-adjusted living with the appellant; and 3) that there was ample evidence of the appellee's attempt to influence the children to want to live with her. It is not necessary to address the foregoing arguments beyond stating that they either involve findings of fact or determinations of credibility made by the chancellor, with respect to which we find no clear error. The question of preponderance of the evidence turns largely on the credibility of the witnesses and we defer to the superior position of the chancellor.

Appellant's remaining arguments in support of his point of appeal are that "the chancellor erred and abused his discretion" 1) by holding that significant circumstances had changed and 2) by basing the change of custody of the minor children on the desire of an eight-year-old boy to be with his mother. We address these arguments below, also incorporating into them appellant's additional assertions that the chancellor erred by considering appellee's cohabitation with her boyfriend as a stable relationship, that the children are being subjected to a "reprehensible" relationship regarding their mother's cohabitation with her boyfriend, and that there had been no significant change of circumstances in the custodial home of the minor children.

Whether changed circumstances were significant enough to warrant a change of custody

In making the conclusory statement that the children are subjected to a reprehensible lifestyle, appellant cites no caselaw, statute, or other authority that cohabitation itself disqualifies a parent from obtaining custody. Although cohabitation is regarded as a negative in a custody determination, we view it as but one factor along with all other factors to be considered in deciding the best interest of the children. We note that here, while Ms. Campbell is in a continuous live-in relationship with her boyfriend, Mr. Campbell allowed a girlfriend to spend nights with him when the children were home, to sneak out the window, and to re-enter the home in the mornings.

Finally, we turn to the issue of changed circumstances, which the chancellor addressed as follows:

> In regard to whether circumstances have changed since the last custody decision, there is no question that they have. Mrs. Campbell has a steady job. She appears to be emotionally stable at this time unlike before and she is in an apparent stable relationship with a man . . . , notwithstanding the fact that the Court has misgivings about this out of wedlock relationship.

Appellant argues that appellee presented no evidence of changed circumstances in appellant's home or on his part and that, in citing changes only on the part of appellee, the chancellor erroneously shifted the burden of proof from the moving party to the custodial parent.

In *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996), the supreme court found that the chancellor erred in shifting the burden of proof away from Dr. Jones, the party seeking modification of the initial custody award, to require Ms. Jones, the non-moving party, to prove her ability to adequately provide an emotionally stable home environment for their child. The supreme court, viewing this erroneous shifting of the burden of proof together with the chancellor's faulty reliance on Ms. Jones's move from Conway to Little Rock and Dr. Jones's remarriage as material changes in circumstances, concluded that the chancellor's

decision to change custody to Dr. Jones was clearly erroneous. Citing Jeff Atkinson, *Modern Child Custody Practice*, § 9.07 at 462-63 (1986), the court acknowledged the majority view that a change of circumstances of the noncustodial parent, including a claim of an improved life because of recent marriage, is not sufficient to justify a modification of custody. The court found that under the circumstances of the case, including the fact that at the time of the original divorce decree it was within Dr. Jones's reasonable contemplation to remarry, his remarriage did not constitute a material change in circumstances. *Jones v. Jones*, 326 Ark. 481, 490-91, 931 S.W.2d 767, 771-72 (1996). We do not read the *Jones* case to say that changes in the life of the noncustodial parent are never pertinent in determining whether a significant change of circumstances has occurred, but that they were insufficient under the facts of that case to modify custody. In the instant case, unlike *Jones*, the chancellor did not shift the burden of proof to the custodial parent.

Although the chancellor here cited only changes in appellee's life as the basis for the change of custody, we find from our *de novo* review of the record that there was other evidence of changed circumstances and that appellee met her burden of proof. Dr. Barling stated that he was concerned about the emotional health of both children. He testified that Michael feared that his father would learn what the boy told the psychologist and that he exhibited unusual behavior by crying and climbing into the psychologist's lap. He opined that Michael was in obvious emotional distress and that Nicole's coping method of isolation could cause later problems. The chancellor, after interviewing the children, found Michael to be a tearful, stressed, almost frightened little boy with an overwhelming desire to be with his mother. There was also evidence that appellant had been arrested for disorderly conduct in front of the children after pouring beer on a former girlfriend. Taken together, this constitutes evidence that circumstances of the children's living with their father had changed sufficiently for the chancellor to consider whether the best interests of the children would be served by a change of custody to their mother.

Whether the chancellor erred "by basing the change of custody on the desires of an eight-year-old boy"

We initially note that the weight to be assigned testimony is a matter for the chancellor. Appellant argues that the basis of the custody change was solely the young boy's preference. The chancellor's stated reason for changing custody was not merely the preference stated by the minor son, but the harmful effect that the chancellor perceived the boy would suffer if custody were not changed. After considering all the evidence, interviewing the children, and concluding that the boy would suffer emotional harm if custody were not changed, the chancellor based his decision on the best interests of the children.

This case involves a close question of child custody, one in which we must defer to the chancellor more than at any other time. We cannot say that his decision that the change of custody was in the best interests of the children was clearly against the preponderance of the evidence.

Finally, we note that appellant's reply brief also raises the argument that the decision to place Michael with his mother was contrary to Arkansas Code Annotated section 9-13-101, under which custody must be awarded without regard to the sex of the parent. We will not address this argument, for the abstract does not reveal that it was raised below. Neither do we address arguments in the reply brief based upon the credibility of witnesses and the weight of testimony.

Affirmed.

JENNINGS and BIRD, JJ., agree.

ROBBINS, C.J., MEADS and ROAF, JJ., dissent.

JOHN B. ROBBINS, Chief Judge, dissenting. I believe the prevailing judges perpetuate a chancellor's error today by failing to reverse an order that changes custody of two young children, contrary to their best interest, and without proof of a material change in relevant circumstances. I disagree with the prevailing opinion in three essential respects. First, there is an absence of any material change of circumstances apart from those involving appellee, the

noncustodial parent; next, I disagree with the weight given to the custodial preference of an eight-year-old child; and finally, I do not believe serious consideration was given to an illicit sexual relationship in which the appellee is involved.

Material Change of Circumstances

The prevailing opinion seems to say that in *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996), the supreme court did not adopt the majority view that changes only in the life of the noncustodial parent cannot constitute a sufficient change in circumstances to reopen the custody issue. However, the prevailing opinion then undertakes a de novo review of the record and finds two basic changes in circumstances apart from those in appellee's life. First was the overwhelming desire of Michael, age eight, to live with appellee, and the second was an incident that resulted in the appellant being charged with disorderly conduct. I believe the prevailing opinion is in error on both bases.

If the prevailing judges are reading *Jones* as having held that changes solely in the noncustodial parent's life may constitute a sufficient change to reopen the custody issue, then I submit they are wrong. In *Jones*, the supreme court cited Professor Atkinson, *Modern Child Custody Practice*, § 9.07 at 462-463 (1986), and acknowledged that it set forth the majority view that a change of circumstances of the noncustodial parent, including a claim of improved life because of recent marriage, is not sufficient to justify modifying custody. The supreme court then cited *Delgado v. Silvarrey*, 528 So.2d 1358 (Fla. App. 3 Dist. 1988), where a noncustodial parent's remarriage and anticipated higher standard of living did not amount to circumstances sufficient to support a change in custody; and *Spoor v. Spoor*, 641 N.E.2d 1282 (Ind. App. 3 Dist. 1994), which held that changes in lifestyles, including remarriage, by the noncustodial parent do not warrant a change in custody. I believe that significant changes in the life of a noncustodial parent should permit reopening the issue of custody between the competing parents; however, it appears that the supreme court has spoken, and by implication it has adopted the majority view set forth by Professor Atkinson.

The chancellor identified the changed circumstances on which he relied in modifying custody as follows:

> In regard to whether circumstances have changed since the last custody decision, there is no question that they have. Mrs. Campbell has a steady job. She appears to be emotionally stable at this time unlike before and she is in an apparent stable relationship with a man . . . , notwithstanding the fact that the Court has misgivings about this out of wedlock relationship.

Because these three changes pertain solely to the noncustodial parent, and inasmuch as the majority view has now become the rule in Arkansas, these changes fail to constitute a significant change in circumstances sufficient to open the door to a review of custodial placement.

As to the prevailing opinion's reliance upon a de novo review to find a significant change of circumstances apart from those in the noncustodial parent's life, I believe the prevailing judges' conclusions are strained and not well based. Though the prevailing opinion identifies the overwhelming desire of Michael to live with his mother as a significant change of circumstances, there is nothing in the record to indicate that this is a changed circumstance. How do the prevailing judges know that Michael did not have this same desire to live with his mother when custody was previously placed with appellant? Since the record is silent on this, I submit that the prevailing judges have erroneously shifted the burden of proof to the custodial parent by finding this to be a change in circumstances in the absence of proof of what the circumstances were at the time custody was placed with appellant in November 1993.

The other event that the prevailing opinion identifies on de novo review as a significant change in circumstances is the disorderly conduct charge against appellant. However, the prevailing opinion cites no cases where a single, isolated event of misconduct, which caused the children no physical harm nor placed them in risk of physical harm, has been held to constitute a significant change in circumstances for custody purposes. Nor do I know of any such cases.

Best Interest of the Children

(a) Custodial preference of an eight-year-old child

Although there was not proof of sufficient changes in circumstances to permit the issue of custody to be addressed by the chancellor in this case, I submit that even had significant changes been shown, it is contrary to the best interest of these children to be placed in the custody of appellee. The chancellor explained the basis for changing custody in his remarks from the bench, as follows:

> [A]fter hearing the parties and their witnesses and having considered the evidence and after having lengthy conversation with the children in chambers, Court's findings are that in although *in all probability I would not change custody in this case if it were not for Michael's overwhelming desire to be with his mother*, I am convinced that because of Michael's desire to be with his mother that his best interest can only be served by placing him with her.
>
> While *I believe Nicole's best interest would not be harmed if she were left in the custody of her father*, the Court believes it is in both children's best interest to stay together.
>
> Accordingly, I am awarding custody of both children at this time to their mother, subject to visitation set out in the Court's standard visitation order in the father.
>
> This is a painful decision for the Court because in many ways, *the Court believes the children's father has done an outstanding job in raising these children against tough odds, being a student with a limited income and limited time.*
>
> *He has been there for the children when their mother was not. I am impressed by the teachers, by the testimony of the children's teachers who in summary said that the children are excellent students, cheerful and that their father has had a very concerned — has been a very concerned, involved parent.*
>
> However, after lengthy interview with the children I find Michael to be as Dr. Barling did, a tearful, stressed, almost frightened little boy who desperately wants to be with his mother. When I reminded Michael how hard his father had tried to be a good father to both him and his sister he started crying and said, "He's not going to let us go to Mom."

> *In summary, this little boy wants and needs his mother for whatever reason* and I am convinced not to grant this desire would be emotionally damaging if not devastating to him.

(Emphasis added.) I submit that the emotions of an eight-year-old child should not constitute the gauge for determining custody. If we countenance tantrums in the judge's chambers by rewarding this conduct, the trial-tactic message we send out to attorneys in domestic-relations practice is obvious. The expert to whom the chancellor referred was Dr. Barling, and he testified as follows:

> I don't feel like I'm in a position to give a recommendation today to the court as far as who should have custody. There are a lot of factors to be considered. I didn't evaluate these factors.
>
> In Ms. Gibbon's report she describes Nikki as perceiving her mother as someone who needs to be cared for and stated that she has to be careful about her mother's feelings. That Nikki played the role of the mother in the relationship, that she had to be the mother. This is something that should be taken into consideration. It's the parenting situation, the parenting skills, the stability of the parents, as well as the physical factors of shelter, schools, things like that.
>
> It isn't always common that children who have a parent who's had emotional problems and psychological problems to feel they are the caretaker for their parent. It depends on the age of the children, but the need to comfort or want to take care of, those kinds of behaviors, care taking behaviors, are not unusual.
>
> . . . .
>
> There is a quote in Ms. Gibbons report that Nikki indicated that Mrs. Campbell told the children that she was "homeless and she had no children." That kind of statement would be in poor judgment. The result would be very negative in my opinion. It would be a matter of rejection, it had a negative impact. Pleasing parents is a very strong motivation for most all children.

The risk of manipulation of an eight-year-old to tell a chancellor what a parent wants the child to say and how to say it is so great that a court should not rely solely on the child's preference in making a custody determination. Such a burden should never be placed on the shoulders of a small child; and we abdicate our

adult responsibility to determine the best interest of a child when we let the child decide this very serious issue.

Furthermore, I find it somewhat inconsistent for the court to decide the custody issue on the stated basis of the preference of this eight-year-old child, but yet deny appellant's motion for reconsideration by holding that even if the child apologized to appellant after the hearing for *lying* and *spying* and remarked to appellee as they were leaving the courtroom that "I guess I get my cellular phone now," that these statements were insufficient reasons for the court to reconsider its decision.

(b) Illicit cohabitation

Finally, the matter of cohabitation by appellee with her boyfriend, while not disregarded by the trial court, did not influence its decision. It should have. The only reason our judicial system is ever involved in such an intimate family matter as this is because the family has become dysfunctional; one or both of the parents have sought the aid of a court to terminate their marital relationship; and because they cannot agree to custody of their minor children they require the intervention of a court to decide the matter. The exercise of this intervention can impact the rights to privacy and association of consenting adults. So long as a person's conduct does not violate the law, his lifestyle is and should be a private matter between him and his conscience. But when children enter the picture — minor children who are *wards of the court*, *Clark v. Reiss*, 38 Ark. App. 1501, 831 S.W.2d 622 (1992) — society has an interest in seeing that these children are placed in the parent's custody who will better provide for their physical, educational, cultural, and moral character development.

Our courts have never condoned a parent's illicit conduct or lifestyle when such conduct has been in the presence of the child. *Ketron v. Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985). It has never been necessary to prove that illicit sexual conduct on the part of the custodial parent is detrimental to the children, for our courts have presumed that it is. *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). In *Anderson v. Anderson*, 18 Ark.

App. 284, 715 S.W.2d 218 (1986), a case that involved a situation very similar to the one at bar, the father of a nine-year-old son sought a change of custody, citing his ex-wife's cohabitation with a man as evidence that she was an inappropriate custodian. His ex-wife subsequently married the man with whom she had been living, and the trial court denied the father's petition for change of custody. On appeal, we made this observation:

> [W]e cannot say the chancellor was clearly erroneous in finding . . . that appellee's subsequent marriage to Rick tempered her reprehensible conduct. In so holding, we note that the chancellor was in a superior position to assess the sincerity of the appellee's atonement for allowing Rick Beightol to move into the home without benefit of marriage, her subsequent marriage to Rick and the effect of this transgression on the welfare of Will.

Id. At 289, 715 S.W.2d at 221. We affirmed a chancellor who characterized the mother's illicit cohabitation as "reprehensible conduct," and a "transgression." However, because the mother married her boyfriend prior to the custody hearing and the chancellor found that this tempered her meretricious relationship, we affirmed the chancellor's decision to leave the child in the mother's custody. In the case at bar, however, there was not a subsequent marriage. Though the live-in boyfriend suggested that they had been too busy to obtain a marriage license, they have found time to cohabit for the past two years. His commitment to marriage appears somewhat less certain than appellee's, as evidenced by the fact that he has not given appellee an engagement ring, and by his statement that "*if* we're married Mrs. Campbell will have a legal interest" in the house he plans to build within the next year or so.

The prevailing opinion appears to equate appellant's relatively brief relationship with a former girlfriend with the appellee's cohabitation. However, appellant's girlfriend did not reside with him. She spent the night with him on a few occasions but did so without the children's knowledge. Furthermore, this relationship terminated months before the court's custody decision was entered. The appellee's illicit cohabitation continued even to the time of the hearing and, as far as we know, persists to this day.

I do not contend that a parent's illicit cohabitation should be an automatic and absolute bar to custody. There must be a better alternative custodian before custody is denied on the basis of such cohabitation. Indeed, a cohabitating parent would be preferable as a custodian if the other parent is abusive or otherwise incapable of parenting a child. If the competing parent has satisfactory parenting skills and is able to provide a suitable home and environment for the child, this would constitute the preferable alternative. In the case before us, the appellee is cohabitating with a man out of wedlock. Appellant is not.

Appellant has proven his parenting skills and ability to provide a suitable home for his children. The court specifically noted that "the children's father has done an outstanding job in raising the children against tough odds," and that "he has been there for the children when their mother was not." The chancellor further stated that he was impressed by "the testimony of the children's teachers who in summary said that the children are excellent students, cheerful and that . . . [appellant] has been a very concerned, involved parent."

These children should have remained in the custody of their father, and we do them a disservice to affirm a removal of custody to their mother.

For all those reasons stated herein, I respectfully submit that the chancellor erred in changing custody of the parties' two minor children and would reverse and remand the case to the trial court with directions that custody be returned to appellant, subject to such reasonable visitation as the chancellor may direct.

Because we have reached a tie vote in this case, the chancellor's decision must be affirmed. Ark. Code Ann. § 16-12-113 (Repl. 1994). It would be instructive for appellant to seek a review of this decision in our supreme court. Ark. Sup. Ct. R. 1-2(e)(i).

MEADS and ROAF, JJ., join in this dissent.

Jim GIBSON *v.* Jim HERRING, d/b/a The Gem Shop

CA 98-181 975 S.W.2d 860

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 7, 1998

[Petition for rehearing denied November 11, 1998.]

Matthews, Sanders, & Sayes, by: *Margaret M. Newton* and *Mel Sayes*, for appellant.

Clifton H. Hoofman and *Pike & Bliss*, by: *George E. Pike, Jr.* and *Deborah Pike Bliss*, for appellees.

OLLY NEAL, Judge. Appellant Jim Gibson appeals from an order granting summary judgment in favor of appellee Jim Herring, d/b/a The Gem Shop. We reverse and remand.

Appellant filed suit against appellee on March 18, 1997. He alleged that he entrusted appellee with a loose diamond over two carats in size for mounting in a ring. Several years later, appellant had the ring appraised and was told that its stone was not a diamond, but glass. The complaint charged that appellee had either lost the diamond through lack of ordinary care or had deceitfully and fraudulently switched the diamond for a glass stone. Compensatory damages of $12,000 and punitive damages of $50,000 were sought.

In July 1997, appellee filed a motion for summary judgment on the ground that appellant's cause of action was barred by the three-year statute of limitations contained in Ark. Code Ann. § 16-56-105 (1987). Attached to the motion were appellant's answers to interrogatories and a page from appellant's deposition. These exhibits revealed that appellant found the loose stone in the winter of 1992. A verbal appraisal was obtained in Memphis at that time, but the exhibits do not reveal the outcome of the appraisal. Appellant took the stone to appellee for mounting

shortly thereafter and retrieved the ring two weeks later. In the brief in support of his motion, appellee argued that, in order to be timely, appellant's complaint should have been filed in the winter of 1995, that is, within three years of the time appellant picked up the ring from appellee.

In response to the motion, appellant argued that appellee's fraudulent concealment tolled the statute of limitations. Appellant attached to his response several pages from his deposition. Therein, he stated that he found the stone on the floor of a casino and put it in his pocket. He did not notify the casino management. Later, but still during the winter of 1992, he took the stone to appellee. On September 24, 1996, appellant and his wife had the stone appraised by East Coast Estate Buyers. The appraiser informed them that the stone was a cubic zirconium. The same day, appellant took the ring to Lloyd Stanley Jewelry for appraisal, and it was confirmed that the stone was a cubic zirconium. Thereafter, appellant and his wife went directly to appellee's place of business and asked him to appraise the ring. Appellee became excited, lost his composure, and said he knew nothing about the ring.

After a hearing, the trial court granted appellee's motion. In the judgment incorporating his ruling, the judge found:

> [T]he Court finds that Plaintiff, Jim Gibson, has not presented any evidence in support of his allegation that Defendant, Jim Herring, took any affirmative actions of concealment sufficient to cause a tolling of the three-year statute of limitations. Since the alleged wrongful conduct occurred in 1992 and this litigation was not filed until August 7, 1997, [*sic*] all causes of action contained in the Complaint are barred by the three-year statute of limitations set forth in Ark. Code Ann. § 16-56-105.

It is this order that appellant challenges on appeal.

[redacted] The statute of limitations for fraud, negligence, and all tort actions not otherwise limited by law, is three years. *See Stoltz v. Friday*, 325 Ark. 399, 926 S.W.2d 438 (1996); *Orsini v. Larry Moyer Trucking, Inc.*, 310 Ark. 179, 833 S.W.2d 366 (1992); *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997), respectively. The limitations period begins to run, in the absence of

concealment of the wrong, when the wrong occurs, not when it is discovered. *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994). However, when there have been affirmative acts of concealment, the statute begins to run at the time the cause of action is discovered or should have been discovered by reasonable diligence. *O'Mara v. Dykema, supra.* Mere ignorance on the part of the plaintiff of his rights or the mere silence of one who is under no obligation to speak will not toll the statute. *Wilson v. General Elec. Capital Auto Lease, Inc.*, 311 Ark. 84, 841 S.W.2d 619 (1992). There must be some positive act of fraud, something so furtively planned and secretly executed as to keep plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. *Id.*

Appellant argues that summary judgment was erroneously granted in this case because genuine issues of material fact exist as to whether the limitations period was tolled by fraudulent concealment. Summary judgment is to be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). Once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On review, the appellate court determines if summary judgment was appropriate based on whether the evidentiary items presented in support of the motion leave a material question of fact unanswered. *Id.* The evidence is viewed in a light most favorable to the party against whom the motion was filed, with all doubts and inferences resolved against the moving party. *Id.* Although the existence of fraudulent concealment is normally a fact question that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion, a trial court may resolve fact issues as a matter of law. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996).

