Fred DUNAVANT *v.* Melissa DUNAVANT

CA 98-819 986 S.W.2d 880

Court of Appeals of Arkansas
Division II
Opinion delivered March 17, 1999

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

McNutt & Swicegood Law Firm, by: *Mona J. McNutt*, for appellee.

JOSEPHINE LINKER HART, Judge. The parties married on July 14, 1990, and separated March 7, 1995. At the divorce hearing held on August 6, 1997, the Chancellor awarded appellee the divorce and ordered a division of property. Appellant contends the Chancellor erred by: (1) dividing equally shares of stock, sureties, and other investments; (2) dividing equally the net proceeds from the sale of the marital home; and (3) dividing equally appellant's savings plan and retirement benefits that accrued during marriage.

All issues presented in this appeal deal with the division of property. In reviewing such cases, we affirm the findings of the

chancery court unless these findings are clearly erroneous. *Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993). We affirm the decision of the chancery court on issues (2) and (3). We affirm in part, reverse in part, and remand on issue (1).

A. Stocks

Appellant was employed by United States Tobacco, Inc. ("UST"). As a benefit of employment, appellant received options to purchase stock in UST. Five options were granted prior to the marriage. Of those five, three were exercised during the marriage. The appellant received six options during the marriage and exercised only one of these during the marriage. The chancellor, disregarding the options, ruled that all stock, securities, and other investments owned and retained by the parties from July 14, 1990, until August 6, 1997, be divided equally between the parties.

Five options are at issue in this case. Four of those options were granted prior to July 14, 1990, the date the parties were married, and one option was granted after their marriage.
The options were issued and exercised as follows:

Option Grant	Exercise Date	Number	Loan	Purchase Price
1. 06/06/86	10/09/90	1200	$ 8,962.50	$10,162.50
2. 07/22/87	06/25/90	1200	0.00	17,100.00
3. 04/13/88	08/27/90	1600	0.00	24,600.00
4. 09/28/89	12/02/92	1000	0.00	13,781.25
5. 08/27/90	12/02/92	1200	0.00	17,812.50

The fifth option was granted on August 27, 1990, approximately one month after the parties were married, and is therefore a marital asset. *Richardson v. Richardson*, 280 Ark. 498, 659 S.W.2d 510 (1983); *Cate v. Cate*, 35 Ark. App. 79, 812 S.W.2d 697 (1991). In *Richardson*, the court ruled that stock options constitute martial property if acquired during the marriage. The court further stated that the value of the option is the difference between the cost of exercising the option and the market value of the stock.

The fifth option was exercised on December 2, 1992, for a purchase price of $17,812.50. The option price was $14.84 per share and the market value on the exercise date was $33.56. Appellant sold sufficient shares at the market price to pay the commission cost and the option price for the shares. Appellant testified that he retained 300 shares of UST from that transaction. The 300 shares were later sold and the proceeds were used to purchase stock in a company known as "MSU." The MSU stock acquired in this transaction is marital property, and the Chancellor properly awarded appellee one-half of those shares.

Appellant's first option was granted on June 6, 1986, and was exercised on October 9, 1990. The option price was $8.47 per share and the market value on the exercise date was $30.56. Because the market price per share had increased by $21.09, the 1200 shares of UST had a value of $36,672.00 on the date of purchase. Appellant paid $1,200.00 cash toward the purchase price of $10,162.50 and financed the remaining balance of $8,962.50. Appellant's use of marital funds in the purchase of this stock entitles appellee to an interest in the stock to the extent that marital funds were expended to purchase shares of stock. *Id.* Appellee's interest does not extend to the benefits appellant acquired before marriage through his ownership of options. Appellant is entitled to receive as premarital property the difference between the purchase price granted in the option and the market price the parties would have paid for stock without the option. Had the parties spent $10,162.50 for stock at the market price of $30.56 per share, they would only have been able to purchase 332.5 shares of stock. Appellee is entitled to receive one-half of the shares that marital funds purchased, or 166.25 shares. The appellant is entitled to the benefit of the option or 867.5 shares as his premarital property and one-half or 166.25 of the shares purchased with the marital funds for a total of 1033.75 shares of stock.

The second option was granted on July 22, 1987, and was exercised on June 25, 1990, approximately one month before the marriage. The money exercised from that stock option was used to purchase U.S. Treasury stripped coupons on October 10, 1990. On December 21, 1992, the appellant sold the stripped

coupons to purchase 150 shares of Wal-Mart stock, which he sold on November 13, 1996. With these proceeds, appellant purchased 339 shares of stock in MSU and 188 shares of stock in Sybase, Incorporated. This money is traceable and is nonmarital property. Ark. Code Ann. § 9-12-315(b) (Repl. 1998).

The third option was granted on April 13, 1988, and exercised on August 27, 1990. The option granted appellant the right to purchase 1600 shares of UST. This option was premarital property even though it was exercised after the date of the marriage. The option price was $15.38 per share for a total purchase price of $24,600. The market value of each share on the date the option was exercised was $29.69. Had the parties purchased 1600 shares at the market price, they would have paid $47,500.80; however, the option price allowed appellant to purchase the shares for $24,600. He paid for the shares by selling a portion of them at the market price and retained the remainder of the shares. Appellant then sold those shares, which were his premarital property, and used the proceeds, approximately $20,000, to remodel the marital home. Appellant received the money from the sale of the stock in August 1990, one month after the marriage. The deed to the marital home is in the name of both appellant and appellee. When property is placed in the names of a husband and wife, a presumption arises that they own the property as tenants by the entirety. This presumption can be overcome only by clear and convincing evidence that a spouse did not intend a gift of one-half interest to the other spouse. *Boggs v. Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988). When appellant invested his separate funds in the marital home, and that home was deeded in the names of both parties, a presumption arose that appellant intended a gift to appellee of an equal interest in the premarital funds he placed in the home. *Ramsey v. Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1975). Since appellant failed to rebut this presumption at trial, his separate interest in the funds was extinguished when appellee's name was placed on the deed.

The fourth option was granted on September 28, 1989, and exercised on December 2, 1992. The option was for 1000 shares of UST at a purchase price of $13.78 per share. The market price per share on the exercise date was $33.56. Appellant sold

sufficient shares at the market price to pay the commission cost and the option price for the shares. From this option, appellant retained over 300 shares of UST stock. Appellant then sold the UST stock and purchased stock in MSU. The option was premarital property, and the exercise of the option was effected without expending any marital funds. The net gain from the exercise of the option is appellant's separate property because appellant was able to trace the ownership of the MSU stock through the sale of the UST stock. The increase in the market value of $33.56 above the $13.78 option price enabled the appellant to sell at the market price, pay for the option cost and the selling expenses, and use the difference to acquire stocks without using any marital funds to complete the transaction.

B. Real Estate

The Chancellor ordered the real property to be sold and the proceeds to be divided equally between the parties after payment of the mortgage and the expenses of the sale. Appellant seeks to be reimbursed for monies expended on improving the marital home with monies obtained through the exercise of a premarital stock option. As previously set forth in this opinion, the marital home was deeded in the joint names of the parties. The appellant's expenditure of premarital funds on the marital home is presumed a gift.

Appellant failed to provide evidence to overcome the presumption. Appellant was unable to specify the exact amount he contributed to the remodeling of the home, and he did not produce any documentation to trace the expenditures claimed as premarital money. In *Ramsey*, the Arkansas Supreme Court held that when property is purchased in the names of both parties, a presumption arises that the party who invests funds in joint property intends a gift to his or her spouse of an equal interest in those funds. This presumption can only be overcome by clear and convincing evidence. Appellant's proof did not overcome the presumption. The Chancellor did not err in requiring that the home be sold and the net proceeds from the sale be divided equally between the parties.

C. *Retirement*

Appellant had an employee retirement plan from which benefits were payable to him after he obtained the age of fifty-five. Appellant asserts that the plan had not vested because he could not obtain benefits therefrom until he reached age fifty-five. The Chancellor awarded appellee one-half of the retirement benefits accrued during the marriage. The Chancellor was correct. In *Day v. Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), the Arkansas Supreme Court held that a retirement plan that is vested but payable sometime in the future is a property right that is subject to division.

D. *Savings*

Appellant also invested in an employee savings plan. Appellant's employer matched every dollar appellant invested in the plan. Appellee testified that she and appellant decided to invest in appellant's savings plan because her employer's savings plan only matched twenty-five percent of every dollar she invested. Appellant argues that the money contributed by his employer was a gift to him and, therefore, nonmarital property. The Chancellor awarded appellee one-half of the savings benefits contributed by appellant and by appellant's employer during the course of the marriage. Appellant would not have received matching funds had he not been an employee and entitled to the benefits of his employer's savings plan. The matching funds paid by the employer into appellant's savings account are an employee benefit, not a gift.

We reverse and remand in part and affirm in part.

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

David Donald SCHUMACHER *v.* Rebecca W. SCHUMACHER

CA 98-531 986 S.W.2d 883

Court of Appeals of Arkansas
Division II
Opinion delivered March 17, 1999

[redacted]

Rose, VanWinkle & Woods, by: *Jim Rose III*, for appellant.

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

SAM BIRD, Judge. David Donald Schumacher, appellant/cross-appellee (hereinafter appellant), appeals from a divorce decree entered by the Washington County Chancery Court contending that the court erred in its determination of the amount of alimony and child support that he should pay, and in its division of the marital assets and debts. Appellee/cross-appellant Rebecca W. Schumacher (hereinafter appellee) also appeals the order, arguing that the court erred in failing to award to her certain work-related bonuses that were paid to appellant by his employer for 1996 and 1997. We affirm in part and reverse and remand in part on direct appeal, and we reverse and remand on cross-appeal.

Appellant and appellee were married on July 29, 1978. The parties' only child, a son, was born in 1983, and at that time, appellee quit her employment. The couple separated on August 1, 1996, when appellant moved out of their home. For approximately fours months after he moved out, appellant voluntarily provided financial support to appellee. However, appellant ceased to provide any financial assistance to appellee from December 1996 to May 21, 1997.

In February of 1997, appellant filed for divorce in the Washington County Chancery Court, and appellee filed a counterclaim for separate maintenance. In May 1997, appellant dismissed his complaint for divorce, and the parties reached an agreement settling appellee's claim for separate maintenance, by which appellee was awarded custody of the parties' son, possession of their marital home, $750 per month in child support, and $1,500 per month for her separate maintenance. The parties also agreed that each would pay one-half of their marital debts as they became due and payable; however, the agreement did not identify those marital debts by creditor or amount. An amended decree of separate maintenance incorporating the parties' agreement was filed on July 2, 1997. In June 1997, appellant moved into the home of another woman, and they opened a joint checking account. On July 25, 1997, the appellee filed a complaint for absolute divorce.