There is no evidence in the exhibits presented below that appellee made any overt misrepresentations, *see, e.g., Adams v. Arthur, supra; Smothers v. Clouette*, 326 Ark. 1017, 934 S.W.2d 923 (1996), or made an attempt to "cover up" any act he may have committed. *See, e.g., First Pyramid Life Ins. Co. of Am. v. Stoltz*, 311 Ark. 313, 843 S.W.2d 842 (1992), *cert. denied*, 510 U.S. 908 (1993). However, appellant argues that the act of switching a

cubic zirconium for a diamond is an act of fraud perpetrated in a way that it conceals itself. We agree that genuine issues of material fact remain as to this aspect of fraudulent concealment. Viewing the evidence in the light most favorable to appellant, the alleged act of concealment is part and parcel of the wrongful act complained of. *See Howard v. Northwest Ark. Surgical Clinic, P.A.*, 324 Ark. 375, 921 S.W.2d 596 (1996). An act such as that alleged to have been committed by appellee is so furtive by nature that it tends to exclude suspicion or prevent inquiry. *See generally Scroggin Farms Corp. v. Howell*, 216 Ark. 569, 226 S.W.2d 562 (1950). A cubic zirconium is designed to look like and be mistaken for a true diamond. The only way appellant could have discovered the fraud immediately upon retrieving the ring would be to have hired an expert to examine the stone. One in appellant's position should not be required to go to such lengths. We hold therefore that summary judgment was erroneously granted on the issue of fraudulent concealment.

Appellee presents two alternative grounds for affirmance. First, he contends that appellant's deposition was conclusory and filled with hearsay. In particular, he argues that appellant presented no evidence that the object he found was actually a diamond and presented no evidence, other than hearsay, regarding the 1996 appraisals. Secondly, appellee claims that, because appellant wrongfully converted the stone, he was not entitled to seek redress for its loss. We decline to address either ground. In reviewing the propriety of a motion for summary judgment, an appellate court will not affirm a trial court on alternative grounds when those grounds require additional fact-findings. *Schwarz v. Colonial Mortgage Co.*, 326 Ark. 455, 931 S.W.2d 763 (1996). The trial court did not, for example, have the opportunity to hold a hearing regarding the admissibility of the alleged hearsay statements, *see Jones v. Abraham*, 58 Ark. App. 17, 946 S.W.2d 711 (1997), or develop the record regarding whether appellant wrongfully converted the stone. *See generally Simmons First Nat'l Bank v. Wells*, 279 Ark. 204, 650 S.W.2d 236 (1983).

Reversed and remanded.

STROUD and GRIFFEN, JJ., agree.

MINNESOTA MINING & MANUFACTURING and Old Republic Insurance Company *v.* Theodore BAKER

CA 97-1403 975 S.W.2d 863

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 7, 1998

[Petition for rehearing denied December 2, 1998.]

Barber, McCaskill, Jones & Hale, P.A., by: *Gail Ponder Gaines*, for appellants.

Davis & Holiman, by: *Zan Davis*, for appellee.

OLLY NEAL, Judge. Minnesota Mining & Manufacturing (3M) and Old Republic Insurance Company appeal the Workers' Compensation Commission's decision that Theodore Baker is entitled to disability benefits for an occupational noise-induced hearing loss. For reversal, appellants contend that the Commission's finding that appellee sustained a compensable hearing loss is not supported by substantial evidence and that appellee's claim is barred by the statute of limitations. We affirm.

Baker's employment with appellant, 3M, began on August 18, 1977, and continues. On February 23, 1978, a baseline hearing test was administered to appellee, the results of which demonstrated significant bilateral hearing deficiencies. Appellee underwent subsequent tests that demonstrated no clinically significant decrease in hearing from the February 1978 baseline test through the time he filed his claim in February 1992.

Appellants contend that the Commission's finding that Baker sustained a compensable hearing loss is not supported by substantial evidence. We review decisions of the Workers' Compensation Commission and affirm if they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Min-Ark. Pallet Co. v. Lindsey,* 58 Ark. App. 309, 950 S.W.2d 468 (1997). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Id.*

At the administrative hearing on his claim, Baker testified that his employment with 3M began on August 18, 1977, and that

he initially was assigned to work in the bagging department where 3M's principal product, roofing granules, are prepared for shipping. According to Baker, he began experiencing moderate to severe hearing loss within three to four months of his employment, and the hearing tests he took within the following two-month period showed significant hearing loss. Subsequent tests, including an audiogram administered in December 1992, showed no significant change in his hearing from the results of the February 23, 1978, hearing test. Baker testified that he was transferred to another department shortly after his initial hearing examination. Documentary medical evidence corroborated Baker's testimony regarding his hearing loss.

Dr. Daniel J. Orchik opined in a report dated June 2, 1993, that, based on the appellee's medical records, work history, and other relevant history, Baker suffers from noise-induced hearing loss related to his employment with 3M. He noted that during the six-month period between the time he was hired and the time of his first audiological exam, the appellee was exposed to workplace noise as high as ninety-nine decibels without the benefit of any hearing protection. Appellee worked an average of forty-seven hours weekly, including some twelve-hour shifts. Dr. Orchik agreed that appellant's audiogram results did not change significantly between his baseline or initial test in February 1978 and the test he underwent in December 1992. He concluded that Baker suffered 46.25 percent impairment in the left ear, 38.8 percent in the right, and binaural impairment of 39.82 percent.

■ ■ Appellant 3M contends that because appellee did not experience a significant decrease in his hearing after the February 1978 baseline audiogram, the Commission could not find that his hearing loss is related to his employment. It is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989). Dr. Orchik's opinion, Baker's testimony that he did not have a hearing impairment prior to becoming employed by 3M, and the fact that he was transferred from the bagging station, 3M's noisiest job site, shortly after his first hearing test, constitute substantial

evidence to support the Commission's finding that appellee proved his hearing loss was caused by his employment.

Appellants next contend that Baker's claim was barred by the statute of limitations. It is undisputed that appellee's hearing deficiencies were established and known following hearing tests administered on February 23, 1978. The parties also agree that appellee has not suffered any loss of earnings because of the injury.

The case at bar presents an issue of first impression for this court because whether the statute of limitations applies to scheduled injuries has yet to be decided. The beginning point in interpreting a statute is to construe the words just as they read and to give them their ordinary meaning. *Arkansas Dept. of Health v. Westark Christian Action*, 322 Ark. 440, 910 S.W.2d 199 (1995). The basic rule of statutory construction is to give effect to the intent of the legislature, making use of common sense. *Office of Child Support Enforcement v. Harnage*, 322 Ark. 461, 910 S.W.2d 207 (1995). Statutes relating to the same subject should be read in a harmonious manner, if possible. *Mecco Seed v. London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994).

Because appellant filed his claim in February 1992, the commencing of the statute of limitations is controlled by Arkansas Code Annotated § 11-9-702(a)(1) (1987), which provides:

> TIME FOR FILING. (1) A claim for compensation for disability on account of injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Commission within two (2) years from the date of injury.

The time of injury means when an injury becomes compensable, not the date of the accident. *Donaldson v. Calvert-McBride Ptg. Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950). For purposes of commencing the statute of limitation under Ark. Code Ann. § 11-9-702(a)(1), an "injury" is not to be construed as "compensable" until (1) the injury develops or becomes apparent and (2) the claimant suffers a loss in earnings on account of the injury. Thus, the statute of limitations does not begin to run until both elements of the rule are met. *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992). Following the supreme court's 1950 decision in *Donaldson v. Calvert-McBride Ptg. Co., supra*, we

held that a claimant's injury did not become a compensable one until he suffered a loss of earnings. Disability, which is compensable under our statute, is based upon incapacity to earn because of injury. *Arkansas Louisiana Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

In a majority of jurisdictions, the statute of limitations generally begins to run on a workers' compensation claim for alleged hearing loss when the claimant is aware of his injury and aware that the injury is causally related to the working environment. See 4 Larson, *Workers' Compensation Law*, App. A-2C-1(1997). However, Arkansas is technically a "compensable injury" state. *Hall's Cleaners, supra.*

A few jurisdictions as well as Arkansas have similar statute-of-limitations requirements that address compensable injuries, i.e., those injuries that disable an employee totally or partially from performance of his work or require medical or surgical treatment. *Williams v. S.N. Long Warehouse Co.*, 426 S.W.2d 725 (Mo. Ct. App. 1968). The Missouri Court of Appeals determined that the statutory period for workers' compensation did not begin to run until the claimant's doctor told the employee not to go back to work. *Sellers v. Trans World Airlines, Inc.,* 752 S.W.2d 413 (Mo. Ct. App. 1988). However, the subtle distinction between the law of that jurisdiction and Arkansas law is that any medical or surgical treatment provided to the claimant will begin the running of the statutory period for filing a claim for compensation.

Appellant contends that the legislature did not intend that a gradual-onset occupational, noise-induced hearing loss would not have an applicable statute of limitations. This is so, according to appellant, because gradual-onset hearing loss by its very nature will not result in time missed from work or in a loss of earning capacity, because there is no treatment other than hearing aids.

Here, because the permanent injury suffered by appellee affects only his hearing, the permanent injury may be reduced to a scheduled injury. *See Anchor Const. Co. v. Rice,* 252 Ark. 460, 479 S.W.2d 573 (1972).

Arkansas Code Annotated § 11-9-521(a)(16) (1987) provides:

> (a) An employee who sustains a permanent injury scheduled in this section shall receive, in addition to compensation for the healing period, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period set out in the following schedule:
>
> . . .
>
> (16) loss of hearing of both ears, one hundred fifty-eight (158) weeks;
>
> . . .

Compensation for an injury scheduled in Ark. Code Ann. § 11-9-521(a) is payable to the injured worker without regard to subsequent earning capacity. These benefits are awarded more in the nature of an indemnity for physical or functional loss and are payable whether the worker is employed or unemployed and irrespective of what his wages or earning capacity may be. *Rash v. Goodyear Tire & Rubber Co.*, 18 Ark. App. 248, 715 S.W.2d 449 (1986).

Professor Larson, in his treatise on workers' compensation law, sets forth the following reasons for awarding scheduled benefits:

> Under most acts, if an injury has left the claimant with a permanent bodily impairment, compensation for a specified number of weeks is payable without regard to presence or absence of wage loss during that period.
>
> . . .
>
> . . . these payments are not dependent on actual wage loss. This is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law — that benefits relate to the loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience.

4 Larson, *Workers' Compensation Law*, § 58 (1997).

Upon reading related statutes, case law, and reviewing the underlying policies for awarding benefits for scheduled injuries, it is clear that the legislature intended that compensation for scheduled injuries be awarded without regard to the statute of limitations in § 11-9-702(a)(1). Disability benefits for compensable injuries under other sections of the workers' compensation act continue until the employee's healing period has ended. Compensation for injuries scheduled by statute are limited to the period scheduled and do not extend until a cure is effected. *See e.g., Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1988). Moreover, in cases involving scheduled injuries, it is clear that a loss in earnings has no effect on the award of benefits. This is so, because the benefits are awarded in the nature of an indemnity for bodily impairment. If we were to decide that the statute of limitations applies to scheduled injuries, the result would be that the injury would not become compensable until a loss in earnings occurred. In that case, workers like appellee who have not experienced a loss of earnings would never satisfy the requirements of a compensable injury.

Our workers' compensation law in effect prior to the legislative enactment of Act 796 of 1993 required that we construe sections of the act liberally in favor of awarding compensation. We hold that the legislature did not intend that the statute of limitations apply to scheduled injuries, especially in light of the underlying rationale for awarding benefits for scheduled injuries.

Affirmed.

STROUD, CRABTREE and ROAF, JJ., agree.

GRIFFEN and MEADS, JJ., dissent.

MARGARET MEADS, Judge, dissenting. I cannot agree with the result in this case because I believe it completely disregards the statute of limitations for filing a workers' compensation claim in this state. The majority is willing to recognize a special category of claimants, those who suffer from scheduled injuries, and permit them to file their claims at any time, regardless of when they were injured or became aware of their condition. In my opinion, this is

an outrageous result which is unfair to employers and should not be the law.

Appellee began working for appellant Minnesota Mining & Manufacturing ("3M") in August 1977, and his hearing was first tested by 3M in February 1978. The results of this baseline test were provided to appellant. There is no question that appellant knew he had a significant hearing deficiency in 1978. Appellee filed his claim for benefits in 1992.

Arkansas Code Annotated section 11-9-702(a)(1) (1987) provides, in pertinent part:

> A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the commission within two (2) years from the date of the injury.

Injury means the state of facts which first entitle a claimant to compensation. *Cornish Welding Shop v. Galbraith*, 278 Ark. 185, 644 S.W.2d 926 (1983). Our courts have held that, for purposes of commencing the statute of limitations under section 11-9-702(a)(1), the word "injury" is to be construed as "compensable injury," and that an injury does not become "compensable" until (1) the injury develops or becomes apparent, and (2) the claimant suffers a loss in earnings on account of the injury. *Donaldson v. Calvert-McBride Printing Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950); *Arkansas Louisiana Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983); *Shepherd v. Easterling Const. Co.*, 7 Ark. App. 192, 646 S.W.2d 37 (1983). The statute of limitations does not begin to run until both elements of the rule are met. *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992).

The majority opinion points out that appellee has not suffered any loss of earnings because of his injury, and he cannot meet the second prong of the above two-prong test. Applying the rule of *Hall's Cleaners*, appellee would not be entitled to any disability compensation unless and until he actually suffers a loss of earnings. To avoid this result, the majority has treated work-related noise-induced hearing loss as a scheduled injury for which benefits are awarded to an injured worker without regard to earning loss or employment status. With this, I can agree. Where I

disagree is in the majority's holding that the statute of limitations does not apply to scheduled injuries.

Any statute of limitations will eventually operate to bar a remedy, and the time within which a claim should be asserted is a matter of public policy, the determination of which lies almost exclusively in the legislative domain, and the decision of the General Assembly in that regard will not be interfered with by the courts in the absence of palpable error in the exercise of the legislative judgment. *Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976); *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988). The basic policy reasons for statutes of limitations have been expressed as follows:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (Citation omitted.) They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.

Owen, supra, at 26, quoting *Chase Securities Corp. v. Donaldson*, 325 U.S.304 (1945). For this court to abandon the statute of limitations for all scheduled injuries in general and for noise-induced hearing loss in particular is a step I am unwilling to take.

The majority has cited Larson's treatise on Workers' Compensation Law for the proposition that for scheduled injuries, compensation for a specified number of weeks is payable without regard to the presence or absence of wage loss during that period. Larson writes:

> This is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law — that benefits relate to the *loss of earning capacity* and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a *conclusively pre-*

> *sumed* one, instead of a specifically proved one based on the individual's actual wage-loss experience.

4 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 58.11 at 10-492.91-.92(1998)(footnotes omitted)(emphasis added).

This theory means that a claimant seeking benefits for a scheduled injury is not required to prove a loss of earnings or earning capacity in order to be entitled to compensation. The impact on a claimant's earnings or earning capacity is conclusively presumed.

Applying this theory to the two-prong test recited above, a work-related noise-induced hearing-loss injury does not become compensable until (1) the injury develops or becomes apparent, and (2) claimant suffers a loss in earnings on account of the injury, which loss is conclusively presumed. Because the statute of limitations does not begin to run until both elements of the rule are met, and because of the conclusive presumption as to loss of earnings, the statute of limitations with respect to work-related noise-induced hearing loss begins to run when the hearing loss becomes apparent to the claimant.

The burden of filing a claim within the statute of limitations is on the claimant. *Plunkett v. St. Francis Valley Lumber Co.*, 25 Ark. App. 195, 755 S.W.2d 240 (1988); *St. John v. Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983). The court cannot extend the period of the statute of limitations on appeal, despite the fact that a claim may be meritorious. *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972).

Here, appellant became aware of his hearing loss in February 1978. In my opinion, the statute of limitations began to run in February 1978, and appellant's claim became time-barred in February 1980, pursuant to Ark. Code Ann. section 11-9-702(a)(1). Although appellant's claim may be meritorious, I do not think we should extend the time for him to file his claim by some twelve years.

I respectfully dissent.

GRIFFEN, J., agrees.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

December 2, 1998

984 S.W.2d 28

WORKERS' COMPENSATION — STATUTE OF LIMITATIONS — INAPPLICABLE TO SCHEDULED INJURIES INVOLVING HEARING LOSS WHERE THERE IS NO LOSS OF WAGES. — The appellate court clarified its holding to reflect that the statute of limitations cannot apply to scheduled injuries involving hearing loss where there is no loss of wages; the decision to treat hearing loss, where there is no loss of wages, different than other scheduled injuries was based upon the fact that such claims would otherwise not be compensable; other scheduled injuries may result in the permanent loss of a member of the injured worker's body thereby resulting in compensability.

Appeal from the Arkansas Workers' Compensation Commission; Supplemental Opinion on Denial of Rehearing.

Barber, McCaskill, Jones & Hale, P.A., by: *Gail Ponder Gaines*, for appellants.

Davis & Holiman, by: *Zan Davis*, for appellee.

OLLY NEAL, Judge. In a recent opinion dated October 7, 1998, we affirmed the order of the Workers' Compensation Commission that held that appellee's claim for work-related hearing loss was not barred by the statute of limitations.

Appellants have filed a petition for rehearing that takes issue with the portion of our opinion holding that the statute of limitations was not intended to apply to scheduled injuries. We agree with appellants that the statute of limitations has been held to apply to other scheduled injuries. Notwithstanding, that does not change our holding that the statute of limitations under the facts of this case does not apply to workers' compensation cases involving hearing loss, which is a scheduled injury, where there was no loss of wages.

Therefore, we clarify our holding to reflect that the statute of limitations cannot apply to scheduled injuries involving hearing loss where there is no loss of wages. Our decision to treat hearing loss, where there is no loss of wages, different than other scheduled injuries is based upon the fact that such claims would otherwise not be compensable. *See Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992); *Donaldson v. Calvert-McBride Printing Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950). Other scheduled injuries may result in the permanent loss of a member of the injured worker's body thereby resulting in compensability.

The stance we have taken regarding the applicability of the statute of limitations to claims involving hearing loss is not contrary to prior caselaw. In the case of other injuries scheduled under Arkansas Code Annotated § 11-9-521, the nature of those work-related injuries is usually apparent, and such injuries usually result in a loss of earnings well within the limitations period. In the instant case, the loss of hearing was gradual and continued over a period of time and did not affect the employee's ability to earn wages.

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

GRIFFEN and MEADS, JJ., would grant.

Richard E. SHULTS *v.* PULASKI COUNTY SPECIAL SCHOOL DISTRICT

CA 98-314 976 S.W.2d 399

Court of Appeals of Arkansas
Division II
Opinion delivered October 7, 1998

Rice & Adams, by: *Ben E. Rice*, for appellant.

Thomas W. Mickel, for appellees.

MARGARET MEADS, Judge. Appellant, Richard E. Shults, filed a workers' compensation claim for an injury he sustained on June 26, 1995. The administrative law judge (ALJ) found that appellant was not entitled to benefits because he failed to prove by a preponderance of the evidence that he was performing employment services at the time he was injured. The Commission affirmed the denial of benefits, stating that merely because appellant was on his employer's premises at the time an accident occurs does not mean the accident is compensable and that appellant's injury was not inflicted at a time when employment services were being performed. On appeal to this court, appellant contends that the Commission erred in finding that he was not performing employment services at the time of his injury. We agree with appellant; therefore, we reverse.

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).

Appellant was employed by the Pulaski County Special School District as a building custodian at Tolleson Elementary School in Jacksonville, Arkansas. On June 26, 1995, appellant's son had taken him to work because appellant's truck was not working. Appellant's co-worker, Leonard Holder, usually rode to

work with appellant, but appellant had told him that he would have to find another way to work that day. Appellant and his son arrived at the school between 6:30 and 6:45 a.m. Appellant fell while entering the building, fracturing his right patella. This injury required surgery, and appellant was off work for seven weeks. His surgeon assessed a five percent permanent partial impairment of the lower extremity.

One of appellant's duties upon arriving at work was to disarm the alarm system when he entered the building. At the hearing, appellant testified, "I opened the door, and the alarm system is right on the right. And on the uprising when I went in the building, I seen the alarm had been disarmed, so I started running in the building . . . And the uprising, it was a fan cord on my left, and I don't know whether I tripped on the uprising or the fan cord, but that's where I fell at." On cross-examination, appellant stated that the building doors were already opened when he arrived, and he knew his co-worker, Leonard Holder, was already at work because the doors were open and the alarm system was disarmed. He said, "After I walked in, yes sir, I could tell the alarm system was off."

Act 796 of 1993, which applies to all workers' compensation injuries incurred after July 1, 1993, requires that the provisions of the workers' compensation statutes be strictly construed. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). This act excludes from the definition of "compensable injury" any injury inflicted upon the employee at a time when employment services were not being performed. Ark. Code Ann. § 11-9-102(5)(B)(iii) (Supp. 1997). We have held that an employee was performing "employment services" when he "was engaging in an activity that carried out the employer's purpose or advanced the employer's interests." *Hightower v. Newark Pub. Sch. Sys.*, 57 Ark. App. 159, 943 S.W.2d 608 (1997).

In denying appellant's claim, the Commission stated that merely entering upon the premises of one's employer was not sufficient to bring one within the employment services provision of Act 796. Although that is a correct statement of the law, we disagree that appellant was "merely entering upon" the employer's

premises. Upon appellant's arrival at Tolleson Elementary School, his first duty as building custodian was to check the alarm system. We believe this duty was an activity that carried out the employer's purpose or advanced the employer's interests, and therefore constitutes employment services. Whether or not the alarm system had already been disarmed on the day of appellant's accident is not dispositive, because appellant did not know this until he stepped into the building to check the system for himself. Therefore, we find that appellant did sustain a compensable injury because he sustained an injury to his knee at a time when employment services were being performed. We reverse and remand for an award of benefits.

Reversed and remanded.

CRABTREE and ROAF, JJ., agree.

Kara Kathleen HUFFMAN et al. *v.* John Nicholas FISHER

CA 97-1493 976 S.W.2d 401

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered October 14, 1998

Shaver & Smith, P.A., by: *Tom B. Smith*, for appellants.

Killough & Ford, by: *Robert M. Ford*, for appellee.

SAM BIRD, Judge. Appellant Kara Huffman, a minor, and her parents, appellants William H. and Kathryn Huffman, as Guardians of the Person of Jacob Auston Huffman, a minor,

appeal a decision of the Cross County Chancery Court that changed the name of Kara's baby from Jacob Auston Huffman to Jacob Auston Fisher. The father of the baby is John Nicholas Fisher. We affirm the decision of the chancellor.

Kara Huffman and John Nicholas Fisher (Nick) had been involved in a long-term relationship when Kara became pregnant in 1995. At trial, Kara testified that Nick, a high-school senior, urged her not to tell anyone about the pregnancy and said that he wanted her to have a secret abortion. Kara said Nick teased her about being fat and was angry when she refused to have an abortion. Soon after Kara's parents found out about the pregnancy, Nick told his parents. The Fishers then sought a meeting with the Huffmans, who did not want Nick and Kara present, and the parents met without Nick and Kara. The Fishers offered to, and did, assist in paying for the birth of the child. On May 18, 1996, Jacob was born six weeks premature in a hospital in Forrest City and had to be transferred to a hospital in Memphis. Although Nick acknowledged paternity, Kara did not give the baby Nick's last name. Nick and Kara went separately to Memphis every day to see him. In the fall, Nick went to college in Russellville. Nick and Kara did not marry.

On August 9, 1996, the State of Arkansas, Office of Child Support Enforcement, as Kara's assignee of child-support benefits, filed suit to collect child support. In his answer, Nick acknowledged paternity and, by third-party complaint against appellants, asked the court to set an appropriate amount of child support to be paid by him, to grant him reasonable visitation and establish a specific schedule of visitation, and to order that the child's birth certificate be corrected to reflect the name of the child to be Jacob Auston Fisher. After a hearing, the chancellor entered an order on May 19, 1997, in which he found that Nick was the child's father and set child support and visitation. The issue of Jacob's last name was reserved, and on June 3, 1997, the chancellor issued a letter opinion in which he held that there was a compelling reason to change Jacob's last name to Fisher and so ordered. A formal order directing that the child's name be changed was entered on July 14, 1997. From that order comes this appeal.

Appellants argue that (1) the court erred in finding that the surname of the baby should be changed from that of the mother and custodial parent to that of the father, the father having failed to present any compelling facts that show it would be in the best interests of the baby to change the surname he has carried since birth; and (2) the best interests rationale adopted by the court in *Reaves v. Herman*, 309 Ark. 370, 830 S.W.2d 860 (1992), and in *McCullough v. Henderson*, 304 Ark. 689, 804 S.W.2d 368 (1991), should be clarified to adopt a presumption in favor of the surname chosen for a child by the child's custodial parent.

Upon *de novo* review of a chancery court decision, a chancellor's findings are not disturbed unless they are clearly erroneous or clearly against the preponderance of the evidence. *Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake had been committed. *Duckworth v. Poland*, 30 Ark. App. 281, 785 S.W.2d 472 (1990).

At the hearing Nick admitted that he was upset when he found out that Kara was pregnant, that he may have asked Kara not to tell anyone about the pregnancy, that he had suggested she have an abortion, and that he did not tell his parents about the baby until a couple of months before he was born. He testified that he wanted the child to have his surname because he grew up with his dad's name and he did not believe that he should be treated differently just because his son was born out of wedlock. He also insisted that he wanted to pay child support and all of the medical expenses, be involved in the decisions relating to Jacob's upbringing, have regular visitation, and do the things that all fathers do.

Nick's mother, Janet Fisher, testified that she was willing to take any action on Nick's behalf the court ordered as long as Nick was in college. When asked why she wanted the baby's name changed to Fisher, she said:

> Nick is his father and he comes from a very proud family. We're all proud of who we are. This baby will always be — Nick will always be his father and he will always be Nick's son, and we

> feel like his name should always be Fisher. Nick's father was a Fisher and his grandfather was a Fisher and we want this baby to be a Fisher so that his children can be Fishers.

Mrs. Fisher also testified that Nick and his entire family adored and loved the baby, that they visited with him in their home every other Saturday from 10 a.m. to 6 p.m. and that Jacob was considered a part of their family.

Nick's father also testified that he offered to pay more of the expenses of the birth and to start paying child support for his grandson, but the Huffmans had refused his offer. On cross-examination, Mr. Fisher said he wanted Jacob's last name changed to Fisher because it was usual and customary for a child to have his father's last name.

Kara testified that after the baby was born she had no relationship whatsoever with Nick, that there was no way possible there would ever be one again, and she objected to prolonged visitation while Jacob was so young.

On appeal, appellants first argue that the chancellor erred in finding that Jacob's surname should be changed because there was no compelling evidence that it would be in the best interest of the child. Arkansas Code Annotated section 20-18-401(f) (Supp. 1997) provides:

> (2) If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father. The parents may give the child any surname they choose.
>
> (3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.

In *Reaves v. Herman*, 309 Ark. 370, 830 S.W.2d 860 (1992), in which the parents of the baby were seventeen, the father was initially angered by the mother's pregnancy and unwilling to accept the baby until sometime after its birth. The mother had

given the baby her surname. Some months later the father filed a petition for the establishment of paternity, to have the surname of the baby changed to his surname, for division of the birth expenses, future medical expenses, support, and visitation. The chancellor refused to change the surname of the child to that of its biological father. The Arkansas Supreme Court affirmed, stating that there were no compelling facts that showed it would be in the best interest of the nine-month-old child to change the surname he had carried since birth.

In *Mathews v. Oglesby*, 59 Ark. App. 127, 952 S.W.2d 684 (1997), the father had offered no financial support during the pregnancy, was in arrears in child support, and did not show up for his first two visitations. We are not told the ages of the parents, but the father was able to pay $400-a-month car payments, indicating someone at least older than high-school age. The chancellor announced early in the presentation of the case:

> It has been this Court's policy to change the last name to that of the father unless it is a situation where the child is, let's say, ten or eleven years old, been in school for a number of years, everybody knows that child by that last name. We're talking about an infant here. So in all likelihood the Court is going to change the last name.

We held that the chancellor's policy considered only the age of the child, that the "mechanical application of such a policy precludes consideration of the full panoply of factors inherent in determining the best interest of a child," and that "[W]hen the best interests of the child are involved, the chancellor should make his or her decision on an individualized basis, not on the basis of a presumption." 59 Ark. App. at 130, 952 S.W.2d at 686.

Appellants rely heavily upon the *Reaves* case, pointing out the almost identical facts and arguing that if the supreme court found no compelling facts to change the baby's name to that of the father in *Reaves*, then the chancellor in this case abused his discretion by changing Jacob's name to Fisher. Appellants also point out additional factors in support of their position: Kara has sole custody of the child and is his complete caretaker while also continuing her schooling; appellee encouraged appellant to have a secret

abortion; appellee gave no financial assistance to Kara during the pregnancy; appellee gave no emotional assistance, and in fact, ridiculed Kara during the pregnancy about her weight gain; and appellee has not attempted to continue any kind of relationship with Kara since his son's birth.

Changing the name of a child is a matter in which the chancellor has broad discretion. *McCullough v. Henderson, supra.* In *Clinton v. Morrow*, 220 Ark. 377, 247 S.W.2d 1015 (1952), a case in which the natural father objected to his children's names being changed to the surname of their stepfather, the Arkansas Supreme Court said:

> We have no statute requiring the consent of both parents to change the name of an infant. Under the facts here presented, we hold that the question of the right and propriety of the children's use of the surname of their stepfather is one that rests in the sound discretion of the chancellor. In view of the natural and commendable desire of the father to have his children bear and perpetuate his name, this discretion should be exercised with the utmost caution and such use or change should not be sanctioned unless it is for the best interests of the children.

220 Ark. at 383, 247 S.W.2d at 1018. More recently, in *Mathews v. Oglesby, supra,* we cited *McCullough, supra,* and said:

> [T]he decision to change or not change the child's surname should be "the product of the chancellor's informed discretion, exercised in response to what is deemed to be in the best interests of the child." When the best interests of the child are at stake, the chancellor should look into the peculiar circumstances of each case and act as the welfare of the child appears to require.

59 Ark. App. at 130, 952 S.W.2d at 686.

The chancellor has done exactly that in this case. In a six-page[1], single-spaced, twenty-paragraph letter opinion, the chancellor carefully reviewed the evidence presented at the hearing and

[1] For unexplained reasons, page four of the chancellor's opinion letter was omitted from the record as well as from the copy of it that was attached as an exhibit to appellees' brief. However, because of the lack of continuity between the end of page three and the beginning of page five of the letter, it is apparent that the original letter did, in fact, contain a page four.

pointed to the factors that he considered to be most significant and persuasive to him in the formulation of his conclusion that it would be in Jacob's best interest to bear the surname of his father. In his letter, the chancellor opined,

> I believe that [Nick] and his family will take a very active interest in the childhood development of Jacob and that Jacob will have every opportunity to know his father and his father's family. I believe that this will not be a situation in which the mother and her family raises a child without the help, care, love, and support of the father's family. This being the case, the child will know his father and his father's family and a surname of Fisher will not [be] awkward for him. I believe that any other scenario would be awkward. A child needs a surname that he can connect with for a lifetime; taking the surname of the mother opens up too many opportunities for the child to be later left without that connection[.]

The chancellor also said it was the "norm" in Cross County for the child to have the surname of its father; and that "What is of importance to this court is that Jacob have a surname that he is most likely to be able to connect with one of his parents. The most likelihood of that happening is for Jacob to have the surname of Fisher."

The dissent states that "the real issue here is whether Jacob's best interests will be served by changing his name to that of his father, or whether those interests will be better served by retaining his mother's name . . . ." We do not agree. It is true that the determination of the child's best interests was the issue the chancellor had to decide, but the issue on appeal is whether we believe the chancellor abused his discretion by basing his decision on findings that are clearly erroneous or clearly against the preponderance of the evidence. In making that determination, we do not substitute our judgment for that of the chancellor and retry the case as if no decision had been made below.

From his findings, it is clear to us that the chancellor considered the "full panoply of factors inherent in determining the best interests of a child," that he has carefully considered the "peculiar circumstances" of this case, *Mathews v. Oglesby*, *supra*, and that he has pondered at length the ramifications of his deci-

sion. We believe that his conclusions are rationally related to the evidence revealed by the record, and we are not convinced that they are clearly erroneous. Under these circumstances, we are simply not able to say that the chancellor abused his discretion in concluding that the child's surname should be that of his father.

Appellants also argue that the best-interest rationale adopted in *Reaves* and *McCullough* should be clarified by this court to adopt a presumption in favor of the surname chosen for a child by the child's custodial parent. In support of this position, they rely on and quote extensively from *Gubernat v. Deremer*, 140 N.J. 120, 657 A.2d 856 (1995). We rejected an identical request in *Mathews v. Oglesby*, *supra*, and said, "When the best interests of the child are involved, the chancellor should make his or her decision on an individualized basis, not on the basis of a presumption."

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

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

MARGARET MEADS, Judge, dissenting. I am deeply troubled by the affirmance of the trial court's decision in this case, not only because I believe it is not in the child's best interests to change his surname but also because it unfairly subverts Kara Huffman's ability to name her child. The real issue here is whether Jacob's best interests will be served by changing his name to that of his father, or whether those interests will be better served by retaining his mother's maiden name, which he has now held for twenty-nine months.[1]

Kara Huffman faced painfully difficult circumstances when her son, Jacob Auston Huffman, was born: she was seventeen years old, still in high school, and unmarried, with a premature infant who required hospitalization. Although she had had an eighteen-month relationship with the child's father before she became pregnant, he had not only encouraged her to abort the pregnancy but

[1] The trial court granted appellant's petition to stay the order changing Jacob's surname on his birth certificate until the decision has been reviewed by the appellate courts.

had also ridiculed her as she grew larger, and she knew that the relationship was over. Fortunately, she had the love and nurture of her mother and father, who welcomed the infant into their family's home. Four months after Jacob's birth, appellee sought an order to "correct" the birth certificate, claiming that the certificate reflects the child's name to be Jacob Auston Huffman, when in fact the child's "lawful" name is Jacob Auston Fisher. Kara opposed this, stating in her response: "[John N. Fisher] has exhibited contempt, rudeness, and utter disregard for the parental rights of Kara Huffman . . . . The birth certificate was not erroneously entered reflecting the name, and the child's correct and lawful name is Jacob Auston Huffman."

At the hearing, Kara testified that it was her decision to use the last name of Huffman on the birth certificate. As abstracted by appellants, Kara testified:

> It was my decision to use the last name of Huffman on the birth certificate. Jacob was going to be raised in my family, around my brothers and sisters. He's going to be raised with me his whole life, and I think it's important he has my name. I'm going to be the one raising him. Even when I get married, I can keep my name Huffman and he'll have the same name as me. I don't mind doing that. It's for Jacob. I think it's in his best interests to keep it Huffman.

Clearly, Kara had given careful thought to her son's best interests and their future.

In remarkable contrast to Kara's selflessness, appellee testified that the main reason he wanted Jacob's name on the birth certificate changed to Fisher was because that was how he grew up, with his father's name. Although he admitted that his parents were married to each other, he did not think he should be treated differently merely because he had a child out of wedlock. On cross-examination, appellee was questioned about any other reasons he might have for wanting to change Jacob's name. As abstracted by appellants, appellee testified:

> I want the name changed from Huffman to Fisher because I grew up with my dad's name. Unless she doesn't get married, her last name's going to change. I'm always going to be Fisher. As far as

> the child being raised in the Huffman home, I think he would be better labeled with a different name.

Similarly, appellee's father, William M. Fisher, Sr., testified, according to appellant's abstract, as follows:

> I think my grandson's name should be Fisher. When Nick is at baseball games and somebody asks him if any of his kids are playing and he tells them "Jacob Huffman," it's kind of awkward to explain why he's got his mother's name instead of his father's. . . . My feeling is that his name should be changed because it would be awkward for Nick. It's usually customary that the child have the father's name. It would be awkward to explain to everybody. The question would probably never come up for the mother as to why the child's name were Fisher but she was never married to the father.

Incredibly, appellee thought his child "would be better labeled with a different name." It defies credulity to think that a child raised in the home of six family members named "Huffman" would be better off with the name "Fisher." Moreover, it defies my sense of compassion to consider the "awkwardness" that Nick might feel when he explains that his son bears his mother's surname, and the reason why.

It is the best interests of the child, not the father or his family, that must guide our decision. When the best interests of the child are at stake, the chancellor should look into the peculiar circumstances of each case and act as the welfare of the child appears to require. *See Reaves v. Herman*, 309 Ark. 370, 830 S.W.2d 860 (1992); *McCullough v. Henderson*, 304 Ark. 689, 804 S.W.2d 368 (1991); *Matthews v. Oglesby,* 59 Ark. App. 127, 952 S.W.2d 684 (1997). 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. *Riley v. Riley*, 61 Ark. App. 74, 964 S.W.2d 400 (1998). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Duckworth v. Poland*, 30 Ark. App. 281, 785 S.W.2d 472 (1990). After reviewing the record in this case, I am firmly convinced that the chancellor was clearly erroneous in ordering that Jacob's name be changed to Fisher.

Other jurisdictions have recognized that an unwed father does not have superior rights to have his child carry his surname. In *Barabas v. Rogers*, 868 S.W.2d 283 (Tenn. App. 1993), the court reviewed the evolution of the use of surnames in English history, stating in summary:

> The common law recognized that unmarried mothers obtained their parental rights by giving birth to the child, while fathers obtained their parental rights through marriage. It followed that unmarried mothers possessed greater parental rights than did putative fathers, and in fact, some commentators stated that fathers had no rights with regard to their nonmarital children. Accordingly, it became customary for nonmarital children to assume their mother's surname at birth rather than their father's . . . . [N]either custom nor the common law recognized a father's right to have his nonmarital children bear his surname. (Citations omitted.)

Id., at 286-87. Further, in *Daves v. Nastos*, 711 P.2d 314 (Wash. 1985), the trial court entered an order changing the surname of a child born out of wedlock from the mother's to the father's surname, without entering any specific findings that a name change was in the child's best interests. On appeal, the trial court's order was vacated and the case remanded for a hearing to determine whether the child's best interests would warrant making such a change. The court stated:

> A change in surname, so that a child no longer bears the name of a custodial parent, not only is of inherent concern to the custodial parent but is, in a real sense, a change in status having significant societal implications. Once a surname has been selected for a child, be it the maternal, paternal, or some combination of the child's parent's surnames, a change in the child's surname should be granted only when the change promotes the child's best interests.

Id., at 318.

In his order granting the name change to Fisher, the chancellor reasoned:

> With the father being active in Jacob's life, Jacob will know that his surname is different from his father's. Although this happens often, it is not the norm in this locale. The norm in this locale is

> that the child will have the same surname as the father. Whether that is right or wrong, that is the norm in this locale.

This reasoning is virually the same as the announced "policy" of the chancellor in *Mathews*, *supra*, to wit: "It has been this court's policy to change the last name to that of the father unless it is a situation where the child is, let's say, ten or eleven years old, been in school for a number of years, everybody knows that child by that last name." The court of appeals reversed the chancellor in *Mathews*, finding that the mechanical application of a "policy" that only took into account the child's age precluded consideration of the full panoply of factors inherent in determining the best interests of a child. Here, the chancellor's focus on "the norm in this locale" is commensurate with a policy of automatically assigning a child his father's surname.

I do not believe there are compelling facts which make it imperative to change Jacob's surname, and I do not believe it is in Jacob's best interests to do so. In my opinion, the significant considerations are that it is Kara Huffman who has custody of Jacob, it is she who is his primary caretaker, and it is she who will make major decisions for him as he grows up. Moreover, as a result of the decision of the prevailing judges, it is Jacob who will deal with awkwardness when his mother enrolls him in school and he tries to understand why his name is not the same as hers. I do not believe there are more compelling facts in this case than there were in *Reaves*, *supra*, wherein our supreme court announced it was not in the minor child's best interests to change the surname he had carried since birth. I would therefore reverse the chancellor and restore the child's birth name.

Because this court has reached a tie vote in this case, the trial court's decision must be affirmed. Ark. Code Ann. § 16-12-113 (Repl. 1994). It would be instructive for appellants to seek a review of this decision in our supreme court. Ark. Sup. Ct. R. 1-2(e)(i).

NEAL and AREY, JJ., agree.

Randy REAVES *v.* Cindy Lou REAVES and
Office of Child Support Enforcement

CA 97-1491 975 S.W.2d 882

Court of Appeals of Arkansas
Division II
Opinion delivered October 14, 1998

Teresa A. French, for appellant.

Bynum Gibson, for appellee.

JUDITH ROGERS, Judge. Appellant, Randy Reaves, brings this appeal from an order finding that he was $9,899.24 in arrears on his payments of child support. For reversal, appellant first contends that the chancellor erred by rendering his decision without

taking the opportunity to examine the exhibits he introduced at the hearing. Secondly, he argues that the chancellor erred in finding that he should not be credited for payments made outside the registry of the court. We find merit in the first issue raised and reverse the chancellor's order.

In the 1993 decree of divorce, appellee, Cindy Lou Reaves, was awarded custody of the parties' two children. Appellant was ordered to pay child support in the amount of $162.79 a week through the registry of the court. The amount of support was to be reduced to $114 a week should their son, Toby, cease to reside with appellee. By order dated June 18, 1996, appellant's obligation was reduced to $77 a week.

In June of 1997, the Office of Child Support Enforcement, having acquired an assignment of appellee's right to receive support, filed a motion to collect an alleged arrearage in appellant's child-support payments. At the hearing on this motion, it was stipulated that appellant owed a total of $26,116.74 in support, that payments of $16,217.50 had been made through the court's registry, leaving a balance owed of $9,899.24. In his defense, appellant asserted that he had made payments directly to appellee, and he asked to be credited for those sums paid outside the registry of the court. In support of his contention, appellant introduced into evidence copies of money order receipts and personal checks made out to appellee, and two handwritten receipts signed by appellee. He also presented copies of his payroll checks that he claimed to have endorsed over to appellee. In her testimony, appellee generally denied that she had received any money outside the registry in payment of child support. In ruling from the bench, the chancellor stated that he had not had the opportunity to review the exhibits introduced and that, even though he assumed some of the payments made were for child support, he had no idea how much and thus was not going to allow any credit for payments made outside the court's registry. The court's order finding an arrearage in the stipulated amount was entered thereafter, and this appeal followed.

Appellant contends that the chancellor erred in denying his claim for credit without even examining the exhibits introduced to corroborate his testimony on the matter. We agree.

The standards governing our review of a chancery court decision are well established. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). Although we try chancery cases *de novo* on the record, we do not reverse unless we determine that the chancery court's findings of fact were clearly erroneous. *Id.* In reviewing a chancery court's findings of fact, we give due deference to the chancellor's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id.* As an antecedent to our review, however, a duty rests upon the trial court to determine the issues before him based on all of the evidence presented. *See Dudley v. Adams*, 227 Ark. 376, 298 S.W.2d 701 (1957). Here, when we review the chancellor's remarks in context, we do agree that the issue in this case boils down to a question of credibility as to whether the testimony of appellant or that of appellee was to be believed. However, the chancellor admittedly did not consider all of the evidence presented in evaluating the testimony of the witnesses. From our review of the record, we find this to constitute error.

On *de novo* review of a fully developed chancery record, where we can plainly see where the equities lie, we may enter the order that the chancellor should have entered, or we may decline to do so if justice will better be served by a remand. *Matthews v. Oglesby*, 59 Ark. App. 127, 952 S.W.2d 684 (1997). We think the better course in this case is to remand for the chancellor to render an appropriate decision, and thus we do not address the second issue raised.

Reversed and remanded.

PITTMAN and GRIFFEN, JJ., agree.

Edwin D. DIEHL *v.* STATE of Arkansas

CA CR 98-304 975 S.W.2d 878

Court of Appeals of Arkansas
Division II
Opinion delivered October 14, 1998

Gene O'Daniel, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. The appellant was convicted at a bench trial of DWI, second offense. He argues on appeal that there was insufficient evidence to sustain the conviction because he was not in actual control of the vehicle. We disagree and affirm.