Subsequent to the entry of the decree of separate maintenance and before the parties were granted an absolute divorce, the appellant failed to pay appellee the agreed $1,500 monthly separate maintenance. The appellant, instead, reduced appellee's separate maintenance payments by sums he contended that he was paying on their marital debt, thereby reimbursing himself for appellee's share of their marital debt that he claimed to be paying for her.

Following a trial on January 6, 1998, the court granted appellee an absolute divorce on the grounds of general indignities. By its decree, the court granted appellee custody of the couple's son, awarded appellee possession of the marital home and its contents during the minority of their son, ordered appellant to pay $750 per month in child support until their son's eighteenth birthday, and ordered appellant to pay $1,500 per month in alimony until appellee's remarriage or death. Appellee was also awarded one-half of the 1,000 shares of Kennametal stock that were owned by the couple, one-half of the money in the checking account that had been opened and maintained by appellant subsequent to the parties' separation, and one-half of $54,918.84, which the appellant had vested in a 401(k) retirement savings plan. The court also ordered appellee to maintain the mortgage payments on the mari-

tal home and ordered the appellant to maintain the casualty insurance on it.

The appellant brings this appeal arguing six points for reversal. First, he argues that the court erred in refusing to use the child-support chart in setting the amount of child support. Second, he argues that the court abused its discretion in awarding permanent alimony in the amount of $1,500. For appellant's third, fourth and sixth points, he makes arguments concerning the division of marital property and what constitutes marital property. And appellant argues for his fifth point on appeal that the court erred in ordering him to pay the casualty insurance premiums on the marital residence. We reverse and remand on appellant's first and second points on appeal, and we affirm on appellant's other remaining points.

Appellee cross-appeals, arguing that the court erred in refusing to award her one-half of appellant's work-related bonuses for 1996 and 1997. We agree, and we reverse and remand on appellee's cross-appeal.

Child Support

For appellant's first point, he argues that the court erred in not setting child support by reference to the most recent revision of the family-support chart. Appellant's net monthly income was determined to be $6,309. He argues that on that amount of monthly income, according to the family-support chart, he should be required to pay $946.50 per month in child support; however the court ordered, instead, that he pay only $750 per month. Appellant makes the seldom, if ever, heard argument that he has not been ordered to pay enough child support. However, he quickly assures us that his motive is less than eleemosynary when he argues that he has been ordered to pay too much alimony, and that while his child support should be increased, the amount the court ordered that he pay in alimony should be reduced. Appellant reasons that since he will probably be required to pay alimony much longer than he will be paying child support, it is financially advantageous to him, and it will also conform with the require-

ments of the law, if the child support and alimony are set in accordance with the family-support chart.

After the hearing in which appellee was awarded a divorce, the court made the following oral findings relating to the issues of child support and alimony:

> Barely six months ago another Court directed Mr. Schumacher to pay $1,500.00 a month for separate maintenance and $750 a month of child support. If you add the two figures that the Chart shows it comes to $2,271.00. If you pick up on the $2,250 total from the Order of the other Court, you've got [an insignificant difference.] There appears to be no material change of circumstances, therefore, this Court directs that alimony shall be payable in the sum of $1,500.00 a month and child support in the sum of $750.00 per month.

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. *Thompson v. Thompson,* 63 Ark. App. 89, 974 S.W.2d 494 (1998); *Woodson v. Johnson,* 63 Ark. App. 192, 975 S.W.2d 880 (1998); *Anderson v. Anderson,* 60 Ark. App. 221, 963 S.W.2d 604 (1998). *See also* Ark. Code Ann. § 9-14-106 (Repl. 1998). The family-support chart itself creates a rebuttable presumption that the amount of child support set forth therein is the correct amount of child support to be awarded, and that such amount can be disregarded only if the chancery court makes express written findings or specific findings on the record that application of the support chart is unjust or inappropriate. *Woodson v. Johnson* and *Anderson v. Anderson, supra.* Relevant factors to be considered by the court in determining whether to deviate from the amount of child support set by the family-support chart are set forth in *Administrative Order No. 10: Arkansas Child Support Guidelines,* 329 Ark. 668 (1997).

In the case at bar, the chancellor did not refer to any of these factors when he deviated from the child-support guidelines. He merely referred to the separate-maintenance order entered by a different court six months earlier and stated that there had been no material change of circumstances over the last six months; therefore, he made the same award of alimony and child

support. This court will consider a change of circumstances when *modifying* an existing child-support award. *Payton v. Wright*, 63 Ark. App. 33, 972 S.W.2d 953 (1998). However, in the case at bar, the chancellor was setting the initial amount of child support incident to the entry of an absolute decree of divorce. While there was in existence in another proceeding an order awarding child support, the court in the case at bar was not *modifying* an *existing* child-support award. Although the chancellor did refer to the family-support chart and noted that it called for child support and alimony in the amounts of $946.50 and $1,325.10, respectively, he declined to order payment of those sums by the appellant because their total ($2,271.60) was not significantly different than the total of the amounts of child support and alimony ($2,250) that had been set approximately six months earlier by another court in the disposition of appellee's action for separate maintenance. Except for noting this insignificant difference in the totals, the chancellor did not make any findings of fact as to whether any of the relevant factors justified a conclusion that the amount of child support set forth in the family-support chart was inappropriate or unjust. Therefore, we reverse and remand as to the issue of child support in order that the chancellor can properly consider whether any of the relevant factors set forth in the Administrative Order No. 10 justify a deviation from the amount of child support fixed by the family-support chart.

Alimony

For appellant's second point on appeal, he argues that the court abused its discretion in awarding the appellee permanent alimony in the amount of $1,500 per month. First, he argues that the chancellor did not set forth any factors that he considered in making the award. And the appellant asserts that if this court does not reverse the chancellor, then this court should award temporary alimony in the amount of $1,325.10.

The purpose of alimony is to rectify, insofar as is reasonably possible, the frequent economic imbalance in the earning power and standard of living of the divorced husband and wife. *Mitchell v. Mitchell*, 61 Ark. App. 88, 964 S.W.2d 411 (1998). The award of alimony is a matter resting solely in the chancery court's

discretion. *Mitchell v. Mitchell, supra; Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993). The alimony award must always depend upon the particular facts of each case. *Dean v. Dean*, 222 Ark. 219, 258 S.W.2d 54 (1953). The ability of one party to pay and the need of the other party are primary factors to be considered in awarding alimony. *Burns v. Burns*, and *Mitchell v. Mitchell, supra.* To balance these primary factors, a chancery court should consider certain secondary factors, including the financial circumstances of both parties; the amount and nature of the income, both current and anticipated, of both parties; the extent and nature of the resources and assets of each of the parties; and the earning ability and capacity of both parties. *Anderson v. Anderson, supra.* The chancellor's award of alimony will not be reversed absent an abuse of discretion. *Mitchell v. Mitchell* and *Anderson v. Anderson, supra.* In *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines, supra*, the supreme court stated that when determining temporary support, a dependent custodian should be counted as two dependents as a guide for determining support. And in final hearings, on issues of alimony, the court should consider all relevant factors, including the chart, in determining the amount of spousal support that should be paid. *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines, supra.*

In the case at bar, the appellee showed a need for alimony. First, she has not worked full time for fourteen and one-half years so that she could stay at home and raise the couple's son. Second, a doctor testified that she is precluded from working long hours because of her illnesses. Third, appellee, over the past fourteen years, has never earned more than $800 per year, in the years that she did work. Clearly, she could not find a job in which she would earn enough to keep her in the standard to which she had become accustomed. Because of her testimony and the testimony of her doctor, the chancellor cannot be said to have abused his discretion in awarding alimony.

However, the chancellor did not consider the family-support chart, as the appellant argues, in determining the amount of alimony. Again, he referred to the separate-maintenance award of another court and stated that there had not been a material change of circumstances; therefore, he would award the same

amount of child support and alimony. That constituted reversible error; therefore, we reverse and remand this issue to the chancery court in order to consider all relevant factors when determining the amount of alimony that should be awarded.

Marital Property

For appellant's third, fourth, and sixth points on appeal, he makes certain arguments concerning what is and what is not contained within the definition of marital property. Marital property is defined by Ark. Code Ann. § 9-12-315 (Repl. 1998) as:

> (b) . . . all property acquired by either spouse subsequent to the marriage except:
>
> (1) Property acquired prior to marriage, or by gift, or by bequest, or by devise, or by descent;
>
> (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (3) Property acquired by a spouse after a decree of divorce from bed and board;
>
> (4) Property excluded by valid agreement of the parties;
>
> (5) The increase in value of property acquired prior to marriage or by gift, bequest, devise, or descent, or in exchange therefor;
>
> (6) Benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses; and
>
> (7) Income from property owned prior to the marriage, or from property acquired by gift, bequest, devise, or descent, or in exchange therefor.

Appellant contends that the trial court erred in finding that deposits that appellant had made into a joint checking account with another individual during the time the separate maintenance decree was in effect were marital property and, thus, appellee was entitled to one-half. He states that during the time he was making these deposits, he was supporting appellee and their son and that

the separate checking account was merely for his living expenses. He also argues that the court erred in ordering him to pay one-half of the various credit card debts incurred by the appellee during the separation while he was paying court-ordered separate maintenance. And he argues that the appellee should not have benefitted from the sale of stock because the stock does not constitute marital property.

As defined in § 9-12-315, marital property is all property acquired subsequent to marriage except for those seven categories specifically listed. While the statute does exclude from the marital-property definition property that is acquired after a divorce from bed and board, it does not exclude property that is acquired after a legal separation. Therefore, the funds acquired by appellant and deposited into the joint checking account prior to their divorce are marital property subject to division by the court.

Likewise, the credit card debts incurred by appellee during the period of the parties' legal separation were marital debts that the chancellor had discretion to divide between the parties.

The 1,000 shares of Kennemetal stock were acquired during the marriage and sold during the marriage, and are considered marital property. The appellant concedes in his argument that he "was vested with a certain amount of company stock, which he sold and deposited the proceeds into a bank account."

Appellant seems to argue that since he was supporting appellee during the legal separation, the marital property should be distributed differently. He cites no authority for this argument. Neither the code nor case law make an exception for the division of marital property that has been acquired after a legal separation has been granted. *See* Ark. Code Ann. § 9-12-315.

The House

The appellant argues that because the appellee has the use and benefit of the home, he should not be responsible for the insurance payments on the home as ordered by the court. We disagree.

The court has wide discretion in awarding either party the possession of the home, and the award of possession of the home is subject to such terms as the chancellor deems to be equitable and just. *Hodges v. Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989); *Cantrell v. Cantrell,* 10 Ark. App. 357, 664 S.W.2d 493 (1984); *Hada v. Hada,* 10 Ark. App. 281, 663 S.W.2d 203 (1984). It cannot be said to be unjust that appellant pays the casualty insurance while appellee pays the mortgage payment. When the house is sold, both parties will share in the equity resulting from appellee's payment of the mortgage. Likewise, should the house be damaged in some way, again both parties would benefit from the insurance proceeds, even though only appellant paid the premiums.