On November 14, 1996, at approximately 9:00 p.m., Officer Larry Behnke of the Pulaski County Sheriff's Office was patrolling

the parking lot of Ton's Place, a sports bar. The night was cold, and Officer Behnke saw exhaust coming from the tailpipe of a 1987 Chevrolet pickup. Officer Behnke's investigation of said vehicle resulted in his finding the appellant on the driver's side behind the steering wheel slumped over in the seat apparently unconscious. The doors of said vehicle were locked, and the keys were in the ignition with the engine running. Officer Behnke assisted Sergeant Brawly in helping the appellant out of the vehicle. As the officers moved appellant away from the vehicle, appellant stated that he had a designated driver. The appellant was then taken to Sherwood intake where he was administered a breathalyzer test. The result of the BAC test was .23%.

On appeal, the test is whether there is substantial evidence to sustain the conviction. *Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984). Substantial evidence is direct or circumstantial evidence that is forceful enough to compel a conclusion one way or another and which goes beyond mere speculation or conjecture. *Harris v. State*, 331 Ark. 353, 961 S.W.2d 737 (1998). In making this determination, we review the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* The resolution of credibility issues is within the province of the trial court. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

To convict the appellant of DWI, the State had to prove that the appellant was intoxicated and that he either operated or was in actual physical control of the motor vehicle. Ark. Code Ann. § 5-65-103 (Repl. 1997). The appellant readily admits that he was intoxicated when approached by Officer Behnke, but denies that he was in actual physical control of the vehicle. The appellant and several witnesses testified that he had a designated driver and that the appellant went out to warm up the pickup because it was cold. The appellant relies on *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984), for the proposition that he was not in actual physical control of the vehicle. However, the *Dowell* case is not on point with this case. In *Dowell*, the appellant was found asleep in his car with the keys in the seat beside him. The motor was not running. We find the case of *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988), cited by the State, to be

more on point with the present case. In *Blakemore*, the officers saw a red pickup truck sitting in front of a business. The motor was running and the lights were on. The appellant was either "asleep or passed out" in the front seat of the truck, and the officer had a hard time waking him up. The officer noted the strong odor of alcohol on the appellant. The appellant asserted on appeal that he was not in actual physical control of the vehicle. We hold that since the appellant could have awakened at any moment and started the car, he was in actual physical control. *Id.* The same holds true in this case as well. The appellant was slumped over in the driver's seat of the car with his legs under the steering wheel, at which time the keys were in the ignition with the motor running. We have no hesitancy in holding that the appellant was in actual physical control of the vehicle, and we affirm.

MEADS and ROAF, JJ., agree.

John Steven WOODSON *v.* Vicki R. Woodson JOHNSON

CA 97-1422 975 S.W.2d 880

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered October 14, 1998

Friday, Eldredge, & Clark, by: *Barry E. Coplin*, for appellant.

Mitchell, Blackstock, & Barnes, by: *Jack Wagoner III*, for appellee.

MARGARET MEADS, Judge. This case concerns modification of a child-support award. The parties to this action were divorced in 1985; Johnson was awarded custody of the parties' daughter, and Woodson was ordered to pay child support of $250 per month. In 1994, although the court failed to determine appellant's specific income, Johnson obtained an increase from $250 to $1,300 per month; Woodson did not appeal that decision.

Woodson remarried and had two children with his second wife. In 1995, Woodson and his second wife separated, and the Saline County Chancery Court ordered him to pay $1,371 per month in child support for his two youngest children. Woodson fell behind in his child-support obligations to both Johnson and his second wife, and he filed a motion to decrease his child-support payments to Johnson. In response, Johnson filed motions for contempt for failure to pay child support and for an increase in child support. After two hearings on the issue, the chancellor reduced Woodson's child-support payments to $900 per month and found him in willful contempt for failure to pay child support; however, she stated that she was unable to determine Woodson's income. Woodson now appeals the chancellor's order setting child support at $900 per month, arguing that this finding was clearly erroneous and an abuse of discretion, and that the chancellor erred in failing to establish his income and in failing to reference the family support chart. Johnson cross-appeals, arguing that the chancellor erred in finding that there had been a material change in circumstances justifying a decrease in appellant's child-support obligation from $1,300 per month to $900 per month.

We find that Johnson's cross-appeal is dispositive of the litigation. The amount of child support to be paid lies within the sound discretion of the chancellor, and the chancellor's finding will not be disturbed on appeal absent an abuse of discretion. *Scroggins v. Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990); *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998); *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997).

However, a change in circumstances is required before a child-support obligation can be modified, and it is the burden of the party seeking the modification to show that there has indeed been a change in circumstances. *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993). A chancellor's decision regarding whether there are sufficient changed circumstances to warrant a modification in child support is a factual finding, and that determination will not be reversed unless clearly erroneous. *Id.* The *Roland* court, citing *Reynolds v. Reynolds*, 299 Ark. 200, 771 S.W.2d 764 (1989), held:

> In determining whether there has been a change in circumstances warranting adjustment in support, the court should consider remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child support chart.

43 Ark. App. at 63-64 (citations omitted).

It is mandatory that a chancellor, in deciding a reasonable amount of child support, refer to the family support chart. Ark. Code Ann. § 9-14-106(a)(1)(A) (Repl. 1998). This statute creates a rebuttable presumption that the amount contained in the family support chart is the correct amount of child support to be awarded; however, this presumption can be rebutted upon a written finding that the application of the family support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart. Ark. Code Ann. § 9-14-106(a)(1)(B) and (C). Before a chancellor can refer to the family support chart, the payor's income must be determined. *Stepp v. Gray*, 58 Ark. App. 229, 947 S.W.2d 798 (1997). If the chancellor then deviates from the chart amount, she must explain her reasons for doing so; for if appellate review is to have significance, it is essential that we have an account of why the chart amount is inappropriate under the circumstances. *Cochran v. Cochran*, 309 Ark. 604, 832 S.W.2d 252 (1992).

After hearing the evidence, the chancellor declared that she could not determine Woodson's income and did not think Wood-

son wanted her to know his income. She stated that she did not believe Woodson's testimony with regard to certain business expenses; however, she also said that she was convinced that his business was in worse shape than it had been in 1994 and noted that he was now making a $1,371 monthly child-support payment for his youngest two children. She then reduced Woodson's monthly child-support obligation to $900. The order does not specify appellant's income, contains no reference to the child-support chart, does not state what the chart amount would be, and does not explain why application of the chart amount would be unjust or inappropriate.

The chancellor did not determine Woodson's income in 1994 when she ordered an increase in his monthly child-support obligation to $1,300, but Woodson did not appeal that decision. Similarly, after hearing appellant's current petition to reduce child support, the chancellor did not make a finding of Woodson's income because she was unable to determine his income with the proof he provided. The party seeking modification of child support has the burden of showing a change in circumstances. *Ritchey v. Frazier*, 57 Ark. App. 92, 940 S.W.2d 892 (1997). Because Woodson's income was not determined when support was set at $1,300 per month and cannot be determined now, we cannot say that there has been a material change in circumstances justifying a decrease in Woodson's child support. Therefore, the monthly support should have remained at $1,300.

Reversed with instructions to reinstate the $1,300 monthly child-support award.

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

ALLTEL MOBILE COMMUNICATIONS, INC., Alltel Northern Arkansas RSA Limited Partnership, Alltel Cellular Associates of Arkansas Limited Partnership, Alltel Central Arkansas Cellular Limited Partnership, Arkansas RSA No. 2 (Searcy County) Cellular Limited Partnership, Ft. Smith MSA Limited Partnership, Fayetteville MSA Limited Partnership, and Northwest Arkansas RSA Limited Partnership *v.*
ARKANSAS PUBLIC SERVICE COMMISSION

CA 97-826 975 S.W.2d 884

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered October 14, 1998

[redacted]

Stephen B. Rowell; and *Friday, Eldredge & Clark*, by: *Allison Graves*, for appellants.

Paul J. Ward, for appellee.

ANDREE LAYTON ROAF, Judge. This appeal involves the interpretation of Act 77 of 1997, the Telecommunications Regulatory Reform Act, as it relates to the Arkansas Public Service Commission's authority to require appellants and other commercial mobile-service providers to comply with Ark. Code Ann. §§ 23-3-109 (Supp. 1997) and 23-3-110 (Supp. 1997). Appellants contend that the passage of Act 77 eliminated the Commission's jurisdiction to require them and other commercial mobile-service providers to file gross-earnings reports and pay gross-earnings fees as provided by sections 23-3-109 and 110. We agree and reverse Commission Orders No. 1 and 2.

This docket originated with a motion filed by the staff of the Arkansas Public Service Commission (Staff) to force utilities providing cellular or wireless service to file annual reports with the Commission as required by section 23-3-109 (section 109). Staff's motion explained that some cellular utilities had informed Staff that Act 77 exempts them from the annual gross-earnings report requirement, and Staff therefore was requesting that the Commission determine the question. Less than a month later, the Commission entered Order No. 1, which held that "Act 77 of 1997 does not exempt any telecommunication utility from the specific

statutory requirements of Ark. Code Ann. § 23-3-109 (1995 Supp.)" and that Staff's uncontested motion should be and is hereby granted.

Following the entry of Order No. 1, eight commercial mobile-service providers, referred to collectively in this opinion as Alltel, appeared solely for the purpose of submitting an application for rehearing of Order No. 1. Alltel argued that the Commission's holding in Order No. 1 was erroneous, because the passage of Act 77 eliminated the Commission's jurisdiction to regulate commercial mobile-service providers except with respect to universal services. Alltel further argued that the Commission's limited jurisdiction over commercial mobile-service providers did not justify requiring the section 109 reports. Although Staff had argued in its motion that the section 109 reports were necessary for the Commission to carry out its statutory mandate with regard to the Arkansas Universal Service Fund established by Act 77, Alltel argued that the information included in the section 109 report was in direct conflict with the information required by Act 77 and, therefore, not relevant to the universal-service jurisdiction of the Commission.

Order No. 2 entered by the Commission in June 1997 denied Alltel's request for a rehearing. The Commission held that Alltel was not exempt from section 109, and it also held that it was not exempt from section 23-3-110 (section 110), which requires utilities to pay an annual gross-earnings fee. Alltel filed a timely notice of appeal from Orders No. 1 and 2, and Southwestern Bell Mobile Systems, Inc., and others (Amici) were granted permission by this court to file an amici curiae brief in this proceeding.

Appellants, Alltel and Amici, contend that, as a result of the passage of Act 77 and specifically section 11(g), the Commission no longer has authority to require commercial mobile-service providers to submit an annual gross-earnings statement or pay a fee as required by sections 109 and 110. Sections 109 and 110 are included in the general provisions portion of the Arkansas Code that addresses regulation of utilities, generally. The pertinent language of section 109(a) provides that "[a]nnually. . . each utility subject by law to the payment of fees or charges under the juris-

diction of either the [Commission] or the Arkansas State Highway and Transportation Department shall prepare and transmit to the Commission having jurisdiction over the utility a certified statement of the gross earnings from its properties in Arkansas for the preceding calendar year ending December 31." Section 110(a)(1) provides:

> There is levied and charged and there shall be collected annually from each utility subject by law to the payment of fees or charges under the jurisdiction of either the Arkansas Public Service Commission or the State Highway and Transportation Department a fee in an amount which shall be equivalent to that proportion of the total utilities costs that the gross earnings of each of the utilities bear to the total gross earnings of all utilities.

Act 77 of 1997, the Telecommunications Regulatory Reform Act, became effective by its emergency clause on February 4, 1997. Section 2 of the Act recites the "Legislative Findings":

> It is the intent of the General Assembly in enacting this Act to:
>
> (1) Provide for a system of regulation of telecommunications services, consistent with the Federal Act, that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms, modifies outdated regulation, eliminates unnecessary regulation, and preserves and advances universal service.

Section 11 of the Act is titled "Regulatory Reform," and subsection (g) provides: "The Commission, except as provided in this Act with respect to universal services, shall have no jurisdiction to regulate commercial mobile services or commercial mobile service providers." Appellants argue that the unambiguous language of section 11(g) removes the Commission's jurisdiction to regulate them except as specifically provided for in Act 77 with regard to universal services.

The Commission acknowledges that section 11(g) removes the Commission's jurisdiction to regulate commercial mobile service on issues not related to universal services. Instead, it contends that it can still require the annual assessment under sections 109 and 110 because these assessments are needed to recover its cost of

administering universal services. The Commission maintains that it has numerous regulatory responsibilities over universal services and that the section 110 assessment funds these responsibilities. The Commission concludes that section 11(g) should be read harmoniously with sections 109 and 110 by construing section 11(g) to exempt commercial mobile-service providers from the Commission's nonuniversal-service regulatory jurisdiction but continue to require commercial mobile-service providers to pay section 110's annual assessment to cover the Commission's universal-services costs. Courts presume that the legislature passes laws with full knowledge of existing laws. *See Moncus v. Raines*, 210 Ark. 30, 194 S.W.2d 1 (1946). The Commission further notes that sections 109 and 110 are not expressly repealed by section 11(g) and reminds this court that repeals by implication are not favored. *See Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997); *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994).

Although the legislature did not expressly repeal sections 109 and 110 in Act 77, Act 77 does unambiguously limit the Commission's universal-service jurisdiction to what is provided in Act 77. Repeals by implication do transpire when there exists an invincible repugnancy between the earlier and latter statutory provisions. *See Board of Trustees v. Stodola, supra.* The first rule in considering the meaning of a statute is to construe it just as it reads, giving words their common and usually accepted meaning in common language. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 53 Ark. App. 114, 919 S.W.2d 522 (1996); *see also Arkansas Vinegar Co. v. Ashby*, 294 Ark. 412, 743 S.W.2d 798 (1988). The primary object is to carry out the legislative intent, which is determined primarily from the language of the statute considered in its entirety. *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n*, 26 Ark. App. 202, 762 S.W.2d 403 (1988), *aff'd in part, rev'd in part*, 299 Ark. 359, 773 S.W.2d 427 (1989). In interpreting a statute and attempting to construe legislative intent, the appellate court looks to the language of a statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate means that throw light on the subject. *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994). Where the language of a statute is plain and unambigu-

ous, the appellate court gives the language its plain and ordinary meaning and determines legislative intent from the language used. *Leathers v. Cotton*, 332 Ark. 49, 961 S.W.2d 32 (1998); *Omega Tube & Conduit Corp. v. Maples*, 312 Ark. 489, 850 S.W.2d 317 (1993).

Section 11(g) limits the Commission's authority to regulate commercial mobile service and commercial mobile-service providers to universal services "*as provided in this Act.*" (Emphasis added.) One of the stated legislative intents of Act 77 is to preserve and promote universal service. Section 4 of Act 77 covers the "Preservation and Promotion of Universal Service" and establishes the Arkansas Universal Service Fund (AUSF) to promote and assure the availability of universal service at rates that are reasonable and affordable. Section 4(b) requires the AUSF to provide a mechanism to restructure the present system of telecommunication service rates in the State, and requires that all telecommunications providers, except as prohibited by federal law, shall be charged for the direct and indirect value inherent in the obtaining and preservation of reasonable and comparable access to telecommunication in the rural or high-cost areas. Subsection (c) delegates to a trustee (Administrator) the administration, collection, and distribution of the AUSF, and section (d) authorizes the Commission "to increase the AUSF charge by those amounts necessary to recover the cost of administration of the AUSF." There is no other language in Act 77 that allows the Commission to charge or assess commercial mobile-service providers a fee other than that contained in section 4(d).

■ ■ Despite the Commission's argument that the fees assessed pursuant to sections 109 and 110 are necessary to pay its costs of administering universal service, section 4(d) of Act 77 specifically addresses recovery of the costs of administering the AUSF. It is a well-recognized principle of statutory construction that a general statute must yield when there is a specific statute involving the particular subject matter. *Board of Trustees v. Stodola, supra*; *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957). Furthermore, section 11(g) limits the Commission's universal-service jurisdiction to "as provided in [Act 77]." A statute should be construed so that no word is void,

superfluous, or insignificant, and meaning and effect must be given to every word contained therein, if possible. *See Locke v. Cook*, 245 Ark. 787, 434 S.W.2d 598 (1968).

By its clear wording, section 11(g) terminated the Commission's traditional regulatory authority over commercial mobile-service providers except as specifically set forth in Act 77. No reference is made in Act 77 to sections 109 and 110. Accordingly, the Commission no longer has jurisdiction to require commercial mobile-service providers to comply with these sections, and Orders No. 1 and No. 2 are reversed.

Reversed and remanded.

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

Ozzie ATKINS *v.* STATE of Arkansas

CA CR 98-77 979 S.W.2d 903

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered October 14, 1998

William R. Berry, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Ozzie Atkins was convicted by a jury of residential burglary and sentenced to twenty years' imprisonment. On appeal, Atkins argues that the trial court erred in denying his motion for directed verdict because there was insufficient evidence of his intent to commit an act punishable by imprisonment. We hold that there was sufficient circumstantial evidence of intent, and affirm.

At 11:30 a.m. on March 13, 1997, Gene Jackson, an evening shift dispatcher for the local sheriff, was home alone watching television in a bedroom when he saw Atkins enter his home unannounced. Jackson did not know Atkins and did not authorize him to enter his home. Although the front door was left slightly open, the storm door was closed.

Jackson testified that he heard the door open and observed Atkins walking toward his stereo, located in a corner of his living room. Jackson stated that Atkins fled the moment they made eye contact with one another. Jackson then sent his Rottweiler, who was lying at his feet, after the intruder, and Jackson also gave chase. He caught up with Atkins as he was trying to jump a fence across the street from Jackson's home.

Jackson testified that when he asked the intruder why he was in his home and to identify himself, Atkins responded that he wanted to ask if he could rake his leaves, and said that his name was "June Bug." Because there were no leaves on the ground, Jackson returned home and called the police. The police apprehended Atkins a few blocks from Jackson's home. Atkins again identified himself to the police as "June Bug," but gave his real name when asked. He was later identified by Jackson as the intruder.

After the State rested, Atkins moved for directed verdict and argued that the State had failed to present sufficient evidence that he entered an occupiable structure with the purpose of committing an unlawful act. The trial court denied the motion, and the jury convicted Atkins of residential burglary.

On appeal, Atkins contends that the trial court erred in denying his motion for directed verdict because the State failed to present sufficient evidence that he had the requisite intent to support a conviction for burglary. He argues that there is no evidence of his intent to commit a felony after his unlawful entry, and that he could well have entered to seek employment, such as raking leaves, and could have simply been admiring Jackson's furnishings. He further claims that he fled because Jackson's dog was intimidating and gave chase after him. In response, the State contends that his felonious intent may be inferred from the surrounding circumstances — the illegal entry, movement toward the stereo equipment, fleeing from the house, use of a false name, and giving an implausible reason for the entry. We agree that these factors constitute sufficient circumstantial evidence of Atkins's intent, and that the trial court did not err in denying the motion for directed verdict.

The offense of residential burglary requires proof: (1) that the defendant entered or remained unlawfully in an occupiable structure of another person and (2) that he did so with the purpose of committing an offense punishable by imprisonment. Ark. Code Ann. § 5-39-201 (Repl. 1993). It is well settled that the State is required to prove each and every element of the offense. *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985). Specific intent cannot be inferred solely from proof of an illegal entry. *Forgy v. State*, 302 Ark. 435, 790 S.W.2d 173 (1990); *see also Oliver v. State, supra.* The State cannot shift to the defendant the burden of explaining his unlawful entry, but must also establish the defendant's intent. *Norton v. State*, 271 Ark. 451, 609 S.W.2d 1 (1980). However, intent may be inferred from circumstantial evidence, so long as such evidence is consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion. *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992) (*citing Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981)).

It is well settled that the flight of an accused to avoid arrest is evidence of his felonious intent. *Cristee v. State,* 25 Ark. App. 303, 757 S.W.2d 565 (1988); *Oliver v. State, supra.* In *Cristee, supra,* a finding of intent for a conviction of burglary was upheld where, although nothing was stolen, the appellant was seen running, with a crowbar, from the scene of a break-in after the alarm went off. In *Oliver, supra,* although nothing was stolen, a finding of criminal intent for a conviction of burglary was upheld where the appellant was seen running from an illegally entered structure; the alarm triggered by the entry summoned the police. In *Forgy, supra,* a burglary conviction was affirmed because intent could be inferred from the illegal entry, fresh scrape marks around a television, and the fact that other valuables had been prepared for removal. In *Rudd v. State supra,* a conviction of burglary was upheld where the appellant was found hovering around computer equipment with gloves on; appellant's seven prior burglary convictions were also introduced into evidence.

The existence of criminal intent or purpose is a question of fact for the jury when the evidence shows facts from which it may be reasonably inferred. *Cristee, supra.* Furthermore, a jury may consider and give weight to any false, improbable, and con-

tradictory statements made by an accused explaining suspicious circumstances. *Walker v. State,* 313 Ark. 478, 855 S.W.2d 932 (1993). Here, the evidence shows that Atkins unlawfully entered Jackson's residence; Jackson testified that he observed Atkins walking toward his stereo equipment; upon being discovered, Atkins immediately ran; Jackson gave chase and caught Atkins while he was trying to jump a fence in front of Jackson's residence; upon capture, Atkins provided a false name and an implausible reason for the entry.

We note that the dissenting judges point out that this case is similar to *Wortham v. State*, 5 Ark. App. 161, 634 S.W.2d 141 (1982), in which a burglary conviction was reversed because there was insufficient evidence of Wortham's felonious intent. In both cases there was no forced entry and no property was taken or even touched. However, there are several crucial differences between the two cases. Wortham was merely observed standing inside the open front doorway of the house he had entered. He ran away when a girl inside screamed. The two girls in the house knew Wortham and he had asked them to be his girlfriends. These circumstances are clearly a far cry from an illegal entry by a complete stranger who then brazenly walks across a room towards the owner's stereo equipment.

While it is true that the State may not shift to Atkins the burden of explaining his unlawful entry, here, he did explain and gave an implausible and even ludicrous excuse for his entry into Jackson's home — that he wanted to rake Jackson's leaves in the middle of spring, when there were no leaves on the ground. By doing so, he provided an additional factor from which the jury could infer his felonious intent.

Although none of the factors, standing alone, would sustain the conviction, together they provide sufficient evidence from which the jury could reasonably infer that Atkins had the intent to commit a theft.

Affirmed.

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

STROUD and JENNINGS, JJ., dissent.

JOHN F. STROUD, JR., dissenting. I dissent from the majority opinion because I think the evidence was insufficient to establish that the appellant intended to commit an act punishable by imprisonment when he entered the residence of Charles Jackson.

The majority opinion relies on five factors to prove the appellant's intent to commit an offense punishable by imprisonment. First, the appellant's entry into the residence was unlawful because it was not authorized. As the majority opinion points out, however, the specific intent, which is required by Arkansas Code Annotated section 5-39-201 (Repl. 1993), cannot be inferred solely from proof of an illegal entry. *See Forgy v. State*, 302 Ark. 435, 790 S.W.2d 173 (1990). Furthermore, the prosecution must separately prove specific intent and illegal entry as independent elements of the crime of burglary, and it cannot shift to the defendant the burden of explaining his illegal entry by merely establishing it. *Norton v. State*, 271 Ark. 451, 453-54, 609 S.W.2d 1, 2-3 (1980). The following discussion in the *Norton* decision is directly on point:

> Not only is illegal entry an independent element of burglary, but it also constitutes a separate crime punishable as criminal trespass . . . . By implying a specific criminal intent from mere evidence of illegal entry, the state not only evades its constitutional evidentiary burden in criminal prosecutions but imposes upon a defendant the responsibility to prove he only committed a criminal trespass or stand in jeopardy of a conviction of burglary.

271 Ark. at 454, 609 S.W.2d at 3. Here, there was no breaking or forced entry as is present in most burglary cases. The appellant entered a house in the middle of the day with a truck parked in front of the house, the door to the house open, and a television turned on inside; these were hardly inviting circumstances for a burglary.

The second factor the majority relies on was that Mr. Jackson testified that the appellant was walking toward a stereo and entertainment center when Mr. Jackson saw him. Heretofore, Arkansas cases have required the moving of an object or at least the touching of an object to infer an intent to remove it. Walking toward an object is certainly short of that, and in fact it would be

difficult to walk in a house without walking toward some moveable object or piece of furniture. Evidence that items had been moved went to the sufficiency of the evidence to sustain burglary convictions in *Oliver v. State*, 14 Ark. App. 240, 687 S.W. 2d 850 (1985); *Jimenez v. State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984); and *Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984) (reversed and remanded on other grounds).

The third factor relied upon by the majority is the fact that appellant fled. Arkansas cases where fleeing has been considered a factor to show intent include the following fact situations: fleeing after entering a building at night and ignoring the surveillance officer's order to freeze, *Grays v. State,* 274 Ark. 564, 572 S.W.2d 847 (1978); ignoring an order to halt and fleeing the investigating officer after a burglar alarm was set off, *Oliver v. State,* 14 Ark. App. 240, 687 S.W.2d 850 (1985); or fleeing after a girl in the house screamed, *Wortham v. State*, 5 Ark. App. 161, 634 S.W.2d 141 (1982) (distinguished from flight to avoid arrest: burglary conviction was reversed and reduced to criminal trespass). Here, a different reason existed for fleeing: Mr. Jackson sicced his rottweiler dog on appellant. I don't find fleeing under that circumstance to be evidence of the required intent, but rather the exercise of prudent judgment.

The fourth and fifth factors relied upon by the majority opinion were that appellant gave a nickname, "June Bug," and an improbable explanation, that he wanted to rake leaves. He was, however, in the predicament of being penned against a fence when Mr. Jackson asked him what his name was and why he was in the house. There is no indication that "June Bug" is anything other than the name customarily used by appellant, and I do not think it is unusual to give an improbable explanation while penned by a 125-pound rottweiler.

The circumstances of this case and of the *Wortham* case, *supra*, are similar. There was no forced entry, and no objects were moved or touched. In both cases the party fled, one from a screaming girl and the other from a rottweiler. No prior convictions for theft or burglary were present in either case, although such convictions have been the deciding factor to show criminal

intent in at least one Arkansas case. In *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992), a homeowner testified that she heard a noise at her back door and found appellant in her kitchen, looking at a scanner on a table. He told her that he had seen boys running from her house, had found the screen door wide open, and had come in to see what they had taken. Neighbors testified that they had seen appellant walk around the house but had not seen any boys, and the investigating officer stated that the back door had been forced open. The appellant also testified, and on cross-examination the State introduced evidence of prior theft and burglary convictions. The appellant in *Rudd* alleged error in the trial court's allowing evidence of his prior convictions and claimed the evidence insufficient to support the burglary conviction. The supreme court discussed these points as follows:

> Clearly, the state's case placed the appellant unlawfully in the Rogers' house . . . and appellant's testimony did nothing but enhance the state's evidence when reading his questionable explanation of why Mrs. Rogers found him in her house. No one testified as to having seen anyone run from the Rogers' house except the appellant. And, in giving his account of what happened, his story differed in both major and minor ways from those versions given by Mrs. Rogers and her neighbors. Clearly, the jury could infer from the evidence that he went to the Rogers' house . . . thinking that Mrs. Rogers would not be at home. He went to the back door, and unlawfully forced it open, only to be surprised by Mrs. Rogers' presence.
>
> Concerning appellant's purpose when entering the Rogers' house, the state introduced appellant's prior theft and burglary convictions to show his intent to commit burglary and to counter appellant's defense of mistake and his explanation as to why he entered the house . . . .
>
> . . . [*W*] *ithout appellant's prior theft and burglary convictions, the state had no evidence showing appellant's reason for unlawfully entering the Rogers' house.*

308 Ark. at 406, 825 S.W.2d at 568 (emphasis added).

In other words, the *Rudd* court held that forcing entry, looking at a moveable scanner, and giving an implausible explanation were not enough to affirm the burglary conviction without the added factor of proof of prior theft and burglary convictions. In

the case presently on appeal, there are two similar factors: looking at but not touching a moveable stereo and giving an implausible explanation. The differing factors are hardly comparable: fleeing from a rottweiler here, versus forced entry and proof of prior theft and burglary convictions in *Rudd*.

In *Wortham v. State, supra*, the accused entered a house where a loud radio was playing and two girls were painting in a bedroom. He fled when one of the girls saw him in the living room and screamed. He offered no explanation for entering the house, although this court surmised one when it said:

> From the evidence presented, it is not unreasonable to assume that appellant came to the house with no criminal purpose in mind and that he entered the open side door of the house when he could not get anyone to hear his knock above the noise of the music. When the young girl saw appellant and screamed, he could have panicked and then fled.

This court noted that although flight from the scene of a crime can corroborate other proof of guilt, there was no evidence that the accused fled to elude arrest. We found the circumstantial evidence in *Wortham* to be insufficient and reduced the conviction from burglary to criminal trespass. Surely the implausible explanation offered here versus no explanation in *Wortham* does not sufficiently differentiate this case to justify affirming here and reversing in *Wortham*. I would reduce the burglary conviction in this case to criminal trespass, as we did in *Wortham*. I am authorized to advise that Judge JOHN JENNINGS joins in this dissenting opinion.

Larry McLAUGHLIN, Marsha McLaughlin, Mike Skidmore, and Elaine Skidmore *v.* Samuel SICARD and Melissa Sicard

CA 98-131 977 S.W.2d 1

Court of Appeals of Arkansas
Division IV
Opinion delivered October 21, 1998

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

Walters, Hamby & Verkamp, by: *Bill Walters*, for appellees.

JUDITH ROGERS, Judge. Appellants Larry and Marsha McLaughlin and Mike and Elaine Skidmore appeal the Sebastian County Chancery Court's order quieting title in appellees to forty-one acres of land. We affirm.

In June 1996, appellees filed in chancery court a petition to quiet title. They requested that the chancery court quiet title in them to a particular forty-one-acre tract. Appellees asserted that they had acquired title to this property by deed, which they acquired from James and Phyllis Gilker in September 1974. Appellees alleged further that, at the time they received title to the land from the Gilkers, the Gilkers had been in possession of the land for thirteen years. Finally, appellees alleged that title to the land should be quieted in them because they had adversely possessed the land for twenty-two years and that their predecessors in

interest, the Gilkers, had adversely possessed the land prior to September 1974.

In June 1997, the chancery court held a hearing in connection with appellees' petition. On July 23, 1997, the chancery court handed down an order quieting title to the forty-one acres in appellees. The chancery court found:

> [The] Court finds that, the Gilkers, entered into possession of the subject real property in 1961 and remained in continuous possession of the subject property from 1961 to 1974. That the Gilkers maintained the subject property as part of their farming and cattle operation for the period from 1961 through 1974. That during that entire period, the subject property was part of the farm that was continuously under fence. The subject property and the surrounding property was used for the primary purpose of operating a cattle company and was therefore not wild and unimproved and unenclosed property.
>
> The Court further finds that the Gilkers' possession of the subject property was continuous for the 13 years and that it was held adverse to the rights of the true owners; that the Gilkers' possession was visible, exclusive, hostile and open for the 13 year period and the Gilkers' possession was intentional. That the Gilkers acquired title to this subject property by adverse possession.
>
> That the Plaintiffs obtained color of title to this property when they received and recorded a quit claim deed from the Gilkers for the subject property in 1974. The quit claim deed executed by the Gilkers who had obtained title to this property by adverse possession, conveyed to the Sicards the interest that the Gilkers had obtained by adverse possession. That the Plaintiffs have had possession of the subject real property since 1974.
>
> The Court is cognizant of the fact that the Defendants and their predecessors in title have continuously paid the property taxes on the subject real property. However, the Court finds that since the property is not to be considered as wild and unimproved and unenclosed property, that the statutory provisions allowing acquisition by payment of property taxes is not applicable in this case.

Appellants challenge these findings of fact.

Specifically, appellants assert that the chancery court erred in finding that the forty-one-acre tract was enclosed by a fence and was "not . . . wild and unimproved and unenclosed property." Appellants also argue that, because appellees did not pay property taxes on the forty-one acres, they do not have title to the land. Appellants also maintain that they never had notice that the land was being adversely possessed.

Appellants' allegations of error are meritless. They are meritless because, while appellants' arguments attack appellees' proof of adverse possession of the tract, their arguments fail to persuade us that the chancery court was clearly erroneous in finding that the appellees' predecessors in interest, the Gilkers, adversely possessed the forty-one acres from 1961 to 1974.

The standards governing our review of a chancery court decision are well established. Although we try chancery cases *de novo* on the record, we do not reverse unless we determine that the chancery court's findings were clearly erroneous. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). In reviewing a chancery court's findings, we give due deference to the chancellor's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Jennings v. Burford, supra.*

The legal principles governing establishment of title to land by adverse possession are also well established. We recently set forth these principles as follows:

> It is well settled that, in order to establish title by adverse possession, appellee had the burden of proving that she had been in possession of the property continuously for more than seven years and that her possession was visible, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner. The proof required as to the extent of possession and dominion may vary according to the location and character of the land. It is ordinarily sufficient that the acts of ownership are of such a nature as one would exercise over her own property and would not exercise over that of another, and that the acts amount to such dominion over the land as to which it is reasonably adapted. Whether possession is adverse to the true owner is a question of fact. *See Walker v. Hubbard*, 31 Ark. App. 43, 787 S.W.2d 251

> (1990); *Hicks v. Flanagan*, 30 Ark. App. 53, 782 S.W.2d 587 (1990).

Fulkerson v. Van Buren, 60 Ark. App. 257, 259-60, 961 S.W.2d 780, 782 (1998) (quoting *Moses v. Dautartas*, 53 Ark. App. 242, 244, 922 S.W.2d 345, 347 (1996)). Adverse possession maintained for the statutory seven-year period vests title in the adverse possessor as completely as would a deed from the holder of record title. *See Neyland v. Hunter*, 282 Ark. 323, 668 S.W.2d 530 (1984); *Hart v. Sternberg*, 205 Ark. 929, 171 S.W.2d 475 (1943). A landowner has a duty to keep himself or herself informed as to the adverse occupancy of his or her property. *Welder v. Wiggs*, 31 Ark. App. 163, 790 S.W.2d 913 (1990). A landowner's knowledge that another person is in hostile possession of his land may consist of either actual knowledge or constructive notice. *Welder v. Wiggs*, *supra*. Constructive notice is that which would reasonably indicate to the landowner, if he visits the premises and is a person of ordinary prudence, that another person is asserting a claim of ownership adverse to his own. *Id.*

The Gilkers' adverse possession of the forty-one acres was established by the testimony of their son, Paul Gilker. At the June 1997 hearing, Paul Gilker testified that he remembered, in 1961, when he was six years old, that his father, James Gilker, purchased a farm. He testified further that his father built a fence around the farm. When asked if he had helped build the fence, he replied:

> I helped build [the fences], helped maintain them, and I walked them; because we were there from the time I was six until I was 16 or 17 years old when we sold the farm. We were running cattle on the farm at various levels of intensity. When I was a young man, my father had roughly 40,000 acres of land under lease, and we were running 2,000 to 3,000 cows. So I have done everything on the farm.

Mr. Gilker testified further that his father had the farm for about thirteen years and that he sold it in 1974.

With regard to the forty-one-acre tract at issue, Mr. Gilker testified that the tract was part of his family's farm and that it was fenced in with the rest of the farm in 1961 or 1962. He testified further that his father had a pond bulldozed out in the forty-one-

acre tract and that his family cleared the land around the pond and planted grass in the area. He specifically testified that his family cleared off "maybe half" of the forty-one acres. He also stated that his family cut hay from the upper part of the tract. With regard to the grazing of cattle on the land, Mr. Gilker testified: "We bought our first cattle in . . . 1961 or something. They were Black Angus and we got the Charlet Cattle and then we ran them, basically, until we sold it. We had some cattle down there all the time."

Mr. Gilker also testified that his family's use of the farm was continuous from 1961 to 1974. When asked if it would have been visible to anyone inspecting the farm that his family was using the forty-one acres at issue, he replied:

> If you came on the farm, yes, but the farm is in a remote location. But, yes, if you came on the farm, you could see we had enclosed. We built barns. We built, actually, three barns. A large hay barn, what we called the horse barn, and we built a loafing barn. We built the ponds. We had our trailer house we enclosed. It was an active farm.

Mr. Gilker testified further that his family's use of the forty-one-acre tract as part of their farm was visible.

This testimony by Paul Gilker was sufficient to establish that the Gilkers adversely possessed the forty-one-acre tract at issue as part of their farm, when they pastured cattle on their farm from 1961 to 1974. Proof of the enclosure of land, the maintenance of a fence enclosing the land, and the pasturage of cattle on the land is sufficient to prove adverse possession of the land. *See Morgan v. Downs*, 245 Ark. 328, 432 S.W.2d 454 (1968); *Robinette v. Brooks*, 241 Ark. 470, 408 S.W.2d 490 (1966); *McComb v. Saxe*, 92 Ark. 321, 122 S.W. 987 (1909).

Appellants argue in their brief that appellees failed to prove that the Gilkers had built a fence around the forty-one-acre tract at issue. It is true that Paul Gilker's testimony establishes only that the tract was part of the Gilkers' farm and that the entire farm was enclosed by a fence. However, the Gilkers could have adversely possessed the tract so long as it was within the fence around their farm. The Arkansas Supreme Court addressed this point of the law of adverse possession in *Burns v. Mims*, 224 Ark.

776, 276 S.W.2d 76 (1955). In this case, the court rejected appellant Burns's contention that a fence around a tract of land was not sufficient to put him on notice that appellee was adversely possessing three lots that lay near the center of the larger, enclosed tract. The court held:

> It is the appellant's principal contention that neither the fence nor the improvements touched the three lots to which the appellant has paper title. This is true. It happens that the three lots claimed by the appellant lie near the center of the tract; the perimeter fence at its closest point is about 150 feet north of the lots in dispute. This circumstance, however, does not refute [appellee's] claim. Hostility of possession is to be judged by the views and intentions of the person occupying the property, not by those of the landowner whose title is being extinguished . . . . It was enough for the appellee to erect a single fence encircling the entire tract; he was not required to subdivide his claim by the construction of cross fences conforming to the record ownership of the interior lots. The appellant was put on notice of the hostile claim by the fact that his access to his lots was obstructed from every direction.

Burns v. Mims, 224 Ark. at 777, 276 S.W.2d at 76-77 (internal citation omitted). *Accord Morgan v. Downs*, *supra*; *Robinette v. Brooks*, *supra*.

Paul Gilker's testimony also shows the meritlessness of appellants' contention that appellees do not own the forty-one acres because appellants have paid property taxes on the acreage since 1989. Paul Gilker's testimony establishes that his parents adversely possessed the tract and that they acquired title in 1968, seven years after they had purchased their farm and began their cattle operation there. In 1968, payment of property taxes was not an element of adverse possession. Payment of property taxes did become an element of adverse possession in 1995.[1] Even if the

[1] In 1995 the General Assembly added two general requirements for adverse possession of land. These two requirements, set forth in Ark. Code Ann. § 18-11-106(a)(1)(A) (Supp. 1997), are: (1) the holding of color of title to the land for at least seven years and (2) the payment of ad valorem taxes on the land during this seven-year period. See Shane P. Raley, *Note, Color of Title and the Payment of Taxes: The New Requirements Under Arkansas Adverse Possession Law*, 50 ARK. L. REV. 489 (1997).

appellants had begun paying property taxes on the forty-one acres in 1961, they could not have acquired title to the acreage because, by then, it was no longer unimproved and unenclosed. *See Schmeltzer v. Scheid*, 203 Ark. 274, 157 S.W.2d 193 (1941).

Appellants also assert that appellees' possession of the forty-one acres was not sufficiently visible and notorious to put them on notice of appellees' adverse possession of the tract because appellees never told them that they were doing so. Appellants note that, in January 1989, appellant Michael Skidmore telephoned appellee Samuel Sicard and offered to sell the forty-one acres to him. Skidmore testified that Sicard offered him $100 an acre for the land. Appellants argue that, during this telephone conversation, Sicard did not tell Skidmore that he claimed title to the forty-one acres. According to appellants, Sicard's silence during this telephone conversation established the appellees' lack of visible and notorious holding of the forty-one acres necessary to establish adverse possession. We are unpersuaded by this argument for two reasons.

As noted above, one adversely possessing land is not required to give actual notice to the landowner that he is doing so — constructive notice is sufficient. *Welder v. Wiggs, supra.* Moreover, after an individual obtains title to land by adverse possession, his recognition that another may have a claim to the land does not divest title to the land from the adverse possessor nor does this recognition estop the adverse possessor from asserting title. *See Tull v. Ashcraft*, 231 Ark. 928, 333 S.W.2d 490 (1960); *Hart v. Sternberg, supra.* As noted above, the chancery court found that the Gilkers had title, by adverse possession, to the forty-one acres at least twenty years before the January 1989 telephone conversation between appellant Michael Skidmore and appellee Samuel Sicard. Appellee Sicard's silence during the January 1989 telephone conversation does not cast doubt on the title to the forty-one acres that he received from the Gilkers when he purchased their farm, which included the forty-one acres, in 1974. An adverse possessor's statements, such as an offer to another to purchase the land, do not divest the adverse possessor of title because the offer to purchase "may have been made in order to buy peace and avoid litigation, and not in recognition of appel-

lants' title." *Pitts v. Pitts*, 213 Ark. 379, 385, 210 S.W.2d 502, 505 (1948).

For the reasons set forth above, we affirm the Sebastian County Chancery Court's order quieting title to the forty-one acres at issue in appellees.

Affirmed.

ROBBINS, C.J., and BIRD, J., agree.

HOME MUTUAL FIRE INSURANCE COMPANY *v.*
Charles JONES and Lavonne Jones

CA 97-1457 977 S.W.2d 12

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered October 28, 1998

Smith Law Firm, by: *Truman H. Smith*, for appellant.

Donald B. Kendall, for appellees.

JOHN MAUZY PITTMAN, Judge. Appellant Home Mutual Fire Insurance Company was sued by its insureds, appellees Charles and Lavonne Jones. After a jury trial, appellees were awarded $91,500 in policy proceeds. The trial judge added a 12%

penalty, prejudgment interest, and attorney's fees, pursuant to Ark. Code Ann. § 23-79-208 (Repl. 1992). On appeal, appellant contends that there was no coverage for the loss suffered by appellees, that the trial judge erred in awarding the penalty, interest, and attorney's fees, and that the trial judge erred in instructing the jury. We find no error and affirm.

Appellees were the owners of a poultry farm, part of which was located in Benton County and part of which was located across the Missouri border. In March 1986, they purchased an insurance policy from appellant. The policy insured three poultry houses for $25,000 each, the contents of each poultry house for $5,000 each, and a barn for $1,500. The cover page of the policy stated: "INSURANCE IS PROVIDED AGAINST ONLY THOSE PERILS AND FOR ONLY THOSE COVERAGES INDICATED BELOW BY A PREMIUM CHARGE AND AGAINST OTHER PERILS AND FOR OTHER COVERAGES ONLY WHEN ENDORSED HEREON OR ADDED HERETO." According to the cover sheet, appellees paid a premium for fire and lightning coverage and for "extended coverage," which named the following perils: windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles, and smoke.

In March 1989, a four-day winter storm struck the northwest portion of the state. The storm began with falling ice, which then changed to snow. The buildup of winter precipitation on the roofs of appellees' structures caused them to collapse. Within a few days after the storm, appellees notified appellant of their loss. Their claim was denied on the ground that they had not purchased "collapse coverage." On February 23, 1994, appellees sued appellant in Benton County Circuit Court. After a jury trial, appellees were awarded $91,500 in policy proceeds, the full amount they had sought in their complaint. Following a posttrial hearing, the trial judge imposed a penalty of $10,980 and awarded prejudgment interest and attorney's fees in the amounts of $43,920 and $36,600, respectively. Appellant filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial, which was deemed denied upon the passage of thirty days

without a ruling. See Ark. R. App. P.—Civil 4(c). This appeal followed.