Appellee's cross-appeal: work-related bonus

Appellee cross-appeals arguing that the court abused its discretion by not awarding her one-half of the appellant's 1996 and 1997 work-related bonus compensation. In February 1997, the appellant received a bonus of $14,000 for work performed in 1996. The court did not award the appellee one-half of the bonus. The court wrote, "That the Court finds that the defendant received a bonus through his employment during the separation in the amount of Fourteen Thousand Dollars ($14,000.00). That the plaintiff has no interest in said bonus."

The chancellor also refused to award appellee one-half of the bonus he was to receive in 1998 for work performed in 1997. At trial on January 6, 1998, there was testimony that the amount of the award for 1997 had not yet been determined. The chancellor held that since the amount of the 1997 bonus had not been determined, the appellee was not entitled to one-half of it.

The court erred. Appellee should be awarded one-half of the $14,000 bonus paid to appellant by his employer for 1996, and one-half of the bonus he earned for 1997. *See Wilson v. Wilson,* 294 Ark. 194, 741 S.W.2d 640 (1987). In *Wilson* the court held,

> Because most of appellee's bonus accrued and, therefore, was acquired during his marriage to appellant, we hold the chancellor abused his discretion in finding that none of the bonus was mari-

> tal property. Therefore, we reverse and remand this cause on this point.

294 Ark. at 200, 741 S.W.2d at 644. Therefore, we reverse and remand as to this issue, with directions for the chancellor to award appellee one-half of appellant's 1996 and 1997 work-related bonuses.

Based upon the foregoing, we affirm in part, and we reverse and remand in part on direct appeal, and we reverse and remand on cross-appeal.

Affirmed in part and reversed and remanded in part on direct appeal, and reversed and remanded on cross-appeal.

HART, J., agrees.

ROGERS, J., concurs.

JUDITH Rogers, Judge, concurring. I concur in the excellent majority opinion that was written in this case. I write separately, not because I reject the final decision of the chancellor or the amount of child support and alimony set forth in the order, but because the chancellor should have referred to the family-support chart before beginning the analysis and determining any deviation. I also want to emphasize that the chancellor obviously tried to make an equitable decision, and I cannot fault him for the result that emerged. I agree that under the facts in the case at bar, the chancellor should have first set out specific findings on the record to support his deviation from the guidelines.

Here, the chancellor in the divorce action could have adopted the agreement of separate maintenance the parties had reached six months earlier. The agreement was entered of record a short time after appellant moved into another woman's home and less than one month before he filed for divorce. If the chancellor had found that the doctrine of waiver or estoppel applied due to the previous agreement of the parties or that other equitable considerations under the statute warranted an unequal division, it should have been so stated for the record. Again, the chancellor should have referred to the family-support guidelines and articulated his reasons for deviating from the amounts set forth in the chart.

DUGAL LOGGING, INC., *et al. v.*
ARKANSAS PULPWOOD COMPANY, *et al.*

CA 98-973 988 S.W.2d 25

Court of Appeals of Arkansas
Division II
Opinion delivered March 17, 1999

[redacted]

Gary D. McDonald, for appellant Dugal Logging.

Boswell, Tucker & Brewster, by: *Dennis J. Davis*, for appellant L.T.M. Chips, Inc.

Vickery & Landers P.L.L.C., by: *Michael R. Landers*, for appellant Anthony Forest Products Co.

Harrell & Lindsey, by: *Paul E. Lindsey*, for appellee.

JUDITH ROGERS, Judge. This is a case in which appellants were found liable for conversion, trespass, and the wrongful cutting of timber. The circuit judge, sitting as factfinder, awarded appellees damages of $18,211.90. Numerous issues are raised on appeal and cross-appeal. We find no error and affirm.

On July 5, 1991, Ellena Goodwin, part-owner of sixty acres in Union County, executed a timber-cutting agreement with Arkansas Timber Corporation. The agreement provided that Arkansas Timber would cut and remove certain timber on the land, with the provision that the contract must be complied with by July 5, 1992. On April 8, 1992, before the expiration of the deadline, Ellena Goodwin executed a timber deed on the same land to appellee Arkansas Pulpwood Company, for which she was paid $5,000. Neither Arkansas Timber nor Arkansas Pulpwood knew of the other's transaction with Goodwin.

Sometime in 1992, appellant Dugal Logging entered into a verbal agreement with Arkansas Timber to harvest the trees on the Goodwin tract. It is not known exactly when Dugal began its harvesting operation, but it is undisputed that the cutting and hauling were not completed before the July 5, 1992, deadline. Weight tickets from various mills revealed that deliveries occurred between July 7 and July 20, 1992. Among the mills that purchased the logs were appellants Anthony Forest Products Company, LTM Chips, Inc., and Riverwood International USA, Inc. Anthony paid Dugal $9,380.80 for the logs it purchased; LTM paid $13,816.85; and Riverwood[1] paid $9,150.58, for a total of $32,348.23.

[1] Dugal's sale to Riverwood was accomplished through a purchase order contract held by appellant Meshell Timber Company, Inc. Dugal paid Meshell $1,033.13 for the privilege of using the contract.

After Dugal received payment from the mills, it forwarded $12,541.20 to Arkansas Timber for stumpage, *i.e.*, the right to enter upon the land and cut trees. At about this same time, Arkansas Pulpwood, unaware that the trees on the Goodwin tract had already been harvested, began preparations to cut the trees pursuant to its April 8, 1992, timber deed. Upon discovering what had occurred, it filed suit against Arkansas Timber in Union County Circuit Court alleging a wrongful cutting of timber. By amended complaint, Arkansas Pulpwood added Dugal Logging, Meshell Timber, and the three above-named mills as defendants, charging them with conversion and trespass. These defendants filed cross-claims, seeking judgment over in the event they should be held liable: Dugal against Arkansas Timber; Riverwood against Meshell; and LTM, Anthony, and Meshell against Dugal.

The remaining parties in the case were added by joinder. During the pendency of the lawsuit, Dugal filed a motion for joinder, claiming that Ellena Goodwin was not the titled owner of the sixty acres upon which the timber had stood. Dugal alleged that other persons, including the heirs of W.R. McHaney, appellees herein, were indispensable parties. The trial court agreed and ordered joinder.

Trial was held on September 17, 1997, during which testimony was taken and voluminous documentary evidence presented. Thereafter, the trial judge issued an extensive, carefully-reasoned letter opinion. He found that, at the time of the timber cutting, the ownership interests in the sixty acres were as follows: Ellena Goodwin, one-fifth; Sallie Mae Hardy Freeman (Ellena's sister), one-fifth; and the McHaney heirs (McHaney was a grantee of Goodwin's three other siblings), three-fifths. He further found that, although Dugal began cutting the timber before the July 5, 1992, deadline, the substantial majority of the work was done after the deadline. Dugal was therefore held liable for trespass and conversion. Arkansas Timber and the three mills were also held liable for conversion. However, the judge determined that the parties' acts were not intentional, such as would justify the imposition of exemplary damages pursuant to Ark. Code Ann. § 18-60-102 (1987).

Compensatory damages were calculated by the trial judge as follows: the price Dugal received from the mills for the timber, $32,348.23, less Dugal's cost of harvesting, $14,136.33, for a total of $18,211.90 awarded to appellees jointly and severally against appellants. Prejudgment interest was added from July 20, 1992, to the date of trial. When all cross-claims were figured in, the ultimate judgment fell upon Dugal and Arkansas Timber. Additionally, Dugal was awarded $12,541.10 on its cross-claim against Arkansas Timber, representing the amount Dugal had paid for stumpage.

Ten issues are presented on appeal. The first two concern a motion to dismiss the appeal and a challenge to the circuit court's jurisdiction. The next two concern the merits of the case, and the final six involve the trial judge's award of damages.

Appellees and one of the appellants, Riverwood, argue that the appeal should be dismissed because a motion to extend time for filing the record was improperly granted. We certified this case to the Arkansas Supreme Court for resolution of this issue, and certification was accepted. *See Dugal Logging, Inc. v. Arkansas Pulpwood Co., Inc.*, 335 Ark. 546, 983 S.W.2d 126 (1998). On January 14, 1999, the supreme court denied the motion to dismiss the appeal and reassigned the remainder of the case to this court. *See Dugal Logging, Inc. v. Arkansas Pulpwood Co., Inc.*, 336 Ark. 55, 984 S.W.2d 410 (1999). The issue has thus been decided, and we need not address it further.

Next, appellant Dugal argues that the circuit court had no power to determine the ownership of the land upon which the timber was grown. Dugal claims, without citation to authority, that determination of ownership of real property is the exclusive province of the chancery court, apparently referring to the rule that a quiet title action, brought by one in possession of land, is to be filed in chancery court. *See Carter v. Phillips*, 291 Ark. 94, 722 S.W.2d 590 (1987). However, this was not a quiet title action. Proof of ownership in the property was submitted as part of the conversion and trespass counts. Each of those counts requires proof of an interest in the property converted or trespassed upon. *See Graysonia-Nashville Lumber Co. v. Wright*, 117 Ark. 151, 175

S.W. 405 (1915); *Gardner v. Robinson*, 42 Ark. App. 90, 854 S.W.2d 356 (1993). Thus, determination of ownership of property was not the main thrust of the lawsuit. This was a tort action of a type not generally cognizable in chancery. *See Chamberlain v. Newton County*, 266 Ark. 516, 587 S.W.2d 4 (1979). *See also Palmer v. Sanders*, 233 Ark. 1, 342 S.W.2d 300 (1961), holding that, in a conversion suit brought in circuit court, it was proper to present evidence as to ownership of the converted property.

We also note that Dugal filed no motion to transfer the case from circuit to chancery court. As between law and equity, any objection to jurisdiction is waived in the absence of a motion to transfer unless the court is wholly without jurisdiction, as in the case of a chancery court trying a criminal case or a probate matter. *First Nat'l Bank v. Arkansas Devel. Finance Authority*, 44 Ark. App. 143, 870 S.W.2d 400 (1994). *See also Stolz v. Franklin*, 258 Ark. 999, 531 S.W.2d 1 (1975), holding that appellant's objection to chancery court jurisdiction in an ejectment case was waived when no motion to transfer was made.[2]

Based upon the forgoing, we hold there was no error in the trial judge's exercise of jurisdiction.

We turn now to the merits of the case. The first matter to be addressed is whether there was sufficient evidence to prove ownership of the timber land. As we stated earlier, proof of ownership or the right to possession of property is necessary for the maintenance of trespass and conversion actions. *Graysonia-Nashville Lumber Co. v. Wright, supra*; *Gardner v. Robinson, supra*; *Big A Warehouse Distributors, Inc. v. Rye Auto Supply, Inc.*, 19 Ark. App. 286, 719 S.W.2d 716 (1986). At trial, appellees presented several deeds into evidence that traced the chain of title to the sixty acres to one Allen Hardy. Probate records from the guardianship proceeding of Sallie Mae Hardy Freeman revealed that Freeman and Ellena Goodwin were two of Allen Hardy's five children, the other three

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[2] Separate appellant Anthony Forest Products, in its answer to appellees' third amended complaint, requested that the case be transferred to chancery court. Anthony does not urge this argument on appeal, and Dugal cannot benefit from an objection made on behalf of another defendant. *See generally Smith v. State*, 308 Ark. 603, 826 S.W.2d 256 (1992).

being Henry, Will, and Mary. The probate records stated that Allen Hardy was deceased. Other deeds in evidence showed that Henry, Will, and Mary deeded their share of the sixty acres to W.R. McHaney. From this evidence, the trial court determined that Goodwin and Freeman each had a one-fifth interest in the land, and that McHaney's heirs had a three-fifths interest.

Dugal argues that use of the probate records to establish a chain of title was improper, citing *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 735 (1996). In *Easterling*, the issue concerned the alleged negligence of an insurance agent in establishing an annuity. Appellee, in an attempt to prove the amount of his damages, entered probate documents into evidence showing the amount of the annuities. We held that the documents were hearsay and thus inadmissible.

Easterling is not applicable in this case because appellants made no objection on the basis of hearsay. The objection at trial, which was half-hearted at best, concerned the probative value of all the documents used to establish chain of title. A party cannot change his argument on appeal. *Blocker v. Blocker*, 57 Ark. App. 218, 944 S.W.2d 552 (1997). Additionally, appellants told the trial court that they had no problem with appellees' evidence so long as it was being offered to prove that those prosecuting the lawsuit had an interest in the land.

It is important to remember that the primary purpose of this action was not to establish ownership of property but to determine if a wrongful cutting of timber had occurred. The evidence presented by appellees, while it may have proved weak in a quiet title action, was sufficient for the purposes of this lawsuit.

We next address appellants' claim that, because Dugal began cutting timber before July 5, 1992, he should have been allowed a reasonable time in which to complete the job. Bobby Dugal, owner of Dugal Logging, testified that he did not remember when he began cutting on the Goodwin tract. He admitted that all hauling tickets were dated after the July 5 deadline. He said that the timber that was hauled beginning July 7 could have been cut that day or it could have been cut several days before. He acknowledged that most of the time he began hauling immedi-

ately after getting on a tract. The trial judge found that Dugal began cutting before July 5 but that the substantial majority of the work occurred after July 5.

■ In bench trials, the standard of review on appeal is whether the trial judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998).

■ The wording of the timber-cutting agreement between Goodwin and Arkansas Timber is especially important on this issue. The contract granted Arkansas Timber the right to cut and remove trees. It further provided that Arkansas Timber agreed to cut and remove trees and that it would have "until July 5, 1992, to comply with all the above stated terms." It is the duty of courts to enforce contracts as written and in accordance with the ordinary meaning of the language used and the overall intent and purpose of the parties. *Hancock v. Tri-State Ins. Co.*, 43 Ark. App. 47, 858 S.W.2d 152 (1993). The language used in this contract does not indicate that Arkansas Timber or its assigns, if they began cutting trees before the deadline, would be allowed to complete the majority of the work after the deadline.

Appellants cite several older cases in which a timber-cutter was allowed a reasonable period after his contractual deadline in which to complete his job. *See Griffin v. Anderson-Tully Co.*, 91 Ark. 292, 121 S.W. 297 (1909); *Indiana & Arkansas Lumber & Mfcting. Co.*, 89 Ark. 361, 116 S.W. 1173 (1909); and *Plummer v. Reeves*, 83 Ark. 10, 102 S.W. 376 (1907). However, those cases are distinguishable from the case at bar. Not only did they involve different contractual language, in each of them, all or most of the trees had been cut before the deadline, leaving only the hauling to be completed.

■ Based upon the forgoing, we cannot say that the trial judge's findings on the merits of the case were clearly erroneous.

■ The remaining issues concern the trial judge's award of damages. Appellants argue first that prejudgment interest should not have been awarded because appellees' damages were not ascertainable with reasonable certainty. We disagree. To support an

award of prejudgment interest, damages should be reasonably ascertainable both as to time and amount. *Mitcham v. First State Bank of Crossett*, 333 Ark. 598, 970 S.W.2d 267 (1998). If a method exists for fixing the exact value of a cause of action at the time of the occurrence of the event that gives rise to the cause of action, prejudgment interest should be awarded. *Killam v. Texas Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990). Put another way, where the amount of damages is definitely ascertainable by mathematical computation or if the evidence furnishes data that makes it possible to compute the amount without reliance on opinion or discretion, prejudgment interest should be awarded. *Woodline Motor Freight v. Troutman Oil Co.*, 327 Ark. 448, 938 S.W.2d 565 (1997).

The criteria for awarding prejudgment interest were met in this case. The last shipment of logs taken by Dugal to the mills occurred July 20, 1992, thus providing an exact date upon which the conversion was complete and giving the trial judge an exact time from which to begin the running of prejudgment interest. Further, the amount of appellees' damages was capable of exact determination by use of mathematics rather than opinion or discretion. The amounts paid to the mills and the costs incurred by Dugal were capable of being ascertained at the time appellees' cause of action arose.

Appellants rely on *Kutait v. O'Roark*, 305 Ark. 538, 809 S.W.2d 371 (1991), in support of their argument. There, appellant trespassed on appellee's land and wrongfully removed shale, rock, and ground. The trial court awarded approximately $25,000 as damages but refused to award prejudgment interest. The supreme court upheld that decision. However, it did not hold that prejudgment interest was never recoverable in such a case. The basis for the holding was appellee's failure to specify a time when the trespass occurred and his vagueness with regard to the amount of damages he suffered. Appellee claimed that the trespass occurred "over the course of several weeks" during the summer and fall of 1985 and that "several thousand yards" of shale, rock, and ground were removed. By contrast, the trespass and conversion in this case occurred during a specified period of time and the

amount of damages was capable of exact determination during that time.

Appellants' next argument is that the trial judge failed to follow the rule for measuring damages in a wrongful cutting case, as set out in *Burbridge v. Bradley Lumber Co.*, 218 Ark. 897, 239 S.W.2d 285 (1951). In fact, *Burbridge* deals with a different type of wrongful cutting case. It concerns the situation in which a converter adds value to the timber by turning it into lumber or ties. In such situations, if the conversion was unintentional, the victim of the conversion is entitled to the value of the timber as enhanced less the converter's costs. The timber in this case was not enhanced, but was taken directly to the mill as it was cut. Nevertheless, the trial judge followed the general idea in *Burbridge* by awarding the value of the timber less Dugal's costs. We find no error on this point.

Appellants also argue that, as a component of the cost of harvesting, Dugal should have received credit for the $12,541.20 paid to Arkansas Timber for stumpage. Had the trial judge allowed such a credit, appellees' recovery would have been $5,670.70 rather than $18,211.90. We find no error on this point because the trial judge awarded Dugal judgment against Arkansas Timber for $12,541.20, thereby placing the burden of recovering this amount on a joint tortfeasor rather than the injured parties.

Finally, appellants argue that a judgment should have been entered against Ellena Goodwin for the $5,000 she received from Arkansas Pulpwood, with the appellants being given credit for that amount. No authority is cited nor any convincing argument made on this point. Further, the trial judge stated in his letter opinion that the $5,000 was not at issue in this proceeding. In any case, appellants offer no reason why those who were adjudged liable for the tortious conduct in this case should benefit by a judgment against one who was not adjudged liable.

On cross-appeal, we first consider appellees' claim that the trial judge erred in finding appellants were unintentional trespassers and converters. Had the court found otherwise, Dugal would not have been allowed to deduct his cost of harvesting the trees. *See Burbridge v. Bradley Lumber Co., supra.* The issue

of intent is a question of fact. *Undem v. First Nat'l Bank*, 46 Ark. App. 158, 879 S.W.2d 451 (1994). A trial judge's finding of fact will not be reversed unless clearly erroneous. *McQuillan v. Mercedes-Benz Credit Corp., supra.* There was evidence in the case from which the trial judge could have concluded that Dugal was never shown a copy of the timber-cutting agreement and never knew or had reason to know of the deadline. Under the circumstances, we cannot say that the trial judge's finding that the wrongful cutting was due to a mistake rather than willful or intentional conduct was clearly erroneous.

Appellees also question the manner in which the trial judge calculated Dugal's costs. Dugal testified that his logging costs were $9.60 per ton, an amount which included a profit, and $20 per cord for pine pulpwood. The trial judge used these figures to compute $14,136.33 in costs that Dugal was allowed to deduct. Appellees argue that Dugal should have offered evidence of his exact out-of-pocket costs.

The record as abstracted does not reveal that appellees objected to the method used by the trial judge in calculating Dugal's costs, nor does it reveal that they challenged or rebutted Dugal's figures during their examination of him. The argument is thus being made for the first time on appeal, and we do not consider such arguments. *Meadors v. Meadors*, 58 Ark. App. 96, 946 S.W.2d 724 (1997).

Affirmed on direct appeal and cross-appeal.

HART and STROUD, JJ., agree.

Henry ROGERS *v.* INTERNATIONAL PAPER COMPANY

CA 98-939 988 S.W.2d 23

Court of Appeals of Arkansas
Division I
Opinion delivered March 17, 1999

[redacted]

The Cortinez Law Firm PLLC, by: *Robert R. Cortinez Sr.*, for appellant.

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

WENDELL L. GRIFFEN, Judge. Henry Rogers appeals from a decision on April 10, 1998, by the Arkansas Workers' Compensation Commission that dismissed his appeal from the Administrative Law Judge's (ALJ) decision. Appellant maintains that the dismissal of his appeal was error because the filing of his motion for reconsideration extended the time allowed for his notice of appeal. We affirm the dismissal of the claim.

Appellant filed a claim with the Workers' Compensation Commission for injuries to his neck and lower back suffered on May 21, 1993. Appellant was towing a large piece of heavy equipment when the equipment struck the vehicle he was driving. In an opinion filed on January 14, 1998, the ALJ denied temporary total benefits to the appellant from June 4 to July 12, 1993. Appellant received this opinion on January 15, 1998.

Appellant filed a motion before the ALJ for reconsideration on January 20, 1998. The ALJ denied appellant's motion on January 28, 1998. Appellant then appealed the decision to the Full Commission on February 23, 1998. Appellee filed a motion to dismiss, asserting that the notice of appeal was untimely. The Commission dismissed the appeal based upon Ark. Code Ann. § 11-9-711(a) (Repl. 1996).