Appellant contends first that the trial judge erred in denying its motion for a directed verdict, which was made at the close of all evidence, and in denying its motion for judgment notwithstanding the verdict or, in the alternative, a new trial. It argues that the damage to appellees' property was not caused by a peril named in the policy but by collapse, a peril for which no coverage was provided. Appellant further claims that the loss suffered by appellees was excluded under the policy. Finally, appellant argues that appellees did not offer sufficient proof of the amount of their damages.

■ ■ Appellate review of a denial of a motion for directed verdict or a motion for judgment notwithstanding the verdict entails determining whether the nonmovant's proof was so insubstantial as to require a jury verdict, if entered on his behalf, to be set aside. *St. Edward Mercy Medical Ctr. v. Ellison,* 58 Ark. App. 100, 946 S.W.2d 726 (1997). The same standard of review applies to a denial of a motion for a new trial made on the ground that the jury's verdict was clearly contrary to the preponderance of the evidence. *McLaughlin v. Cox,* 324 Ark. 361, 922 S.W.2d 327 (1996); *Scott v. McClain,* 296 Ark. 527, 758 S.W.2d 409 (1988). The question we must answer is whether there was substantial evidence to support the jury's verdict. *Croom v. Younts,* 323 Ark. 95, 913 S.W.2d 283 (1996). Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or another, forcing or inducing the mind to pass beyond suspicion or conjecture. *Winchel v. Craig,* 55 Ark. App. 373, 934 S.W.2d 946 (1996). On appeal, we will only consider the evidence favorable to the appellee, together with all its reasonable inferences. *St. Edward Mercy Medical Ctr. v. Ellison, supra.*

Appellees contended below that the damage to their property was caused by hail, a named peril in the insurance policy. Appellant's position was that no hail had fallen during the storm and that appellees' loss was caused by ice and snow. Appellant presented the testimony of Dr. John Hehr, a professor at the University of Arkansas and the State Climatologist. Dr. Hehr, relying

on data from the National Climatic Data Center in Asheville, North Carolina, and from cooperative observers from, among other places, the town of Gravette in Benton County, told the jury that an arctic front passed through Tulsa, Oklahoma, at approximately 8:00 p.m., on March 3, and through Fayetteville, Arkansas, at about 12:00 midnight. At Gravette, which is seven to ten minutes from appellees' farm, the cooperative observer measured 2.6 inches of ice on March 4, 3.5 inches of additional ice and snow on March 5, and 8.2 inches of snow after that time. Using these figures, Dr. Hehr estimated that the weight of the accumulation on each of appellees' poultry houses would have been 44.6 tons on March 4[1], 80.6 tons on March 5, and 88.2 tons on March 6. He said he would call the storm an ice storm with a progression of freezing rain to sleet to snow. He noted that there were no reports of hail with the storm. On cross-examination, Dr. Hehr testified that it would have been possible for the ice to destroy appellees' buildings before the snow began. He had already testified that ice weighed more than snow. Further, he acknowledged that precipitation is called hail when it exceeds five millimeters in size. However, he maintained that no hail had fallen during this storm.

According to appellees, the storm began sooner than what was testified to by Dr. Hehr. Charles Jones testified that ice pellets began to fall at his farm on the afternoon of Friday, March 3. The ice fell all that night and the next day. On Sunday morning, March 5, he and Mrs. Jones went to check on the cattle in their barn and found that the barn had collapsed. One cow was killed. Mrs. Jones was dispatched to one of the poultry houses to retrieve some equipment. When she arrived, she heard popping noises and saw that the rafters were breaking. She decided that it would be unsafe to go inside. Mr. Jones then looked at the three poultry houses and determined that they were destroyed. Nearly all the rafters were broken, and the houses looked as if they would fall down at any time. According to Jones, the houses were beyond repair, and the equipment inside the houses was damaged as well.

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[1] Dr. Hehr originally said 4.6 tons but, later in his testimony, referred to 44.6 tons, which seems to be the more logical figure.

These observations took place before the snow started to fall at noon on Sunday.

Jones testified further that the precipitation that was falling was ice pellets, round in shape, and about the size of an eraser on a No. 2 pencil. Being a mechanic and familiar with the use of calipers, Jones estimated the size of the pellets at about six millimeters. Mrs. Jones's testimony corroborated that of her husband. She testified that she considered the precipitation hail as it was falling and confirmed that, before the snow hit, the buildings and their contents were destroyed. According to Charles Jones, the buildings collapsed completely on Tuesday and Wednesday following the storm.

It was appellees' burden to make a prima facie case that their damages were covered under the insurance policy. *Reynolds v. Shelter Mut. Ins. Co.*, 313 Ark. 145, 852 S.W.2d 799 (1993). The question in this case is whether appellees met their burden by offering sufficient evidence that, under the terms of the policy, they suffered a "direct loss" by hail. A direct loss is one proximately caused by the hazard insured against. *Southall v. Farm Bureau Mut. Ins. Co. of Ark.*, 276 Ark. 58, 632 S.W.2d 420 (1982). The policy in this case does not contain a definition of hail. However, there was evidence at trial that ice pellets in excess of five millimeters are considered hail. According to Charles Jones, the ice pellets he observed exceeded that size. Further, Lavonne Jones said she considered the precipitation hail as it was falling. Although Dr. Hehr testified that no hail was reported, the jury was not bound to accept his testimony and reject that of appellees. A jury is not compelled to believe expert testimony more than that of any other witness. *Montgomery v. Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992). Further, the jury was entitled to believe appellees' account of the weather that occurred within their locality, even though their account may have conflicted with the official weather record. *See Lynch v. Travelers Indem. Co.*, 452 F.2d 1065 (8th Cir. 1972). Finally, we note that, in a similar case, *Southall v. Farm Bureau Mutual Insurance Company of Arkansas, supra*, our supreme court recognized that the term "hail" may include winter precipitation. *See also* 10A *Couch on Insurance 2d* §§ 42:360 and 361 (2d rev. ed. 1982).

Based upon the foregoing, we hold that appellees presented substantial evidence that they suffered a direct loss by hail. Having decided that, it is not necessary to discuss appellant's contention that appellees did not purchase collapse coverage. The policy contains no mention of collapse coverage and, in any event, our holding is that a named peril, i.e., hail, could have been considered by the jury to be the cause of the loss.

Next, we address appellant's argument that the following exclusion removes appellees' loss from policy coverage: "This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) snow storm, tidal wave, high water or overflow, whether driven by wind or not." Courts are required to strictly interpret exclusions to insurance coverage and to resolve all reasonable doubt in favor of an insured who had no part in the preparation of the contract. *McGarrah v. Southwestern Glass Co.*, 41 Ark. App. 215, 852 S.W.2d 328 (1993). If there is doubt or uncertainty as to the policy's meaning and it is fairly susceptible to two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be adopted. *Id.* If a reasonable construction may be given to the contract which would justify recovery, it is the duty of the court to do so. *Id.* With these precepts in mind, we hold that coverage is not excluded for appellees' loss in this case. The evidence, as set out above, justifies a finding by the jury that the damage-causing hazard in this case was hail, a named peril. It would be incongruous for an insurer to plainly include a risk only to exclude it a few paragraphs later. *See* 10A *Couch on Insurance 2d* § 42:361, *supra.* Also, it was conceded by Max Leichner, the manager and top underwriter for appellant, that there is nothing in the policy that expressly excludes damage caused by ice. Substantial evidence was presented that the damage done to appellees' property was done before the onset of snow.

Appellant argues next that appellees did not prove their damages. When a new trial is sought on the ground of error of assessment in the amount of recovery, a denial of the new-trial motion will be upheld absent a manifest abuse of discretion. *Kempner v. Schulte,* 318 Ark. 433, 885 S.W.2d 892 (1994). We find no abuse of discretion here, as the evidence is plentiful that

appellees were entitled to recover the full amount of the policy proceeds. Appellees testified that the insured structures were destroyed beyond repair. The insurance policy contains the following clause: "In case of a total loss on buildings, this Company will pay the full amount of insurance on building destroyed." Appellant notes that one of its inspectors who visited appellees' property on March 13 stated that one of the poultry houses was still standing. However, that testimony conflicts with that of appellees that all structures were collapsed within a few days of the storm. The weight and value of evidence presented lies within the exclusive province of the jury. *Winchel v. Craig, supra.*

Charles Jones further testified that the contents of the buildings were destroyed. Another witness, Daryl Spillers, the president of Corner Stone Bank, with whom appellees had done business for twenty years, testified that the buildings were worth at least $35,000 each and the equipment in each building, $7,000. Finally, Max Leichner testified several times that, if appellees had had coverage, appellant would have paid them $91,500. Although Leichner qualified that testimony upon examination by his own attorney, stating that he would have adjusted the claim with the insureds, the weight and value of the evidence was for the jury to decide. *Winchel v. Craig, supra.*

Based upon the foregoing, we find no error in the court's denial of appellant's motion for directed verdict, its motion for judgment notwithstanding the verdict, or its motion for a new trial.

Next, we address appellant's argument that the trial judge erred in adding a 12% penalty to appellees' recovery. When an insurer such as appellant fails to pay an insured's loss within the time specified in the policy, after demand has been made, the insurer is liable for, in addition to the amount of the loss, 12% damages upon the amount of the loss. Ark. Code Ann. § 23-79-208(a) (Repl. 1992). Appellant argues that, because its decision to decline coverage was made on the basis of a good-faith dispute, no penalty was warranted. It is true, as appellant states, that the statute is directed against unwarranted delaying tactics of insurers. *See State Farm Mut. Automobile Ins. Co. v. Thomas,* 316 Ark. 345, 871

S.W.2d 571 (1994). Nevertheless, when an insurer, after demand, fails to pay for a loss within the time specified in the policy, the penalty is to be added, despite the insurer's purported good faith in contesting coverage. *See Shepherd v. State Auto Property and Casualty Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993); *Life & Casualty Ins. Co. of Tenn. v. Wiggins*, 224 Ark. 377, 273 S.W.2d 405 (1954); *American Liberty Mut. Ins. Co. v. Washington*, 183 Ark. 497, 36 S.W.2d 963 (1931) (the latter two cases decided under a prior, similar 12% penalty statute). *See also* Howard Brill, *Arkansas Law of Damages* § 24-5 at 420 (3d ed. 1996) ("the Arkansas statute rests on a strict liability theory"), and Paula Casey, *Bad Faith in First Party Insurance Contracts — What's Next?*, 8 UALR L. J. 237, 252 (1985-86).

Appellant's challenge to the court's award of prejudgment interest also fails. The test for awarding prejudgment interest is whether a method exists for fixing an exact value on the cause of action at the time of the occurrence of the event which gives rise to the cause of action. *State Farm Mut. Ins. Co. v. Brown*, 48 Ark. App. 136, 892 S.W.2d 519 (1995). If such a method exists, prejudgment interest should be allowed because one who has use of another's money should be justly required to pay interest from the time it lawfully should have been paid. *Id.* The trial judge in this case computed interest so that it would begin to run on July 17, 1989, giving appellant a sufficient amount of time to investigate the claim. On that date, the amount of loss to appellees was readily calculable. *See generally Metropolitan Property and Liability Ins. Co. v. Stancel*, 16 Ark. App. 91, 697 S.W.2d 923 (1985). In addition to appellees' own testimony that they had suffered a total loss of their property within days of the storm, we also note Max Leichner's testimony that, had appellees had coverage, they would have been paid $91,500.

Appellant argues that, by allowing interest to begin running from July 17, 1989, rather than the date appellees filed their complaint, we are encouraging claimants to delay their lawsuits in order to increase prejudgment interest awards. That argument defies common sense. There is little likelihood that an insurance claimant would purposely delay the filing of his complaint and invite the uncertainties of a jury trial in hope of recovering pre-

judgment interest. Appellees in this case lost their farm due to the failure to receive insurance proceeds. It is inconceivable that they would postpone their lawsuit, which they brought to recover the much-needed proceeds, simply for the purpose of recovering pre-judgment interest.

Appellant argues next that the trial judge erred in awarding $36,600 in attorney's fees, an amount which is 40% of $91,500. The evidence at trial and posttrial showed that appellees, after consulting at least two attorneys and trying to get their case resolved through the Arkansas Insurance Commission, employed attorney Mark Schafer on a 40% contingency-fee basis. Schafer later associated attorney Donald Kendall, who tried the case. Appellees presented to the trial judge an affidavit signed by three northwest Arkansas attorneys who stated that the 40% contingency fee was not unusual for this case. Attorney Kendall also submitted time sheets reflecting 120.75 hours of work at the rate of $150 per hour, for a total of $18,112.50.

At a posttrial hearing, the trial judge acknowledged that he was not bound to merely accept the contingency agreement as dispositive of the amount of attorney's fees to be awarded. However, he noted that several factors in the case warranted "a pretty good attorney fee." The judge recognized that the case was difficult and complex; that it was several years old when it was brought to appellees' attorneys; that it had been rejected by other attorneys; and that there was a low potential for prevailing on the case. In light of those factors, the judge found that the amount of $36,600 was a reasonable fee.

An award of attorney's fees is a matter for the sound discretion of the trial court. *Arkansas Blue Cross and Blue Shield v. Remagen*, 25 Ark. App. 96, 752 S.W.2d 284 (1988). In the absence of an abuse of discretion, the trial court's award will be sustained. *Id.* There is no fixed formula to be used in awarding attorney's fees. *Southall v. Farm Bureau Mut. Ins. Co. of Ark.*, 283 Ark. 335, 676 S.W.2d 228 (1984). In considering the amount of attorney's fees to award, the trial court should consider the experience and ability of the attorney and the time and work required of him, the amount involved in the case and the results obtained, the

fee customarily charged in the locality for similar legal services, and whether the fee is fixed or contingent. *Id.; Arkansas Blue Cross and Blue Shield v. Remagen, supra.*

In *Southern Farm Bureau Life Insurance Co. v. Cowger,* 295 Ark. 250, 748 S.W.2d 332 (1988), our supreme court recognized that Ark. Code Ann. § 23-79-208 does not contemplate the awarding of a contingent fee against an insurer. In *Cowger,* the insured recovered $100,000 in policy proceeds. The insured's attorney presented documentation of $10,392 in attorney's fees and costs, based upon an hourly rate. However, a $33,000 attorney's fee was awarded. The supreme court upheld the fee, noting that $33,000 was not precisely one-third of the recovery since it did not encompass one-third of the prejudgment interest and penalty awarded. Likewise, in this case, $36,600 does not encompass one-third of the prejudgment interest and penalty received by appellees. Additionally, the supreme court acknowledged that the fee was awarded after a hearing in which the reasonableness of the fee was determined. At the hearing in this case, the trial judge did not simply "rubber stamp" the attorney-client fee agreement but offered reasons for holding that $36,600 was a proper fee. Like the court in *Cowger,* we find no abuse of discretion under such circumstances.

The final issue in this case concerns the propriety of the following instruction given to the jury by the trial judge:

> A contract of insurance like other contracts must be construed according to the terms which the parties have used and be taken and understood in the absence of ambiguity in their plain, ordinary and popular sense. However, where the terms or words of a policy are of doubtful meaning or have more than one meaning then said provisions of the policy of insurance are construed most strongly against the insurance company that prepared it.

Appellant argues that the instruction was unwarranted because no evidence of ambiguity was presented. The case of *State Farm Fire and Casualty Co. v. Midgett,* 319 Ark. 435, 892 S.W.2d 469 (1995), is cited for its holding that the giving of an instruction suggesting an ambiguity when none is present is reversible error. In the present case, the instruction was proper, if for no other reason than

that an ambiguity existed regarding the applicability of the policy exclusion, as discussed previously herein.[2] A party is entitled to a jury instruction when it is a correct statement of the law and there is some basis in the evidence to support the giving of the instruction. *Coca-Cola Bottling Co. v. Priddy*, 328 Ark. 666, 945 S.W.2d 355 (1997). A trial court must give a jury instruction if there is some evidence to support it. *Hopper v. Garner*, 328 Ark. 516, 944 S.W.2d 540 (1997). The evidence in this case supported the giving of the instruction, and it is a correct statement of the law that interpretation of an ambiguity in a contract is a matter for the jury. *See Tribble v. Lawrence*, 239 Ark. 1157, 396 S.W.2d 934 (1965).

Affirmed.

ROBBINS, C.J., and ROGERS, STROUD, and ROAF, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse because of the trial court's decision to instruct the jury regarding ambiguity. I agree with appellant that the instruction was not warranted by the evidence. The policy provision that excluded from coverage loss caused "directly or indirectly by (a) frost or cold weather or (b) snow storm, tidal wave, high water or overflow, whether driven by wind or not" is clear, definite, and unconfusing.

Appellees presented proof and argued that their loss resulted from hail, a named peril in their insurance policy. Appellant con-

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[2] The dissenting judge argues that no ambiguity existed in the insurance policy unless frost, cold weather, and snow storm can reasonably be confused with hail. However, it is apparent that the appellant itself has confused these terms. Appellant argues that the jury's award of damages was erroneous because the evidence did not show that the damage in the case at bar was caused by hail, but instead showed only that the damage was caused by "ice pellets." However, hail is defined as "[p]recipitation in the form of pellets of ice and hard snow." AMERICAN HERITAGE DICTIONARY 587 (2d college ed. 1982); *see also Webster's Third New International Dictionary* 1019 (1976). We think that there was considerable uncertainty about the precise forms of frozen precipitation embraced by the contractual term "hail," and that the ambiguity instruction was properly submitted to the jury.

tended that their loss was caused by ice and snow. Obviously, the policy could not cover loss caused by hail and exclude hail. Unless one reasons that frost, cold weather, snow storm, tidal wave, high water, or overflow can be reasonably confused for hail, it would seem that no ambiguity existed in the policy language to justify the jury instruction.

WAL-MART STORES, INC. *v.* Brenda VANWAGNER

CA 97-1285 977 S.W.2d 487

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered October 28, 1998

Bassett Law Firm, by: *Curtis L. Nebben*, for appellant.

McKinnon Law Firm, by: *Laura J. McKinnon*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellee in this workers' compensation case filed a claim alleging that she sustained a compensable injury to a prosthetic appliance on November 25, 1994, when she slipped at work and ruptured a silicone breast implant. After a hearing, the Commission found that appellee had sustained such an injury and awarded medical expenses for the replacement of the implant; temporary total disability benefits from August 16, 1995, through September 5, 1995; and statutory attorney's fees. From that decision, comes this appeal.

For reversal, appellant contends that there is no substantial evidence to support the Commission's finding that appellee sustained a compensable injury to her right breast implant on November 25, 1994. We find no error, and 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 substan-

tial evidence. *American Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). 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).

Viewing the evidence, as we must, in the light most favorable to the Commission's findings, the record shows that appellee was a forty-year-old woman employed in appellant's bakery. Appellee had previously received silicone breast implants following mastectomy surgeries. She slipped on a wet floor at work in November 1994 and fell against a 300-pound machine with enough force to move the machine, taking the impact on her right breast. Later surgery showed that the right implant had ruptured; the left implant remained intact.

Appellant argues that the Commission's opinion is not supported by substantial evidence because appellee's testimony lacked credibility, and because appellee's physicians testified that "there was no way to prove" that the injury to appellee's implant was caused by her accident on November 25, 1994. We do not agree. First, the question of appellee's credibility and the weight to be given her testimony are matters within the exclusive province of the Commission. *Riverside Furniture Co. v. Loyd*, 42 Ark. App. 1, 852 S.W.2d 147 (1993). Where, as here, the Commission finds a claimant's testimony regarding the manner in which an injury occurred and was reported to be credible, that constitutes substantial evidence that the events took place as described. *Id.* Second, the weight to be given medical testimony is for the Commission to determine, *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986), and 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). Here, the Commission rejected the medical opinions and decided that the sequence of events was sufficient legal proof that appellee's injury

had been caused by her fall at work. The Commission concluded that:

> [None of the doctors] can state that the implant was ruptured on November 25, 1994, when the claimant fell against the proofing machine. In fact, the claimant herself cannot state that the implant was ruptured. However, in looking at the totality of the circumstances, the claimant has proven by a preponderance of the evidence that that is exactly what happened. She stated she fell against the proofing machine, it dislocated the breast implant slightly, she reported the incident to Dr. Moffitt and was referred to Dr. Alderson. Dr. Alderson could not state that the breast implant had been ruptured until such time as he opened her chest. Once he did, he found the right implant had been ruptured. [T]his is proof by a preponderance of the credible evidence of cause and effect.

We cannot say that the Commission erred in so finding. Appellee's injury was established by medical evidence supported by objective findings by virtue of Dr. Alderson's observation during surgery that the right implant had ruptured while the left implant remained intact. *See Daniel v. Firestone Building Products*, 57 Ark. App. 123, 942 S.W.2d 277 (1997) (physician's direct observation of fibrous mass satisfied the requirement that a compensable injury must be established by medical evidence supported by objective findings). That having been done, it was unnecessary to offer medical evidence to prove the causal connection between the accident and the injury. *Aeroquip, Inc. v. Tilley*, 59 Ark. App. 163, 954 S.W.2d 305 (1997) (claimant not required to present medical evidence to show that his back injury, which was established by objective medical evidence, occurred as a result of his work accident). We think that reasonable minds could conclude, as the Commission did, that the sequence of events in the case at bar established a causal connection between the accident and the injury by a preponderance of the evidence, and we hold that the Commission's decision is supported by substantial evidence.

Affirmed.

ROBBINS, C.J., AND ROGERS, STROUD, AND ROAF, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I dissent from the result announced by the majority opinion because I do not believe that the medical opinions in the record rise to the standard required to establish a compensable injury. Therefore, I would reverse the Commission.