Appellant argues that a timely motion for reconsideration or rehearing extends the time to file a notice of appeal to thirty days from the ruling on the motion. He also contends that because there is no provision in the statute for postjudgment motions, the procedure of Rule 4 of the Rules of Appellate Procedure regard-

ing postjudgment motions should apply. The appellee contends that the appellate rules do not apply to cases before the Workers' Compensation Commission, and that any confusion regarding postjudgment motions and time for appeals was resolved by the latest case discussing the issue: *Hill v. Travenol Labs., Inc.*, 24 Ark. App. 116, 748 S.W.2d 356 (1988).

Initially, it should be noted that the Arkansas Rules of Civil Procedure do not apply to proceedings before the Workers' Compensation Commission. *Tracor/MBA v. Artissue Flowers*, 41 Ark. App. 186, 850 S.W.2d 30 (1993). Arkansas Code Annotated section 11-9-711, as a special statute governing appeals only in workers' compensation cases, was intended to remain in force as an exception to the later and more general enactment of the Rules of Appellate Procedure. *Sunbelt Couriers v. McCartney*, 31 Ark. App. 8, 786 S.W.2d 121, aff'd 303 Ark. 522, 798 S.W.2d 92 (1990). Moreover, the Rules of Appellate Procedure "govern the procedure in civil appeals to the Arkansas Supreme Court or Court of Appeals." *See* Rule 1, Rules of Appellate Procedure. Thus, we are not persuaded by appellant's argument that Rule 4 of the Rules of Appellate Procedure applies to his appeal to the Commission from a decision rendered by an Administrative Law Judge.

The Commission found that appellant's notice of appeal was not timely based upon Ark. Code Ann. § 11-9-711 (1996), which provides:

> (a) AWARD OR ORDER OF ADMINISTRATIVE LAW JUDGE OR SINGLE COMMISSIONER — REVIEW. (1) A compensation order or award of an administrative law judge or a single commissioner shall become final unless a party to the dispute shall, within thirty (30) days from the receipt by him of the order or award, petition in writing for a review by the full commission of the order or award.

No provision of the statute addresses any changes in the time for the notice of appeal where a post-award motion has been filed. We have stated that the time for appeal in workers' compensation cases is a matter for the legislature, and accordingly, we have

rejected arguments for a more liberal view of timely appeals. *Lloyd v. Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986).

Our cases have stated the blanket rule that "[i]f a notice of appeal is not received by the Commission within thirty days, the decision becomes final and the Commission is without authority to review the case." *Tracor/MBA*, 41 Ark. App. at 189, 850 S.W.2d at 32. No exceptions have been made. In *Hill v. Travenol Labs., Inc.*, 24 Ark. App. 116, 117-18, 748 S.W.2d 356, 356 (1988), we stated that even though "the Commission has the authority to consider a motion for rehearing which is filed within the thirty days allowed for an appeal . . . the filing of a motion for reconsideration . . . does not extend the time to file the notice of appeal." (Citations omitted.) The timeliness argument in that case involved an appeal from the Commission to this court, not an appeal from the ALJ to the Commission.

The rule seems to have been muddled somewhat in the past by the statement in cases such as *Lloyd, supra*, that "there was no timely appeal from the law judge's decision [awarding claimant permanent partial disability], or from his denial of the petition for rehearing of that decision." 19 Ark. App. at 342. In none of the cases cited by appellant did the court hold that the motion for reconsideration extended the time for appeal. The court in those cases simply noted that the notice of appeal was not timely because it was not within thirty days from either date considered. The language cited by appellant amounts to dicta.

The provisions regarding appeals from the ALJ to the Commission and appeals from the Commission to this court are identical: the lower decision becomes final if no appeal is sought within thirty days. *See* Ark. Code Ann. § 11-9-711(a) and (b). Thus, the rule in *Hill, supra*, is applicable to this case involving an appeal from the ALJ to the Commission. Any confusion created in *Lloyd, supra*, and similar cases, was clarified by our decision in *Hill*. Lastly, the language of the statute clearly states that an award is final where no notice of appeal is sought within thirty days of its receipt. *See* Ark. Code Ann. § 11-9-711 (1996). The clear language of the statute controls. *Hercules, Inc. v. Pledger*, 319 Ark.

702, 894 S.W.2d 576 (1995). Accordingly, we find no error in the Commission's dismissal of appellant's claim.

Affirmed.

MEADS and BIRD, JJ., agree.

FRED'S STORES of Tennessee, Inc. *v.* Lloyd BROOKS

CA 98-820 987 S.W.2d 287

Court of Appeals of Arkansas
Division III
Opinion delivered March 17, 1999

Wright, Lindsey & Jennings LLP, by: *Alston Jennings, Jr.*, for appellant.

Anne Orsi Smith, for appellee.

TERRY CRABTREE, Judge. This is an appeal from a jury verdict in a slip-and-fall case in favor of the appellee, Lloyd Brooks. On appeal, Fred's Stores of Tennessee, Inc., the appellant, maintains that there is insufficient evidence of negligence to support the jury verdict. We find the evidence insufficient and reverse and dismiss.

On September 18, 1995, while on crutches, appellee slipped and fell on clear hair gel in Fred's in Nashville, Arkansas. At trial, five witnesses testified, including appellee, appellee's wife, a customer who was in the store at the time of the accident, a former employee of Fred's, and the supervisor on duty at Fred's at the time of the accident. Appellee testified that as he was making a right turn in the store, his left crutch hit a slick spot, and he fell to the floor. While on the floor, appellee noticed that a clear gel was on his crutch and shoe.

Peggy Lansdell, a former employee of Fred's, testified that she was working at Fred's on the day of the accident and stated that she remembered that on a shelf nearby the accident, the store stocked hair gel. She specifically recalled that one particular bottle had gel all over the outside of the bottle. Lansdell further testified that she knew of no written policy concerning proper cleaning of debris on the floor and that no particular employee was responsible for checking the aisles of the store to ensure that the aisles were free from debris or fallen objects. In addition, she stated that the store usually stayed a mess.

Anita Johnson, Fred's supervisor at the time of the accident, testified that she did not require one particular employee to check the aisles of the store and that the store had no written procedure for employees to follow as a guideline to protect customers from accidents. Johnson further stated that she could not recall if the store was cleaned and swept the night before the accident.

At the close of appellee's case and at the close of all the evidence, appellant made motions for directed verdicts, stating that there was no evidence to support a verdict for appellee because appellee produced no evidence that any substance on the floor

resulted from the negligence of appellant or that a substance had been on the floor for such a time that appellant knew or should have known of its presence. The trial court denied the motions. Subsequently, the jury returned with a verdict in favor of appellee for $10,000. At that point, appellant made a motion for judgment notwithstanding the verdict, and the circuit judge denied it.

A motion for a directed verdict should be granted only if there is no substantial evidence to support the verdict. *Bank of Malvern v. Dunklin*, 307 Ark. 127, 817 S.W.2d 873 (1991). On appeal from a denial of a directed verdict, this court views the evidence in the light most favorable to the party against whom the verdict is sought and gives it the highest probative value. *Boykin v. Mr. Tidy Car Wash, Inc.*, 294 Ark. 182, 741 S.W.2d 270 (1987). Substantial evidence has been defined as being of sufficient force and character to compel a conclusion one way or another. *Wal-Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). It must force the mind to pass beyond suspicion or conjecture. *Id.*

A property owner has a general duty to exercise ordinary care to maintain his or her premises in a reasonably safe condition for the benefit of invitees. *Johnson v. Arkla, Inc.*, 299 Ark. 399, 771 S.W.2d 782 (1989). The burden of establishing a violation of this duty in a slip-and-fall case is well established. A plaintiff must show either 1) that the presence of a substance upon the premises was the result of the defendant's negligence or 2) that the substance had been on the premises for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Safeway Stores, Inc. v. Willmon*, 289 Ark. 14, 708 S.W.2d 623 (1986).

Under the first part of the standard, appellant argues there was insufficient evidence that a substance was on the floor as a result of its negligence. We agree that appellee failed to present sufficient evidence regarding how the substance came to be on the store floor. Appellee's theory apparently was that hair gel was removed or spilled from an opened container on a nearby shelf onto the floor, causing him to fall. However, testimony to this effect was speculative and insufficient to show there was a sub-

stance on the floor due to the appellant's negligence. Possible causes of a fall, as opposed to probable causes, do not constitute substantial evidence of negligence. *Safeway Stores, Inc., supra.*

Appellant next contends, under the second part of the standard, that there was insufficient evidence that a substance remained on the floor for such a length of time that its employees were or should have been aware of its existence and failed to exercise ordinary care to remove it. We have recognized that the length of time a substance is on the floor is a key factor. The burden is on the plaintiff to show there is a substantial interval between the time the substance is placed on the floor and the time of the accident. *Johnson v. Arkla, Inc., supra.*

Here, there was insufficient evidence that a substance had been on the store floor for such a substantial period that the employees knew or should have known of its existence. Appellee introduced no evidence that there were foot tracks through the hair gel in the aisle, which might lead to the inference that employees or patrons had walked through the gel and ignored the danger it presented. In fact, the store was only open two hours before the accident occurred, and appellee presented no evidence whatever of a substance on the floor prior to the time the store opened for business.

After careful review, we conclude that the jury had no evidence from which it might determine without speculation or conjecture how the substance got on the floor or how long it remained there prior to the accident. *See Skaggs Co., Inc. v. White*, 289 Ark. 434, 711 S.W.2d 819 (1986).

Reversed and dismissed.

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

Randy JAYNES *v.* STATE of Arkansas

CA CR 98-852 987 S.W.2d 751

Court of Appeals of Arkansas
Division IV
Opinion delivered March 17, 1999

Smith, Maurras, Cohen & Redd, PLC, by: *Matthew Horan*, for appellant.

Winston Bryant, Att'y Gen., by: *O. Milton Fine II*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Randy Jaynes appeals his conviction in a jury trial of first-degree sexual abuse,

for which he received a three-year sentence in the Arkansas Department of Correction. On appeal he argues: 1) his second trial constituted double jeopardy because the trial court erred in granting the State's request for a mistrial during his defense counsel's opening statement in the first trial because there was no overruling necessity to do so; and 2) the trial court erred in preventing him from introducing evidence that would prove that the complaining witness had fabricated earlier incidents in order to attract attention. We agree that Jaynes's second trial constitutes double jeopardy, and reverse and dismiss.

On September 18, 1997, a jury was selected and sworn to try Jaynes in Sebastian County Circuit Court on a charge of first-degree sexual abuse arising from his alleged fondling of his fourteen-year-old daughter, A.J. The inappropriate touching allegedly took place at Jaynes's residence on July 6, 1996, as Jaynes swam in an eight-foot diameter "kiddie pool" with A.J. and her two young stepsiblings, ages five and three, and later that afternoon in a bathroom while A.J. was attempting to take a shower.

Jaynes's defense was that no sexual abuse took place. Recognizing that the entire case depended on A.J.'s testimony, prior to trial Jaynes had moved to introduce evidence of a specific incident involving A.J. that he believed would tend to prove that she made up stories to get attention. The incident in question occurred on May 9, 1996, when A.J. was admitted to St. Edwards Mercy Medical Center after she had complained to her mother that she had accidentally ingested half a cup of Clorox bleach. Both A.J.'s mother and the treating medical personnel doubted that A.J. had actually swallowed any bleach. The trial court ruled that it was a collateral matter and limited Jaynes to asking about the incident on cross-examination.

In opening statement, Jaynes's defense attorney attempted to describe A.J. as a person who had a propensity for making unfounded allegations. She first related that when A.J. was in the fifth or sixth grade, she told a school counselor that her stepfather had beaten her. The State objected, arguing that the information about A.J.'s story telling was inadmissible character evidence and therefore could not be alluded to in opening statement. The trial

judge ruled that A.J., who had testified about the incident in a preliminary hearing, could be asked about it on cross-examination. The State refused the trial court's offer of an admonition, and the trial resumed.

Jaynes's defense counsel then brought up the Clorox incident. The State objected and asked for a mistrial, which was granted. The trial judge stated on the record that he was not finding that Jaynes's attorney had acted in bad faith, and the State expressly agreed.

On November 21, 1997, Jaynes moved to dismiss the charge on double jeopardy grounds. The trial court denied the motion, and the case was retried before a jury two weeks later. In response to the State's motion *in limine* seeking to limit the defense's opening statement, the court precluded the defense from referring to specific incidents of conduct, but allowed a statement to the effect that A.J. was seeking attention. A.J. subsequently testified on cross-examination that she had accused her stepfather of beating her and that DHS had investigated the allegation. She also testified that she had ingested Clorox and had received emergency medical attention when she told her mother that she had done so.

Jaynes first argues that there was no overruling necessity to declare a mistrial in his first trial and to discharge the jury impaneled to hear the case, because his defense counsel's opening statement was made in good faith, the remarks and observations were not inflammatory, the trial judge considered no less-drastic alternatives, and any prejudice from his counsel's remarks was slight and speculative at best. Accordingly, the second trial constituted double jeopardy because there was no overruling necessity for the mistrial, as required by Arkansas law. He further contends that the mistrial was declared simply because his trial counsel referred to "manifestly true evidence" that would actually be forthcoming in the case and told the jury that the prosecuting witness was trying to get attention, a declaration that the trial court specifically allowed in the second trial. Citing *Wooten v. State*, 220 Ark. 755, 249 S.W.2d 968 (1952), he asserts that if the evidence is ultimately admissible at trial, there is no error or prejudice in allowing reference to it in opening statement.

Jaynes argues further that under Arkansas law, the power of the State or the trial court to declare a mistrial, and require the defendant to stand in jeopardy at a second trial, could not extend beyond cases where it was "impossible" to proceed to judgment in the first case. This standard, referred to as "overruling necessity," is both a case law and statutory formulation. *See, respectively, Whitemore v. State*, 43 Ark. 271 (1884), and Ark. Code Ann. § 5-1-112(3) (Repl. 1997). Citing *Heard v. State*, 322 Ark. 553, 910 S.W.2d 663 (1995)(overruled on other grounds), Jaynes argues that a mistrial must be denied and only a cautionary instruction given unless the contentious remark is "patently inflammatory" or when the remark is so prejudicial that justice cannot be served by continuing the trial, *Holt v. State*, 15 Ark. App. 269, 692 S.W.2d 265 (1985), or where the matter is "beyond repair" by any lesser measures. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998). He contends that the trial judge's ruling was infirm because he did not even consider less drastic alternatives.

Finally, Jaynes asserts that by moving for and receiving a mistrial, the State garnered a significant strategic advantage by learning his theory of the case. He contends that there was no indication that in the first trial, the State was prepared to counter his defense, whereas for the second trial, the State had developed a highly effective closing argument that effectively turned the defense on him.

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). 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). Moreover, this statement comports

with the federal standard of "manifest necessity" as articulated in *Arizona v. Washington*, 434 U.S. 497, 505 (1978):

> [I]n view of the importance of the [defendant's valued right to have his trial completed by a particular tribunal], and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. *The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.*

(Emphasis added.)

Arkansas appellate courts have recognized the difficulty of categorizing cases involving claims of double jeopardy and the resulting inadequacy of expounding any standard formula for guidance. *See Jones v. State*, 288 Ark. 162, 702 S.W.2d 799 (1986). Consequently, each case must turn largely on its own facts. *Id.* As was said by the supreme court in *Cody & Muse v. State*, 237 Ark. 15, 21, 371 S.W.2d 143, 147 (1963)(citing with approval 22 C.J.S. *Criminal Law* § 259):

> The manifest necessity permitting the discharge of a jury without rendering a verdict and without justifying a plea of double jeopardy may arise from various causes or circumstances; but the circumstances must be forceful and compelling, and must be in the nature of a cause or emergency over which neither court nor attorney has control, or which could not have been averted by diligence and care.

A trial court's finding of overruling necessity has been has been upheld where the prosecutor failed to return to the trial after a lunch break due to suffering a mental breakdown, *Green v. State, supra*; a jury was unable to reach a verdict, *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991); a juror became ill, *Atkins v. State*, 16 Ark. 568 (1855); a material witness for the State became ill, *Jones v. State, supra*; and the defense counsel was found to be intoxicated, *Franklin & Reid v. State*, 251 Ark. 223, 471 S.W.2d 760 (1971).

The decision to grant a mistrial and retry a criminal defendant rests within the sound discretion of the trial judge and will be upheld absent an abuse of discretion. *Shaw v. State, supra.*

However, a manifestly incorrect decision to grant a mistrial will bar subsequent prosecution. *Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986). We hold that in this instance, Jaynes's second trial constituted double jeopardy, and therefore, this case should be reversed and dismissed.

The purportedly inflammatory comment made in opening statement that prompted the mistrial was the following assertion by Jaynes's trial counsel:

> In May of 1996, [A.J.] claims she ingested one-half cup of Clorox in her mother's home and went to the emergency room. This happened less than sixty days prior to the date that she made these allegations. [A.J.] was trying to get her mother or someone's attention.

Jaynes correctly notes that the factual component of this statement, the ingestion of the Clorox, was clearly admissible evidence that he believed would be elicited on cross-examination. The conclusion that the incident was an attempt by A.J. to get attention was nothing more than a reasonable inference. A party is not entitled to a mistrial based on an opening statement outlining the admissible testimony of a witness. *Ashley v. State*, 310 Ark. 575, 840 S.W.2d 793 (1992). *Cf. Haight v. State*, 259 Ark. 478, 533 S.W.2d 510 (1976)(holding that a defendant's discussion of inadmissible plea-bargain discussions were prejudicial and warranted the granting of a mistrial).

Because we reverse and dismiss on this point, we need not reach Jaynes's second argument.

Reversed and dismissed.

JENNINGS and NEAL, JJ., agree.

Vera L. STINE (Davis) *et al.* *v.* Bucky SANDERS *et al.*

CA 98-110 987 S.W.2d 289

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered March 24, 1999

John P. Lewis, P.A., by: *John P. Lewis*, for appellants.

Crawford Law Firm, by: *Michael H. Crawford*, for appellees.

JOHN MAUZY PITTMAN, Judge. The appellees brought an action against the appellants alleging that appellants committed the torts of deceit and interference with a business expectancy during the purported purchase of appellees' business by the appellant, Don Davis. After a jury trial, a verdict was returned in favor of appellees on the issue of deceit, and a judgment was entered assessing damages in the amount of $60,000 against appellant Don Davis and in the amount of $65,000 against appellant Vera Stine. The $65,000 assessed against appellant Vera Stine

included $5,000 in punitive damages. From that decision, comes this appeal.

For reversal, appellants contend that the evidence is insufficient to support the jury's finding of deceit; that the evidence is insufficient to support the punitive damage award against appellant Vera Stine; and that the trial court erred in denying appellants' motion for a new trial. We affirm.

We first address appellants' contention that the evidence is insufficient to support the jury's finding of deceit. The tort of deceit consists of five elements that must be proven by a preponderance of the evidence: (1) a false representation of material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Roach v. Concord Boat Corp.*, 317 Ark. 474, 880 S.W.2d 305 (1994). 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 that of sufficient force and character to induce the mind of the fact-finder past speculation and conjecture. *Medlock v. Burden*, 321 Ark. 269, 900 S.W.2d 552 (1995). In cases of deceit, the credibility of the witnesses is vital in determining liability, and the trier of fact is the sole judge of the weight and credibility of the evidence. *Id.*[1]

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[1] Mr. Davis testified that he never offered to purchase appellant's business. Mr. Sanders testified that Davis did make such an offer. This conflict in the testimony is the crux of this case. The jury believed Mr. Sanders. The dissenting judge does not, and the dissent is founded on the premise that no offer to purchase was made. This rejection of the jury's credibility determination concerning the central issue in this case is contrary to a long line of authorities holding that, in cases of deceit, the credibility of the witnesses is *all important* in determining liability, *Ellis v. Liter*, 311 Ark. 35, 841 S.W.2d 155 (1992), and that in such cases the jury is the *sole judge* of the credibility of the witnesses and the weight and value of the testimony. *Id; Nicholson v. Century 21*, 307 Ark. 161, 818 S.W.2d 254 (1991). In cases of deceit, the resolution of conflicts in the testimony is fundamentally a function of the jury, especially where credibility of the witnesses is involved, and the jury's findings are usually conclusive. *Firstbank of Ark. v. Keeling*, 312 Ark. 441, 850 S.W.2d 310 (1993). Although we respect the learned dissenting judge's views regarding the credibility

Viewing the evidence, as we must, in the light most favorable to the appellees, the record shows that appellees are the owners of a security business, Sanders Security and Detective Corporation. They sought to sell their business in October 1994, and advertised the business for sale for an asking price of $200,000 in newspapers in Little Rock and Dallas. Appellant Don Davis saw one of the advertisements and contacted appellees regarding purchase of the business. Mr. Davis met with Mr. Sanders and discussed various aspects of the business. Appellant Vera Stine, who was employed by appellees as manager of their business, provided Mr. Davis with an informational packet listing some of the clients of the business and the income derived from those clients. She also, in furtherance of the prospective sale of the business, took Mr. Davis to several business clients of Sanders Security. Mr. Davis met with appellees' attorney and was provided with information regarding the tax debt of the business, tax returns, and additional financial documents. Mr. Davis then met with Mr. Sanders at the offices of Sanders Security on November 4, 1994. Mr. Davis and Mr. Sanders reached an oral agreement for the sale of the business for $120,000, and Mr. Davis agreed to provide a check for the purchase price from his accountant the next week. However, although Mr. Davis never canceled the agreement, no check was ever provided. At about this same time, Ms. Stine quit her job as manager of Sanders Security following an argument with Mrs. Sanders. Her last day of work for Sanders Security was November 7, 1994. Although Ms. Stine told appellees that she was going to work for University Mall, she did not do so. Unbeknownst to appellees, she began a romantic involvement with Mr. Davis that culminated in their engagement to be married. Ms. Stine obtained her own security license on November 9, 1994, and, together with Mr. Davis, formed a rival security business, Interstate Security and Investigations.