It is undisputed that appellee was examined by Dr. Moffitt on November 25, 1994, the date she contends that she slipped on water, fell against a proofer machine, landed primarily on her right chest, and displaced and ruptured the breast implant that was in her right breast. Although appellee reported increased right shoulder pain because of the November 25 incident and complained about bruising on her anterior chest, Dr. Moffitt found no bruising on her anterior chest. He continued treating appellee for the right shoulder injury that her employer accepted as compensable. On June 20, 1995, Dr. Moffitt noted that appellee questioned whether the displacement of the right breast implant was related to the November 25, 1994, incident. Dr. Moffitt told appellee that he saw no relationship between the right breast implant displacement and the November 25, 1994, incident. Nevertheless, he referred appellee to Dr. Roger Alderson, a plastic surgeon, for evaluation of the breast implant condition. Dr. Alderson examined appellee and eventually performed an explantation of the silicone breast implants in both of appellee's breasts on August 16, 1995. In doing so, he found that the right breast implant had ruptured, and that the left implant was not ruptured. While admitting that the November 25, 1994, injury "may have been the cause of the malposition of the implant, and therefore may have been the cause of the rupture of the implant," Dr. Alderson concluded that "there is no way to prove that . . . ."

I do not understand how a party having the burden of proving that a breast implant rupture occurred within the course and scope of her employment carries that burden based on proof that amounts to nothing more than this. Compensation awards are supposed to be based on findings that claimed injuries have been actually caused by the employment. This requires, at minimum,

proof that an injury actually arose out of the employment, not that the injury theoretically could have arisen out of the employment, even if a medical expert either does not believe it did or cannot decide whether it did. Here, the Commission held that appellee proved by a preponderance of the evidence that her right breast implant was displaced and ruptured because of the alleged incident on November 25, 1994. Appellant has, quite properly, challenged that decision and award on the legal ground that it is not supported by substantial evidence, arguing that the medical-opinion evidence was insufficient to establish causation under any reasonable analysis.

The issue is not whether appellee's right breast implant ruptured. That fact was established by Dr. Alderson's observation when the right implant explantation was done. It is undisputed that the right implant ruptured. What was disputed and for appellee to prove was whether the rupture was caused by her employment. Because the cause of a breast implant rupture is not ordinarily within the competence of lay witnesses, medical-opinion testimony on this issue was vital. If the physicians who examined and treated appellee are unable and unwilling to believe and say that the November 25, 1994, incident caused the displacement and rupture of her right breast implant, I do not see how reasonable minds can find that the incident caused the displacement and rupture, let alone that appellee proved it. Thus, I would reverse the award.

UNICARE HOMES, INC., d/b/a Concordia Care Center *v.* James E. GRIBBLE III

CA 98-28 977 S.W.2d 490

Court of Appeals of Arkansas
Division III
Opinion delivered October 28, 1998

[Petition for rehearing denied December 9, 1998.]

Wright, Lindsey & Jennings LLP, by: *John G. Lile* and *William Stuart Jackson*, for appellant.

Harry McDermott, for appellee.

JOHN F. STROUD, JR., Judge. Appellee, James Gribble III, was an at-will employee serving as a certified nursing assistant for appellant, Unicare Homes, Inc., d/b/a Concordia Care Center. On July 17, 1995, Bonnie Jones, appellant's director of nursing, received information that appellee was taking items from the refrigerator located at the nurse's station. She asked appellee to accompany her to her office, where appellee gave her permission to look in his gym bag. Upon doing so, Ms. Jones discovered several packaged dairy products belonging to appellant. Appellee was suspended pending further investigation and was ultimately

discharged pursuant to a strictly enforced policy against theft. He filed suit against appellant, alleging causes of action for retaliatory discharge and outrage. The retaliatory discharge cause of action was subsequently eliminated, and the case went to trial on the outrage claim only. The jury returned a verdict in favor of appellee, awarding $56,000 in compensatory damages and $750,000 in punitive damages. We reverse and dismiss.

Appellant raises the following six points on appeal:

I. Gribble's exclusive remedy is under the Workers' Compensation Act.

II. Gribble failed to introduce sufficient evidence to reach the jury on his outrage claim.

III. Gribble released all claims against Concordia one month after his termination.

IV. The damages award should be reversed or reduced.

V. The trial court erred by precluding Concordia from cross-examining Gribble about his employment application misrepresentation.

VI. The trial court erred by erroneously instructing the jury.

Appellant's first point, which contends that jurisdiction for this case lies with the Workers' Compensation Commission rather than circuit court, is without merit. The intentional infliction of an injury upon an employee by an employer is an exception to the exclusive-remedy provision of the Workers' Compensation Act. *Hill v. Patterson*, 313 Ark. 322, 855 S.W.2d 297 (1993). In order to escape the exclusive-remedy provisions of the Act, "the complaint must allege a deliberate act by the employer with a desire to bring about the consequences of the act." *Id.* at 325; *see also VanWagoner v. Beverly Enterprises*, 334 Ark. 12, 970 S.W.2d 810 (1998); *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997). Appellee's allegations for the claim of outrage, or the intentional infliction of emotional distress, fit within this exception to the exclusive remedy.

Appellant's second point of appeal challenges the sufficiency of the evidence supporting appellee's outrage claim. Under this point, appellant contends that the trial court erred by denying appellant's motions for directed verdict and for judgment notwithstanding the verdict. We agree.

The standard of review for the denial of a motion for a directed verdict or a motion for judgment notwithstanding the verdict is whether the nonmovant's proof was so insubstantial as to require a jury verdict, if entered in his behalf, to be set aside. *St. Edward Mercy Med. Ctr. v. Ellison*, 58 Ark. App. 100, 946 S.W.2d 726 (1997). "Arkansas courts have consistently upheld the general rule that a trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict of the jury and the moving party is entitled to judgment as a matter of law." *Id.* at 105. Substantial evidence is defined as evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond suspicion or conjecture. *Union Pac. R.R. v. Sharp*, 330 Ark. 174, 952 S.W. 2d 658 (1997). When determining the sufficiency of the evidence, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. In such situations, the weight and value of testimony is a matter within the exclusive province of the jury. *Id.*

To succeed on a tort-of-outrage claim, the plaintiff must prove that 1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct, 2) the conduct was extreme and outrageous and utterly intolerable in a civilized community, 3) the defendant's conduct was the cause of the plaintiff's distress, and 4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *Hollomon v. Keadle*, 326 Ark. 168, 931 S.W.2d 413 (1996). In *City of Green Forest v. Morse*, 316 Ark. 540, 873 S.W.2d 154 (1994), the supreme court examined the history of Arkansas cases involving the tort of outrage arising out of an employee's discharge. The court explained:

We have consistently taken a narrow view in recognizing claims for the tort of outrage that arise out of the discharge of an employee. The reason is that an employer must be given considerable latitude in dealing with employees, and at the same time, an employee will frequently feel considerable insult when discharged. In this context we have written: "Because of the employer's right to discharge an at-will employee, a claim of outrage by an at-will employee cannot be predicated upon the fact of the discharge alone. However, the manner in which the discharge is accomplished or the circumstances under which it occurs may render the employer liable." . . . The duty owed is a matter of law, and we have said that duty is to refrain from conduct that is so extreme and outrageous as to go beyond all possible bounds of decency and to be utterly intolerable in a civilized society. *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980).

Only once have we held that a plaintiff met the standard for proving the tort of outrage in an employee discharge case. That case was *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984). The facts surrounding that discharge were so extreme and outrageous that they went beyond the bounds of decency and truly were intolerable. The employer, Tandy Corporation, thought that Bone, the manager of one of its stores in Little Rock, was stealing either money or merchandise. Bone suffered from a personality disorder which made him more susceptible to stress and fear than normal. His psychiatrist had prescribed, and he had been taking, a tranquilizer for three years. Bone's supervisor and two security officers came to the store to conduct an investigation of the losses. Bone was questioned at thirty minute intervals throughout the day. According to Bone, the security men cursed him, threatened him, and refused to allow him to take his prescribed medication. Bone was subsequently asked to take a polygraph examination and consented. At that time he was in a highly agitated condition and again asked for his medication. The request was denied. He testified that on at least three occasions he had asked to be allowed to take his medication, but each time his request was refused. He stated that once he reached in a desk drawer for his medicine, but one of the investigators slammed the drawer shut. He was eventually taken to another location in Little Rock for the examination, and, while there, hyperventilated. An ambulance was called, but Bone was taken home by the supervisor. The next day, Bone attempted to return

to work, but was unable to do so. He was subsequently hospitalized for a week. In holding that Bone had met the standard for the tort of outrage surrounding the discharge, we endeavored to make the basis for the holding clear when we wrote:

> It was for the jury to decide whether under the circumstances it was outrageous conduct for the employer to deny Bone his medication and to continue to pursue the investigation knowing Bone was on medication or Valium. *We emphasize that the notice to the employer of Bone's condition is the only basis for the jury question of extreme outrage.*

Id. at 542–44, 873 S.W.2d at 156–57.

Dillard Department Stores, Inc. v. Adams, 315 Ark. 303, 867 S.W.2d 442 (1993), does not involve an employment situation, but it is similar to the instant case in other respects because the outrage claim arose out of accusations of theft. In the *Dillard* case, a sales manager observed Ms. Adams, a customer, switch the price tags on two bathing suits and then purchase the one with the lower price tag. As Ms. Adams was leaving the store, the manager and a security guard stopped her, identified themselves as "Dillards security," and asked her to accompany them to the rear of the store. In a manager's office, Ms. Adams was confronted about switching the price tags. She denied any wrongdoing. The store manager and the police were called. The store manager questioned Ms. Adams, took her picture, and told her she was banned from the store. The police issued her a citation and escorted her from the store. The entire incident lasted from twenty minutes to an hour. The supreme court stated:

> In subsequent decisions, we have addressed outrage in a cautious manner. Our recognition of this tort is not intended to "open the doors of the courts to every slight insult or indignity one must endure in life." . . .
>
> We cannot say Ms. Adams presented sufficient evidence for a jury instruction on the tort of outrage. Ms. Adams testified the entire incident lasted less than an hour. During that time she was not physically touched, and while Dillards employees may have questioned her in a confrontational manner, there is no evidence that their tone was abusive or harassing. Ms. Adams testified that Ms. Hallmark initially confronted her in a professional manner

> and in such a way as not to draw the attention of any other customers.
>
> We do not mean to say that Dillards' employees' actions were merely a "slight insult." We recognize Ms. Adams may well have suffered mental distress as a result of them. She was accused of a crime of which she was not convicted. We cannot, however, find in the facts alleged or shown the kind of "extreme degree" of outrageous conduct "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society." Whatever the merits of the claim of Dillards and Ms. Hallmark as to Ms. Adams's conduct (and we assume no merit in them for purposes of this appeal) nothing that was done constituted conduct fitting our definition of "outrage."

Here, appellee testified that before he returned from his workers' compensation leave, his immediate supervisor, Barbara Leonard, telephoned him to warn him to watch his back because "they" were trying to fire him; that when he returned to work he was given the chore of cleaning out the "icebox" before he left the shift; that he would put the items that were to be thrown away in his gym bag at the shift change, in full view of other personnel; that he had done this for about six weeks prior to July 17, the date he was suspended; that on July 17, Bonnie Jones stopped him in the hall and asked him to come to her office; that she asked to look in his bag; that he unzipped the bag and pulled out the plastic bag containing the dairy products; that "she started getting upset with me and said I can't believe you stole from the facility"; that he denied stealing and told her he had permission from Dixie Schancer, the dietary manager, to take the items; that he was placed on probation for three days, pending an investigation; that on his termination report, he explained that it was part of his duties to clean out the icebox at the nurse's station and to throw away anything left in it, that he took the items home rather than throw them away, and that he saw no harm in doing so; that he did not write on the termination report that he had permission from the dietary manager because he verbally told Bonnie Jones; that he had a great relationship with Byron Hooppaw, the administrator; that he had a good relationship with Jeanne Moore, the unit clerk; that the only reason Jeanne Moore would be "after him" was if she were told to do so; that he believes she was told to

lie in the letter where she stated that she had ordered milk for the evening snacks and that she had counted milk cartons as she put them in the door, and there were nineteen; that he believed Bonnie Jones and Byron Hooppaw would set him up if they were told to do so; that his beliefs in this regard were not speculation because his immediate supervisor, Barbara Leonard, had told him to watch his back, although she had not identified anyone; that Bonnie Jones "yelled" at him, but she did not curse him and she did not assault him; that he was denied unemployment benefits; that everything Concordia did was because he filed a workers' compensation claim; that he looked for jobs at maybe fifty places until December 1995; that he heard Bonnie Jones tell a prospective employer that he was not eligible for rehire; and that he was depressed, had stomach pains, and would have killed himself but for his religion.

Dixie Schancer, appellant's dietary manager, testified on behalf of appellee. She explained that she gave appellee permission to take home milk cartons that were sitting on the dining-room tables; that no one came to her to talk about the matter; that when she learned appellee had gotten in trouble, she was upset because she had told him he could take the milk from the dining room; that appellee didn't ask for permission to take milk cartons from the nurse's floor, but that if he had asked she would have told him to check with the director of nursing, Bonnie Jones; and that if Jeanne Moore had ordered the milk for evening snacks on July 17, it was unlikely she would have received them in the morning.

Byron Hooppaw, administrator, testified that he was not aware at the time of the allegation that Dixie Schancer had given appellee permission to take milk from the dining room; that it would be reasonable to assume that a certified nursing assistant would feel that he had permission to take home refused snack milk by asking Schancer's permission; that when he found out about the permission Dixie had given appellee, it did not affect his decision because appellee's duffel bag was full of milk products taken from the nurse's station refrigerator that belonged to the facility and they were in his bag when they should not have been; that

Jones had come to him for advice on how to handle the situation, and that he had told her it seemed "cut and dry" and did not seem like there was much more investigation that could be done; that the decision to terminate appellee was a combination decision between Jones and himself; that he was under no pressure to make the decision; and that Jerry Alexander, Hooppaw's boss, did not know about the situation at the time.

Jeanne Moore, the unit clerk, testified that Jo Bundy, a housekeeper, had told her a couple of days prior to the incident that one of the aides was removing products out of the refrigerator; that she did not remember ordering the milk cartons on July 17, and that she never would have ordered nineteen; that she counted the number of milk cartons in the refrigerator that day and there were nineteen, some of which were to be thrown away; that Bundy told her again on the day of the suspension that appellee was removing the milk; that she went to the nurse's station and appellee was standing there closing his bag; that she went to Jones's office and told Jones what had been reported to her; that as she and Jones walked to the nurse's station, appellee was coming toward them; that Jones said, "Jimmy, I'd like to talk to you"; that Moore then returned to the nurse's station and opened the refrigerator and the milk was missing; that in writing her statement, she was just reporting her actions and she was not trying to get appellee fired.

Bonnie Jones, director of nursing, testified that Jo Bundy, the housekeeper, came to her office and told her that she'd seen appellee taking toilet paper and milk; that Bundy reported this approximately one week prior to July 17; that Jeanne Moore also mentioned to her that she suspected milk was being taken from the refrigerator; that on July 17, she found in appellee's bag milk products, Ensures, shakes, and yogurt; that after her meeting with appellee on the 17th, she asked Moore to write a statement about what happened; that she talked to Bundy, but Bundy was afraid to put anything in writing for fear other certified nursing assistants would be mad at her and Jones did not force the issue; that Jones then talked to Byron Hooppaw; that no one pressured her to fire

appellee; that at some later point, she talked to Dixie and Dixie told her that she had allowed appellee to take the leftover milk from breakfast in the dining room; that this information did not change Jones's opinion as to what happened because appellee took not only the returned milk cartons, but also what Jeanne Moore had ordered that morning for the patients. In a letter to the Arkansas Employment Security Department dated August 9, 1995, Ms. Jones stated that in addition to stealing from the facility, appellee had committed a serious infection-control violation by putting milk products back into the refrigerator.

Appellee urges us to adopt his theory that the entire episode was concocted by appellant in order to frame appellee and thereby get rid of him. Considering all such evidence in the light most favorable to appellee, we do not find that appellant's conduct fits the definition of outrage. We conclude, therefore, that there was not substantial evidence to support appellee's claim for outrage, and that the trial court erred in denying appellant's motions for directed verdict and for judgment notwithstanding the verdict. Finding, as we do, that the trial court erred in denying appellant's motions for directed verdict and judgment notwithstanding the verdict, it is not necessary to address points three through six of the points of appeal.

Reversed and dismissed.

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

Jerry Lee SCHALK *v.* STATE of Arkansas

CA CR 98-227 977 S.W.2d 495

Court of Appeals of Arkansas
Division II
Opinion delivered October 28, 1998

McNutt & Swicegood Law Firm, by: *Teri Hays Swicegood*, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Jerry Schalk has appealed the denial of his motion to dismiss to avoid double jeopardy. For reversal, appellant argues that the trial court erred by denying the motion to dismiss. We disagree and, therefore, affirm.

Appellant was charged by information on December 2, 1996, with aggravated robbery and accomplice to aggravated assault. On May 22, 1997, during *voir dire* of the jury pool, the appellant, his counsel, and the prosecutor were each identified to the members of the pool. The court questioned the pool for conflicts of interest with, or potential bias against, any of the identified parties. No potential witnesses, other than the appellant, were introduced to the jury pool. After the completion of *voir dire*, twelve jurors were selected. No alternate jurors were selected. The prosecutor asked the court whether an alternate juror would be selected, and the court responded that an alternate would not be needed. No comment or objection was made by appellant or his counsel. The jury was sworn, and the remaining members of the pool were excused for the day.

During opening statements, the prosecuting attorney mentioned one of the State's witnesses by name. At that point, a member of the jury panel indicated that the witness was his nephew, although the juror did not know any details of the case. Appellant's counsel objected to the juror and, during a bench conference, moved to reconvene and select a new jury. The court granted the appellant's motion.

Court reconvened the following day, at which time appellant's counsel expressed concern that using the same jury pool in *voir dire* would prejudice the appellant. The court then reset the case for a later date in order to provide appellant with a new jury pool.

On July 28, 1997, appellant entered a motion to dismiss to avoid double jeopardy that was heard September 1, 1997. The motion was denied, and the order entered on November 19, 1997. Notice of appeal was filed on November 19, 1997.

The Arkansas Constitution provides that "no person, for the same offense, shall be twice put in jeopardy of life or liberty[.]" Ark. Const. art. 2, § 8. This prohibition against a second prosecution for the same offense is further discussed in the statute:

> A former prosecution is an affirmative defense to a subsequent prosecution for the same offense [when] . . .
>
> (3) The former prosecution was terminated *without the express or implied consent of the defendant* after the jury was sworn . . . unless the termination was justified by overruling necessity.

Ark. Code Ann. § 5-1-112 (Repl. 1997) (emphasis added). This means that once the jury is sworn, "jeopardy has attached . . . [and] the constitutional right against double jeopardy may be invoked except in cases of 'overruling necessity.'" *Green v. State*, 52 Ark. App. 244, 247, 917 S.W.2d 171, 172 (1996) (citations omitted).

In order to properly assert the affirmative defense of double jeopardy, the case must terminate without the consent of the defendant. In *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997), the supreme court stated that the appellant could not complain on appeal because he received all of the relief he asked for at trial. *Id.* at 389, 948 S.W.2d at 402. Consent was found in *Rowlins v. State*, 319 Ark. 323, 891 S.W.2d 56 (1995), when defense counsel thanked the court and expressed appreciation for the court's granting a mistrial *sua sponte*.

In this case, appellant moved to reconvene the trial after the trial court excused the juror who was related to a witness. His motion was granted; he cannot now complain that the subsequent trial is barred by double jeopardy. *Id.*

However, appellant claims that his motion for mistrial was irrelevant and should not be deemed to bar his double jeopardy claim because he was forced to choose between two undesirable alternatives: (a) proceed with a twelve-member jury that included a biased juror; or (b) waive a twelve-person jury and proceed to trial with only eleven jurors. The "goaded" mistrial motion is an exception to the general rule that one cannot seek a mistrial and then claim double jeopardy. *See Oregon v. Kennedy*,

456 U.S. 667 (1982); *Jackson v. State*, 322 Ark. 710, 911 S.W.2d 578 (1995). Where the State's conduct is such that it "goads" appellant to move for a mistrial, the general bar against claiming double jeopardy does not apply. *Id.* However, in this case nothing indicates that the State engaged in conduct that goaded appellant to move for mistrial, and the exception does not apply. Rather, appellant's mistrial motion resulted, as the trial judge candidly acknowledged, from the trial judge's failure to seat alternate jurors.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

Vicky L. FITZGERALD *v.* Scott R. FITZGERALD

CA 98-757 976 S.W.2d 956

Court of Appeals of Arkansas
Division III
Opinion delivered October 28, 1998

Jack W. Barker, for appellant.

Henry C. Kinslow, for appellee.

MARGARET MEADS, Judge. This is an appeal from the provision of a decree of divorce which granted appellee, Scott Fitzgerald, custody of the parties' son, Christopher, born April 27, 1995.

The parties were married on September 5, 1992. On May 19, 1997, appellee filed a complaint for divorce alleging personal indignities. The complaint stated that the "parties shall share joint custody of the minor child with actual physical custody being with the [appellee]." Appellant filed a counterclaim for divorce alleging personal indignities and seeking custody of the two-year-old minor child.

On June 13, 1997, the trial court entered a temporary order granting the parties joint custody of the child with appellee being

granted actual physical custody. On January 5, 1998, appellant filed a motion to establish specific visitation, and on January 15, 1998, the chancellor entered an order awarding every-other-weekend visitation to appellant. In a decree entered March 26, 1998, appellee was granted a divorce and awarded custody of the parties' minor child.

At the hearing on the divorce complaint, appellee testified that he wanted custody of Christopher because he believed he had a more stable life than appellant. He said he had been taking care of Christopher since he was three months old when appellant, an intensive care nurse who worked nights, returned to work after maternity leave. Appellee testified that appellant had worked from 7 p.m. to 7 a.m., and prior to Christopher's birth, he worked evenings and the graveyard shift seven days a week. The parties agreed that he would change jobs in order to be there for the child. After Christopher was born, appellant took Christopher to day care if she had to work again that night. Appellee said that up until two or three weeks ago, when appellant started a new job, there were only one or two days a week that she could spend longer than thirty minutes with the child. The only problem appellee had with appellant, other than not spending as much time with Christopher as he had, is that appellant had no mothering experience prior to Christopher's birth, whereas he helped raise three sisters and a brother, and he has taken care of two nieces and a nephew.