The rival business was staffed with former employees of Sanders Security who were induced to defect by appellants. Where Sanders Security had sixty-five employees when Mr. Davis

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of the witnesses and the weight to be given their testimony, we do not adopt them because the resolution of conflicts in the testimony is simply not within the province of the appellate court. *Id.*

agreed to purchase the business, one month later Sanders Security had only five remaining employees, the rest having gone to work for appellants at Interstate Security. Such defections would normally have been impossible, because it was standard practice for Sanders Security to have its employees execute an agreement not to work for competing firms.[2] However, the records of these agreements were missing. The office secretary for Sanders Security, Cora Maglero, continued to work for Sanders until November 14, 1994. She gave appellees no notice of her intent to quit her job. On Ms. Maglero's last day of work, a housekeeping employee saw her printing a great many documents from the office computer, although she had not been asked to print out anything. She told the housekeeping employee that she had to get the documents off the computer before she left, and was seen taking the documents out and placing them in the back seat of her red convertible. Ms. Maglero then returned to the office and continued to work on the computer. Later that day, the housekeeping employee saw Ms. Maglero's auto parked at Ms. Stine's house, and she continued to see Ms. Maglero's car parked there every day, morning and night. Ms. Maglero admitted that she went to work for Ms. Stine. Following Ms. Maglero's departure from Sanders Security, it was discovered that the business data on the company computer had been completely deleted. Diagnostic tests showed that an enormous amount of printing had been done on the days immediately preceding Ms. Maglero's departure, and that the business information had been deleted on Ms. Maglero's last day of work.[3]

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[2] The dissent is simply wrong in stating that there is no evidence that employees signed documents preventing them from going to work for competing security companies. After generally describing the nature of the documents, Mrs. Sanders testified that "[i]f we would have had the documents that had been taken from the files of the men, then they would not have been able to go to work for Interstate, but the documents were taken out of their files." There was no objection to this testimony. Without a doubt, it would be preferable to examine the documents themselves in this instance but, in their absence, to refuse to credit Mrs. Sanders's testimony regarding their contents would be to unjustly reward the parties who stole them.

[3] Conceding that Ms. Maglero printed a large number of documents and removed them to her auto on her last day of work, the dissent nevertheless makes the somewhat puzzling assertion that there is no evidence that Ms. Maglero took any of the company's missing employee records. Although it is true that no eyewitness could testify concerning

Staffed with appellees' employees, appellants' rival company soon obtained appellees' clients as well. Anthony Timberlands, Turf Catering, Oaklawn Jockey Club, Nickle Molding, and Lauray's Jewelers canceled their contracts with appellees shortly after the date of the sale agreement and obtained security service from the rival company. Several of these firms had been clients of the appellees for twenty years. Several of the firms canceled their contracts with appellees upon learning that appellees' workers' compensation insurance coverage had lapsed. Ms. Stine was responsible for maintaining workers' compensation insurance for appellees' business, and had been contacted by the insurance agent regarding the problem, yet Ms. Stine neither reinstated the coverage nor informed appellees about the problem.[4]

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exactly which documents were printed by Ms. Maglero and placed in her auto before she left work for the last time, it is clear that the employee records, including the vital noncompetition agreements, were missing; that Ms. Maglero had control of the computer at the time in question; that Ms. Maglero had not been asked to print anything; that an enormous amount of printing was nevertheless done; that Ms. Maglero was in a hurry to accomplish this printing before she left the office for the last time; that the printed documents were deposited in Ms. Maglero's automobile; that this automobile was immediately thereafter seen parked at Ms. Stine's house; and that Ms. Stine contemporaneously founded a rival business by which Ms. Maglero was employed. When considered in light of Ms. Maglero's somewhat dubious explanation of her reason for her hasty departure from appellants' employ, and of the evidence that the business records on the computer were subsequently found to have been completely deleted on Ms. Maglero's final day of work, the evidence that Ms. Maglero took the missing employee records is compelling. Fraud and deceit are, by their nature, frequently accomplished in secret and, despite the dissent's implication to the contrary, it is not necessary that fraud be shown by direct evidence or positive testimony. *Pacini v. Haven*, 194 Ark. 31, 105 S.W.2d 85 (1937). Circumstantial evidence can provide a basis for the jury to infer fraud where, as is manifestly the case here, the circumstances are inconsistent with honest intent. *Id; Interstate Freeway Services, Inc. v. Houser*, 310 Ark. 302, 835 S.W.2d 872 (1992).

[4] It would, as the dissent observes, be speculative at best to suggest that Ms. Stine foresaw when she failed to inform appellants of the lapse of insurance coverage in August 1994 that Mr. Davis would arrive from Dallas two months later and offer to buy the business. We made no such suggestion. The fact remains, however, that Ms. Stine was employed as manager of appellants' business, that as their agent she owed them the utmost good faith and loyalty, and that she was required at all times to make full disclosure of any facts damaging to her principals. *Toney v. Haskins*, 7 Ark. App. 98, 644 S.W.2d 622 (1983). We think this duty was a continuing one, and that Ms. Stine was as much obliged to report the ultimately disastrous lapse in coverage to her employers in October as she was in August. Furthermore, as manager in total control of appellants' business, Ms. Stine owed appellants a fiduciary duty. *See Tandy Corporation v. Bone*, 283 Ark. 399, 678 S.W.2d 312

After Ms. Stine's departure, appellees learned about the problem from clients calling to cancel their contracts with Sanders on the grounds that Sanders was in breach for failure to maintain workers' compensation insurance. Telephone records showed that Ms. Stine telephoned many of these clients from her home within one week of the date of the agreement.

In arguing that the evidence is insufficient to support a finding of deceit, appellants list the actions of Mr. Davis and Ms. Stine separately and urge us to reverse because the evidence does not show that either appellant committed all the acts that would satisfy all five elements of deceit. We do not agree. It is not necessary for a single person to perform all the acts constituting fraud where two persons participate in a fraudulent scheme. Each party to a fraudulent transaction is responsible for the acts of others in furtherance of the fraudulent scheme, and all who participate are liable for the fraud. 37 C.J.S. *Fraud* § 83 (1997); *see, e.g., Medlock v. Burden*, 321 Ark. 269, 900 S.W.2d 552 (1995); *Malakul v. Altech Arkansas, Inc.*, 298 Ark. 246, 766 S.W.2d 433 (1989).

Appellants also contend that there is no substantial evidence to show that Mr. Davis agreed to purchase the business. However, Mr. Sanders clearly testified that, after investigation and negotiation, Mr. Davis agreed to purchase the business for $120,000. Mr. Sanders's credibility was a question within the sole province of the jury, *see Medlock v. Burden, supra*, and, having been found to be credible, his testimony constitutes substantial evidence that an agreement was reached.

Appellants further contend that an agreement to purchase the business was not the sort of misrepresentation for which deceit will lie because it was not a misrepresentation of a present fact, but was instead merely a promise to do something in the future. Although it is true that, as a general rule, a promise of future conduct may not form the basis for a claim of fraud or deceit, *Golden Tee, Inc. v. Venture Golf Schools, Inc.*, 333 Ark. 253, 969 S.W.2d 625 (1998), this rule will not apply if the party mak-

(1984). The dissent would, in effect, set the concept of fiduciary duty on its head by holding that the great trust and confidence bestowed upon Ms. Stine by the appellants barred them from complaining of any subsequent breach of that trust.

ing the false promise knew at the time it was made that it would not be kept. *Undem v. First National Bank,* 46 Ark. App. 158, 879 S.W.2d 451 (1994). The intent of the promisor in this regard is a question of fact. *Id.* We think that the evidence in this case, including the evidence that Mr. Davis agreed to purchase the business on November 4; that, without notifying the appellees, he formed a rival business with appellees' employees and clients on November 9; that appellees' business records were wrongfully taken to further the formation of the rival business and wrongfully destroyed to hinder appellees from taking timely corrective measures; and that Mr. Davis subsequently denied making the agreement — a denial that the jury found to be false — was sufficient evidence to permit the jury to find that Mr. Davis did not intend to purchase the business when he promised to do so.

[redacted] Appellants next contend that, in the absence of a written agreement, appellees had no right to rely on Mr. Davis's promise to purchase the business. There are no Arkansas cases on point, and there is a division of authority on the question of whether the statute of frauds will bar an action for fraud even though the promise underlying the fraud is itself unenforceable under the statute. *See generally* 37 C.J.S. *Statute of Frauds* § 140 (1997). We think that the better rule, however, is that the statute of frauds does not abrogate the common-law remedy for fraud merely because the fraudulent misrepresentation was not in writing. *See, e.g., Hanson v. American National Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993). This view is the logical corollary of the rule, which has long been the law in this state, that fraud may be predicated on promises made with the intent not to perform them. In both cases, the gist of the fraud is not the breach of the agreement to perform, but is instead the fraudulent intention and representation of the promissor. *See Pierce v. Sicard*, 176 Ark. 511, 3 S.W.2d 337 (1928). Arkansas courts have consistently held that the statute of frauds is designed to prevent fraud, not shield or effectuate it, *Betnar v. Rose*, 259 Ark. 820, 536 S.W.2d 719 (1976), so that the statute will not be allowed to be an instrument of fraud either in permitting one guilty of fraud to shelter himself behind it

or in allowing its use as a means of perpetrating fraud. *Bolin v. Drainage District No. 17*, 206 Ark. 459, 176 S.W.2d 143 (1944).[5]

The action in the present case was not one to enforce the agreement, but is instead based upon facts that grew out of the making of the agreement, and proof of the oral agreement was offered only to show that a fraudulent representation had been made. To interpret the statute of frauds as barring an action for damages resulting from such a fraudulent representation would be to allow the statute to be used as an instrument of fraud. *See Nanos v. Harrison*, 97 Conn. 529, 117 A. 803 (1922).

Appellants further contend that there is no evidence that appellees actually relied upon any misrepresentation. In this context it is important to note that there was evidence of two deceptions practiced on appellees: Mr. Davis's representation that he would buy the business, and Ms. Stine's concealment of material facts surrounding the sale. Nondisclosure of material facts may be a basis of recovery for fraud where there is reliance on the failure to disclose those facts. *Copelin v. Corter*, 291 Ark. 218, 724 S.W.2d 146 (1987). In the case at bar, Mr. Sanders testified that he believed Mr. Davis's representation that he would buy the business, and we think that the jury could infer that Mr. Sanders believed that the business was in a brief transition period while he awaited the payment that Mr. Davis promised to bring. There was also evidence that Ms. Stine remained employed by appellees during this period. Ms. Stine, who as manager of Sanders Security controlled virtually every aspect of the business, owed appellees a fiduciary duty, *Tandy Corporation v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984), and we think that, on this record, the jury could properly infer that appellees relied on Ms. Stine to continue to act in good faith towards them and to disclose any facts within her knowledge that were detrimental to their business during the

[5] Both *Betnar* and *Bolin* are, as the dissent notes at some length, distinguishable because the agreements in those cases were partially performed. This distinction is irrelevant in the present case because both *Betnar* and *Bolin* involved actions to enforce the agreement, whereas the action in the present case was not to enforce the agreement, but to recover damages resulting from the fraudulent misrepresentation itself. In the context of this case, *Betnar* and *Bolin* are significant only as statements of the general proposition that the statute of frauds will not be allowed to be used as an instrument of fraud.

period leading up to the sale and the brief transition period thereafter. We find no error on this point.