Appellee testified further that he works from approximately 7 a.m. until 4 p.m. daily. He leaves Christopher at day care on his way to work, gets off work between 4 and 4:30 p.m., goes to the fitness center where he spends thirty to forty-five minutes, picks up Christopher between 5 and 5:30 p.m., and then goes bowling three nights a week, taking Christopher with him. Christopher eats at the bowling alley, and appellee's sister, brother-in-law, and some friends watch Christopher while appellee is bowling. Appellee leaves the bowling alley between 9 and 9:30 p.m. Appellee testified that he does not believe it is detrimental to Christopher, who is only 3, to be in a bowling alley until 9:30 p.m., and that he sees no problem with Christopher getting

home and in bed at 10 or 10:30 p.m. if he does not have to go to school the next day.

Appellant testified that she formerly worked from 7 p.m. to 7 a.m. at the Medical Center of South Arkansas. She has now secured a permanent day job in order to spend more time with Christopher and works from 7 a.m. to 5 p.m. four days a week and every other weekend. In regard to working nights, appellant testified that when you get off work at 7 a.m. you must sleep, it is hard to keep up with a two-year-old child when you have had no sleep, and it is not fair to the child. She said that Christopher could play with other children when he was in day care, she could rest, and she would then go and get him. She testified that when she did not work shifts, she got groceries and paid bills. Sometimes she left Christopher at day care so he could play with the other children, and she could get things done.

Appellant disputed appellee's contention that he had been Christopher's primary caretaker, and said that her mother was Christopher's primary caretaker until he was almost two years old. She testified that her mother had Christopher during the day when appellee was at work, and if appellant was not working in the evenings she cared for him. When the parties were living together, appellee would get home at 4:30 or 5 p.m., she would be trying to get ready for work and fix supper, but appellee would leave to go "work out" despite her request that he stay home and help. She testified further that appellee wanted her to take Christopher to day care and let him play like the other children, that she did it at his suggestion, and that he is now condemning her for doing what he told her to do. She said Christopher belongs with her, and that she had initially agreed to joint custody because of her work schedule, but she now has a day job.

Appellant's mother, Barbara Speers, testified that after appellant returned to work following Christopher's birth, she would get off work, make formula, stay up with him all day except for an hour when he slept, and then go back to work that evening. Appellant was fatigued, and therefore Ms. Speers began keeping Christopher when appellant got off work in the morning so appellant could sleep. Appellee would get off work about

4:30 p.m., but he would not pick up Christopher until 7:30 or 8 p.m. Ms. Speers finally got tired of his coming so late and told him that he would have to stop going to MoJoe's Fitness Center to "work out" and come get his child.

Lori Russell, a friend of appellant, testified that since January 1998, she has seen Christopher at the bowling alley three to five nights a week running free and unattended. Debbie Smith, another friend of appellant, testified that she has seen Christopher at the bowling alley quite often. She has seen him get under the chairs where people sit. She has also seen him lie down, suck his thumb, and go to sleep on the floor in front of the desk where everyone pays.

In a letter opinion dated March 24, 1998, the chancellor wrote that a temporary hearing was held on January 13, 1998, wherein temporary custody of the child was awarded to appellee primarily due to appellant's work schedule, which required her to work from 7 p.m. to 7 a.m. The chancellor noted that appellant now works days. The chancellor held that both parties appear able to provide for the child's care, but until just recently appellant's work hours hampered her spending time with the child. The chancellor found that "most of the life of this child he has been mainly cared for by [appellee]." The chancellor also held that there was not sufficient evidence to justify a change of custody, and therefore custody should be awarded to appellee.

Appellant's first point on appeal is that the chancellor's finding that appellee had been the child's primary caretaker for most of the child's life is clearly against the preponderance of the evidence. She says that the evidence established that when she returned to work after maternity leave, her mother kept the child during the day, and appellee would not help take care of the child in the evenings. Appellant also says the evidence indicated that appellee preferred to "work out" when he got off work rather than pick up his child, and that now the child is at the bowling alley several evenings per week apparently fending for himself. Appellant says that Christopher is either at a day care center or at the bowling alley. Appellant also argues under this point that the

chancellor's award of custody is contrary to Christopher's best interest.

We agree that the chancellor erred in finding that for most of Christopher's life he had been mainly cared for by appellee. The evidence established that appellant cared for the child, who was not yet three years of age at the time of the hearing, during her maternity leave; after that time, Ms. Speers cared for him when appellant got off her shift until approximately 8:00 p.m. This continued until Christopher was two years old, when Ms. Speers got tired and told appellee he would have to stop going to "work out" after work and come get his child instead. There is also evidence that appellant took care of Christopher in the evenings when she was not working.

Appellant's second point on appeal is that the chancellor erred in finding that appellant had not shown sufficient evidence to justify a change of custody. Under this point, appellant argues that obtaining a day job constituted a material change in circumstances, and the chancellor erred by not giving proper consideration to her change in working hours. She also argues that the chancellor erred by not determining custody with the primary consideration being based upon the child's best interest. She says the chancellor's order is merely an affirmation of his temporary order.

In his letter opinion, the chancellor stated that "there is not sufficient evidence here to justify a change of custody and, therefore, custody should be awarded to [appellee]." In *Carter v. Carter*, 19 Ark. App. 242, 246-47, 719 S.W.2d 704, 705-06 (1986), this court stated:

> While the primary consideration in a change of custody suit is the welfare and best interest of the child, an order changing custody cannot be made without proof showing a change in circumstances from those existing at the time the original order was made. If there is no showing of a material change of facts, there must be a showing of facts affecting the child's best interest that were not presented to or known by the court at the time the original custody order was entered. This is because the original decree constitutes a final adjudication that the appellant, not the appellee, was the proper party to have the child, and before an

> order can be made changing the status, there must be proof justifying a change of custody.

In this regard, we simply note that because there had been no prior final decree or final adjudication of custody, the chancellor erred in requiring sufficient evidence to justify a change of custody.

The chancellor also failed to make a custody determination based on the child's best interests. There is no finding of what is in the child's best interests in the letter opinion, the order, or the chancellor's comments from the bench. The primary consideration in awarding custody of children is the welfare and best interests of the children involved; all other considerations are secondary. *Scherm v. Scherm*, 12 Ark. App. 207, 671 S.W.2d 224 (1984).

The order of the chancellor as it pertains to child custody is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

ROBBINS, C.J., and STROUD, J., agree.

Robert L. FORD, Sr. *v.* CHEMIPULP PROCESS, INC.

CA 98-47 977 S.W.2d 5

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered October 28, 1998

[redacted]

Baim, Gunti, Mouser, DeSimone & Robinson, by: *William Kirby Mouser*, for appellant.

Friday, Eldredge & Clark, by: *William M. Griffin III* and *Betty J. Demory*, for appellee.

MARGARET MEADS, Judge. Appellant, Robert Ford, appeals the decision of the Workers' Compensation Commission, which

reversed the administrative law judge's award of benefits for an allegedly compensable work-related injury. The Commission found that the claimant failed to prove by a preponderance of the evidence that the incident of which he complained caused internal or external physical harm to the body and failed to establish a compensable injury by medical evidence supported by objective findings. On appeal, appellant contends that there is no substantial evidence to support the Commission's findings (1) that he lacked credibility; (2) that he had a preexisting neck problem from his degenerative condition at the time he was injured at work; and (3) that he did not have an acute injury supported by objective findings. We affirm.

Appellant worked as a tile/bricklayer for appellee and traveled around the country working on large industrial projects. On April 29, 1994, while working at the Georgia-Pacific plant in Crossett, Arkansas, appellant contended that he bumped his head on some scaffolding as he exited the chest he was tiling, knocking his hard hat off his head. Appellant did not file an accident report for the incident, but he testified that he told his supervisor that he had "knocked" his hard hat off and "popped" his neck. Appellant completed that job and then completed jobs in Georgia, South Carolina, and North Carolina. After the North Carolina job, which ended approximately the second week of June, appellant returned home complaining of pain in his neck and headaches when he wore his hard hat. He notified the division manager of the pain he was experiencing and asked to be off work for awhile, believing the pain would subside with rest. At that time, appellant applied for and began receiving unemployment benefits.

Appellant did not seek medical attention until June 29, 1994, when he was seen by Dr. David Mattice, an associate of his family practitioner, Dr. Glenn Campbell. At that time, he related to Dr. Mattice a "mild toothache quality pain in the back of his neck." The x-rays taken that day appeared normal. In his record of appellant's August 26, 1994, office visit, Dr. Campbell noted that appellant "had to wear a hard hat recently" and had noticed that his neck was sore when he wore a hard hat during the day. During that visit, Dr. Campbell also noted mild spasm in appellant's

neck area and referred him to a neurosurgeon for further evaluation.

During examinations in September and November of 1994, Dr. Kerry Bernardo, a neurosurgeon, found that appellant had cervical spondylosis and an osteophyte at C6-7, both degenerative changes, which he opined predated the April 1994 incident. He also indicated that examination of appellant's neck revealed palpable cervical and trapezius muscle spasms. Dr. Bernardo prescribed medication and a cervical collar and pillow for appellant's neck spasms, and he ordered appellant to undergo physical therapy for a period of three weeks. After completion of physical therapy, Dr. Bernardo diagnosed ulnar neuropathy in appellant's left hand. An MRI revealed that the osteophyte was impinging upon the thecal sac, and a bone scan verified the degenerative changes in appellant's neck. Dr. Bernardo performed an anterior cervical diskectomy on appellant on November 29, 1994.

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 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. *Smith v. Riceland Foods, Inc.*, 61 Ark. App. 132, 965 S.W.2d 794 (1998).

A claimant has the burden of proving the compensability of his claim by a preponderance of the evidence. *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). An accidental injury is caused by a specific incident, identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(5)(A)(i) (Supp. 1997). For an accidental injury to be com-

pensable, the claimant must show that he sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings. Ark. Code Ann. § 11-9-102(5)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16). The requirement that a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

Appellant first contends that there was not substantial evidence to find that he was not credible. At the hearing, appellant testified that he tried wearing a hard hat around the house to see if he would be able to return to work. In its opinion, the Commission stated, "We simply find no validity in claimant's testimony that he simply wore a hard hat around the house to see if he could." The Commission noted that Dr. Campbell's August 24, 1994, office note reflected that appellant had had to wear a hard hat recently, but there was no further explanation as to why he was required to wear a hard hat during this time. The Commission observed that appellant was drawing unemployment at the time Dr. Campbell noted that he had to wear his hard hat.

■ ■ It is within the Commission's sole discretion to determine the credibility of each witness and the weight to be given to their 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 Brothers*, 269 Ark. 733, 600 S.W.2d 448 (Ark. App. 1980). The Commission may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Univ. of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997). 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). Although we might have reached a different conclusion concerning appellant's credi-

bility if we were reviewing the case *de novo*, the determination of witness credibility is exclusively within the Commission's province, and we are bound by its decision.

For his second and third points, appellant argues that there is not substantial evidence to support the Commission's findings that he had a preexisting neck problem related to his degenerative condition prior to his injury at work and that there were no objective findings of an acute injury. Appellant contends that the Commission denied benefits because it found that the April 29, 1994, incident was not the major cause of his injury. Although we agree that there is no major-cause requirement for injuries caused by a specific incident, *see Farmland Ins. Co. v. Dubois*, 54 Ark. App.141, 923 S.W.2d 883 (1996), that was not the basis for the denial of appellant's claim. The Commission denied the claim on the determination that there was no medical evidence supported by objective findings to support appellant's contention that he suffered an accidental injury that resulted in internal or external physical harm to the body.

During his deposition, Dr. Bernardo stated his belief that the April 1994 incident triggered the symptoms that appellant was experiencing. However, he admitted that during the November 29, 1994, cervical diskectomy, he found severe spondylosis and osteophyte formation, both being preexisting degenerative conditions, but found no frank herniation of a disk and nothing that indicated an acute injury. Because there is no medical evidence supported by objective findings to establish the existence of an injury, appellant has failed to establish a compensable injury.

There was objective evidence, namely the presence of the spondylosis and osteophyte, that appellant suffered from degenerative changes. The only other objective evidence in the record concerning appellant's neck complaints was the existence of muscle spasms, first noted in Dr. Campbell's office notes on August 26, 1994. Although the Commission and this court have accepted muscle spasms as objective medical findings, *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998), there was no evidence that connected the muscle spasms to the April 29 incident. The Commission correctly pointed out that the spasms

were first observed almost four months after the April occurrence and after appellant's "mandatory" hard-hat-wearing incident. The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Johnson v. Democrat Printing & Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138 (1997). We may reverse the Commission's findings only when we are convinced that fair-minded people with the same facts before them could not have arrived at the conclusion reached by the Commission. *McClain v. Texaco, Inc.,* 29 Ark. App. 218, 780 S.W.2d 34 (1989).

The dissent, citing *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997), states that when a preexisting injury is aggravated by a later compensable injury, compensation is in order. While this is true, the dissent totally ignores the requirement that the aggravation be a "compensable injury." An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. *Farmland Ins. Co. v. DuBois*, *supra*. Because appellant did not meet the requirements for a compensable injury, any aggravation of his preexisting condition is not compensable.

We find that the Commission did not err in finding that appellant failed to prove his case by a preponderance of the evidence with respect to the April 29, 1994, incident, and that there is substantial evidence to support the Commission's denial of benefits.

Affirmed.

AREY, JENNINGS, and CRABTREE, JJ., agree.

BIRD and NEAL, JJ., dissent.

SAM BIRD, Judge, dissenting. I respectfully dissent from the decision of the majority because I think the claimant-appellant in this workers' compensation case was improperly denied benefits for his compensable injury.

Because I think the majority has abbreviated the evidence unduly, I will begin with a more complete recitation of the facts. Appellant was a brick and tile layer. He was very healthy and had

worked for appellee for ten years. He was always on call; he said he lived out of a suitcase, even at home, because the company would call him and he would have to be anywhere in the United States the next day. Appellant had sustained one work-related injury to his low back many years before.

Appellant testified that he normally worked paper mills, industrial chemical plants, and gold mines. He said he built "chests" out of tile that ranged anywhere from four feet wide and twenty feet long to fifty feet wide and one hundred feet long. Some were lined with "acid brick." The chests, for processing chemicals, had tile inside and out, and steel between the tile.

On April 29, 1994, while appellant was working a job at the Georgia-Pacific mill in Crossett, he was climbing out of a "chest" at the end of the day, and struck his head on a piece of scaffolding so hard that it knocked off his hard hat and popped his neck. Several coworkers witnessed the accident, and Michael Crawley, who testified for appellant, stated, "He hit it pretty good because it looked like it stunned him for a little bit." Appellant reported the incident to his supervisor, Mr. Wells, but testified that he also told him he thought everything was going to be okay; he would just have a sore neck for a few days.

Appellant said he continued on the Georgia-Pacific job until it was finished, and, around May 10, he went to Augusta, Georgia, to do a "shut down." He then went to South Carolina and worked on another shut down, and then on to a job in North Carolina. When the last job was finished, he went home to Mississippi. By the time he got home he was having difficulty wearing his hard hat because it was causing pain in his neck and headaches. He said he called the "Southern Division Office," and reported to "the coordinator Mike and Joe Branch the division manager" that the muscles in the back of his neck were getting really tight and he was having headaches. He still thought a few days rest would solve the problem. Finally, about the end of June he went to the doctor.

Appellant testified that he had never had any problem with his neck before he hit the scaffolding with his head. Appellant was very determined to get back to work but, when he tried wearing

his hard hat at home to see if it still caused pain, he could not wear it. Appellant said he drew unemployment until he could no longer certify that he was able to work.

Appellant reported he had made good money working for appellee: $13.50 an hour, plus overtime, holiday pay, and double time. If he "ran" the job, the lowest rate was $16.50 an hour. He said his duties varied from job to job: sometimes he worked with his tools; sometimes he was supervisor. He also said there was a great demand for his skills, and he could get a job immediately if he was able to work. He said that now just riding the lawn mower caused him to have headaches and neck aches. He stated that on a good day he can clean up, cook or wash clothes, but on other days he has to lay down all day.

The medical exhibits reveal that appellant first saw a doctor on June 29, 1994, with a complaint of neck and back pain. The doctor stated that appellant gave a history of suffering an injury three months earlier.

> [He was] wearing a hard hat climbing out of tank when he smashed the top of his head on an over-hand [sic] resulting in a flexion injury to his neck. Since that period of time, he's had mild toothache quality pain in the back of his neck with no radiation except into the superior part of his trapezius muscles bilaterally. This is exacerbated by flexion of his neck.

On September 14, 1994, Dr. Kerry L. Bernardo reported, "There is palpable cervical paraspinous muscle spasm as well as trapezius muscle spasm, greater right than left, limited range of motion due to muscle spasm, particularly on flexion of neck."

Conservative therapy recommended by Dr. Bernardo was unsuccessful and on November 29, 1994, appellant had an anterior cervical diskectomy with resection of an ossified posterior longitudinal ligament and placement of an Allograft bone arthrodesis under microscopic dissection. In an April 1995 letter to appellant, Dr. Bernardo informed him that his insurance carrier would not approve a work-conditioning program.

The administrative law judge found that appellant had sustained a compensable aggravation of a preexisting medical condi-

tion caused by a specific incident identifiable by time and place of occurrence. The Commission reversed and held that appellant had failed to prove (1) that the head injury of April 29, 1994, caused internal physical harm to the body, and (2) that there were objective medical findings establishing the injury. In spite of Dr. Bernardo's testimony that had appellant not banged his head, there would have been no need for surgery, the Commission concluded that the appellant's problems *and his surgery* were the result of degenerative conditions.

Case law provides that an aggravation of a preexisting condition is compensable. The employer "takes the employee as he finds him," and employment circumstances that aggravate preexisting conditions are compensable. *Nashville Livestock Comm'n v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990); *Public Employee Claims Div. v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992). When a preexisting injury is aggravated by a later compensable injury, compensation is in order. *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997).

The Commission placed much emphasis on the fact that one doctor's report stated that appellant had told the doctor that he had "had" to wear a hard hat lately, but during that period of time appellant was not working. Appellant testified that he "tried" to wear a hard hat at home to determine if he could go back to work. By seizing on the words "had to" in the doctor's report, the Commission discounts appellant's credibility and uses this as a basis for denying benefits to appellant. In my view it is far more likely that the doctor misunderstood or misspoke when he reported that appellant told him that he "had" to wear his hard hat.

For the Commission to believe that appellant would report to his doctor that he was forced to wear his hard hat even though not working is absurd. Who could have mandated it, and why would anyone force him to wear a hard hat if he was not working? Simply put, there is absolutely no evidence in the record from which the Commission could conclude that appellant was not credible, and, in my opinion, the Commission was in error in reaching that conclusion.

In its opinion, the Commission also says that "[a]ll medical evidence supports a finding that claimant's pain originated from the degenerative condition and not a result of claimant's specific incident on April 29, 1994." This conclusion is simply not accurate and could be arrived at only by totally ignoring the medical evidence. The Commission may not arbitrarily disregard the physician's opinion, especially when based on objective and measurable findings. *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996). Nor is the Commission granted leeway to arbitrarily disregard a witness's testimony. *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998).

It is undisputed that appellant had a preexisting degenerative condition consisting of spondylosis and osteophyte formation. As reflected in appellant's abstract, Dr. Bernardo testified by deposition that:

> Without the injury Mr. Ford may have lived the rest of his life without surgery. Likewise, he may have required surgery without any injury. You ask me if I can say with any reasonable degree of medical certainty that this particular injury forced him to have this surgery, and *I say he had the surgery as a result of the injury*. It did not force him to have it, he didn't have to have it. He could have required surgery later without an injury, but there would have had to [have] been a development of symptoms at sometime for him to have the surgery. His spondylosis and osteophyte formation would not necessarily have developed symptomatology. I can tell you within a reasonable degree of medical certainty osteophyte formation and spondylosis caused the impingement. I corrected the impingement by the surgery.
>
> . . . .
>
> I would say that the major cause of his need for treatment was the injury he sustained in May of 1994. *The major cause was his injury in that if he didn't have the injury he wouldn't have come to see me.* If he didn't have the osteophyte formation it's unlikely the bump on his head would have caused any problems.

(Emphasis added.)

Appellee presented no medical evidence and there is no other medical evidence in the record to contradict the testimony of Dr. Bernardo, so this is not a case where the Commission has exer-

cised its privilege to believe certain medical evidence to the exclusion of other evidence. Instead, the Commission has chosen to simply ignore the only medical evidence presented on the question of what caused appellant's condition. Again, there was no evidence whatsoever that appellant's condition, and the ensuing need for surgery, was the result of anything other than his head-banging incident on April 29, 1994.

While conceding that there was objective medical evidence in the form of muscle spasms relating to appellant's neck complaints, the majority states that "there is no evidence that connected the muscle spasm to the April 29 incident." I disagree. In his September 14, 1994, letter to Dr. Glenn Campbell, Dr. Bernardo noted that appellant had come to him "with complaints of neck and bilateral shoulder pain dating back to an accident suffered at work," and reported that "his pain complaints seem to be related to a cervical strain/sprain type injury." No evidence was presented that contradicted that opinion. Furthermore, as already noted, Dr. Bernardo testified during his deposition that, except for the head-banging incident, appellant's preexisting degenerative condition may have never become symptomatic and surgery may have never been required.

I agree with the majority that an appellant has the burden of proving the compensability of his claim by a preponderance of the evidence. However, I do not believe that the law requires that an appellant, having made such proof, must then go forward with evidence that excludes any possibility that his claim is *not* compensable.

I think the appellant should have been awarded workers' compensation benefits. Therefore, I would reverse and remand.

NEAL, J., joins in this dissent.

[redacted]