[redacted] Next, appellants contend that appellees suffered no damage as the result of their reliance on any misrepresentations. They argue that this is demonstrated by the fact that appellees were owners of Sanders Security at the time of the purported sale, and that appellees continue to be owners of Sanders Security to the present day. This argument is somewhat disingenuous, for it ignores the evidence that Mr. Davis, having agreed to purchase Sanders Security, failed to do so but nevertheless obtained the profit-making aspects of that business, *i.e.*, its clients, business records, and employees. We think that the evidence supports a finding that this was achieved by the concerted efforts of appellants to induce Mr. Sanders to believe he had sold the business, a belief that helped distract attention from the loss of key employees and the depredations practiced by Ms. Stine in obtaining the clients, business records, and employees of the business — depredations that were largely accomplished during the brief but crucial period immediately following Mr. Davis's representation that he would purchase the business. We think that the record also contains substantial evidence to show that Ms. Stine, while employed in a fiduciary capacity, undermined the business by failing to pay the workers' compensation premiums or inform her employers of the problem, and that her concealment of this incident led to breaches of Sanders Security's agreements with its clients and the resultant termination of those contracts. We also think that the evidence that Ms. Maglero went directly to Ms. Stine's home with a large stack of documents printed on Ms. Maglero's unannounced last day of work for Sanders Security, together with the evidence that Ms. Maglero thereafter went to work for Ms. Stine's rival company, supports an inference that Ms. Stine and Ms. Maglero worked in concert to wrongfully remove and destroy business records belonging to their former employer. Finally, we think that there is substantial evidence to show that the removal and destruction of these business records made it impossible for appellees to prevent the defection of its employees and severely handicapped the company in competing with appellants' rival firm thereafter. Appellants also argue that appellees were not damaged

by their misrepresentations because appellees' business was in such serious financial difficulty that it was, in any event, bound to fail. However, it is not necessary that the misrepresentation be the sole cause of the injury:

> It has been held that although the fraud does not cause substantial damage apart from the happening of subsequent events which reasonably may be expected to happen, if these do happen the defendant is chargeable with the natural consequences of his act. In such case, he cannot complain that these supposed facts followed as conditions concurring with his fraud to cause the damage, if his fraud was planned in reference to the probability that these events would follow. . . . Fraudulent representations or misrepresentations need not be the sole cause of loss in order to be actionable; it is sufficient if they are a material inducement or an essential, material, or inducing cause.

37 AM. JUR. 2d *Fraud and Deceit* § 293 (1968). On this record, we cannot say that the jury could not have found that appellees were damaged by appellants' misrepresentations, and we hold that there was sufficient evidence to support the jury's finding for deceit against appellants.

Appellants next contend that the trial court erred in denying their motion for a new trial on the ground that the verdict was contrary to the preponderance of the evidence. The test on appeal from the denial of a motion for a new trial is whether the verdict is supported by substantial evidence. *Gilbert v. Shine*, 314 Ark. 486, 863 S.W.2d 314 (1993). In light of our holding that there was sufficient evidence to support the jury's verdict, we find no error on this point.

Finally, appellants assert that there was insufficient evidence to support the jury's verdict of $5,000.00 in punitive damages against Ms. Stine. We disagree. Although in ordinary cases, recovery of exemplary damages will not be allowed in an action of deceit unless the wrong involves violation of a duty springing from a relation of trust and confidence, or the fraud is gross, or there are extraordinary or exceptional circumstances clearly indicating malice and willfulness, *see Dodge v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972), there was evidence in this case that Ms. Stine stood in a relation of trust and confidence to the

appellees. Furthermore, in law, malice is not necessarily personal hate, but is rather an intent and disposition to do a wrongful act greatly injurious to another, *id.*, and we think the evidence supports a finding that Ms. Stine was motivated by such an intent in her dealings with appellees.

Affirmed.

ROBBINS, C.J., and GRIFFEN, STROUD, and MEADS, JJ., agree.

BIRD, J., dissents.

SAM BIRD, Judge, dissenting. I respectfully dissent from the majority opinion in this case because I believe that the evidence presented by the appellees was insufficient as a matter of law to establish the tort of deceit, and that the trial court should have granted appellants' motion for directed verdict. While I recognize that it is our responsibility, on review, to view the evidence in the light most favorable to the appellees, I do not think that our standard of review permits us to embellish the evidence by drawing inferences or conclusions from it that are not supported by it or are, at best, speculative. That is what I believe that the majority has done in straining to affirm the jury's verdict in this case.

The "facts," as recited by the majority, attempt to portray a sinister plot by the appellants to steal the appellees' business by suggesting: (1) that Vera Stine, the trusted manager of the Sanderses' security and detective company, deliberately let the company's workers' compensation insurance lapse so its customers would take their business elsewhere; (2) that Stine and Davis "induced" Sanders's employees to quit and go to work for them, and prevented Sanders from enforcing non-competition agreements against those employees by taking away the non-competition agreements; (3) that Stine and Davis deceived the Sanderses by not telling them about their romantic involvement; (4) that Davis agreed to pay the Sanderses $120,000 for their business, and since he did not do so and did not let them know that he was not going to do so, he must have intended to deceive them; and (5) that although the alleged purchase agreement was not in writing and, therefore, not enforceable under the statute of frauds, the

Sanderses can recover, nonetheless, because the unenforceable agreement was deceitful.

These five bases for the majority decision are discussed below. The problem with the majority's reasoning is that the facts and the law do not support any of them.

(1) Lapse of Workers' Compensation Coverage

Regarding the workers' compensation insurance coverage, the undisputed facts were that a disagreement with the Arkansas workers' compensation carrier about the amount of the premiums arose prior to August of 1994 because a payroll audit resulted in an attempt by the carrier to charge the company a premium on work being performed in Louisiana. Ms. Stine, as manager of Sanders's company, and in whom the Sanderses testified they had entrusted full management authority, disputed the attempted premium assessment on Louisiana payroll and undertook to provide information requested by the insurance carrier that would result in a lower premium. When the dispute was apparently not resolved, the carrier's agent (Harris Shuffield) sent a cancellation notice to the Sanderses' company in mid-August (Shuffield said it was either August 14 or 18), informing the company that the policy would lapse in thirty days, or about mid-September 1994, if the premium was not paid. The significance of these dates is that appellant Don Davis had not even made contact with the Sanderses to inquire about their business being for sale at that time. In fact, the testimony of both the Sanderses and Davis was that Davis first came to Hot Springs from Dallas in mid-October 1994. It was not until then, and the weeks that followed, that Davis, with the knowledge and consent of the Sanderses, was provided with unrestricted information about the Sanderses' business, its clients, its profits, and its extensive tax liabilities.

To attribute some evil motive to Ms. Stine's handling of the workers' compensation premium dispute, one would have to assume that she foresaw, prior to August 1994, that Don Davis, of whose existence she was then unaware, would be arriving from Dallas two months later, that the lack of workers' compensation insurance that she is alleged to have brought about would cause

the Sanderses' clients to change security companies, and that Stine and Davis would hatch a plot to tell the Sanderses that Davis was going to buy their business (presumably to keep anyone else from doing so) in order to give them time to steal away the Sanderses' customers and employees while the Sanderses' business crumbled down around them.

To suggest, as the majority opinion does, that Ms. Stine secreted information from the Sanderses about the lapse of their workers' compensation insurance is simply not supported by anything in the record. The evidence is undisputed that the Sanderses had totally relinquished all control and management of their business to Ms. Stine. In their testimony, both Bucky and Frances Sanders conceded that all aspects of the business were under the absolute control of Ms. Stine, and that they had not, for at least ten years, had anything to do with the management or operation of the business. Neither Mr. nor Mrs. Sanders knew how many employees the business had, who its clients were, or how much money it made, if any. Why, after ten years, would they have expected to receive from Ms. Stine a report about the status of payment of the workers' compensation insurance premium?

(2) Interference with Enforcement of Non-Competition Agreements

The majority opinion also suggests that Davis and Stine induced Sanderses' employees to quit, and that they, somehow, prevented the Sanderses from enforcing documents that the employees signed agreeing not to go to work for competing security companies. There is simply no evidence in the record to support this statement by the majority. The only evidence relating to any kind of an agreement signed by Sanders's employees was the testimony of Frances Sanders who stated that when an employee came to work for Sanders, they signed an agreement that *they would not go to work for any of Sanders's customers.* Although Mrs. Sanders testified that "[i]f we would have had the documents that had been taken from the files of the men, then they would not have been able to go to work for Interstate," she offered no explanation of how an agreement by Sanders's employees not to go to work for Sanders's customers would have prevented those employees from going to work for Interstate, which was never a

Sanders customer. Not one of more than sixty of Sanders's former employees was called to verify that they ever signed any agreement not to go to work for competitor security companies. In the absence of any evidence whatsoever, the majority concludes that it was "standard practice" for Sanders Security to have its employees execute an agreement not to work for competing security firms.

There was no evidence of anything that Davis or Stine did to prevent the Sanderses from enforcing whatever agreement they had with their employees. Although there was testimony by Frances Sanders that they had not been able to locate any agreements since Stine left their employment, there was no evidence whatsoever to indicate that Davis or Stine was responsible for the misplacement of any employee records. Although Cora Maglero was observed by the Sanderses' housekeeper to be making a large number of copies on her computer and removing those copies to her car, there was no evidence suggesting that the employees' agreements were on the computer or that any of the company's employee records were taken by Cora Maglero.

(3) Romantic Involvement

Without any evidence to support it, the majority concludes that Davis and Stine became romantically involved during the period that Davis was looking into the possibility of buying the Sanderses' business, and that they did not inform the Sanderses. The uncontradicted evidence of when Davis and Stine became romantically involved came from Davis himself, who testified that he and Stine started dating in January 1995, two months after Davis's alleged offer to buy the Sanderses' business. There is no evidence in the record to contradict Davis on this point. Furthermore, even if the romance had begun earlier, as the majority concludes, I do not see how the failure to disclose the fact of a romance is in any way relevant to prove any of the elements constituting the tort of deceit. No evidence was presented as to anything the Sanderses would have done differently had they known of the romance. No evidence was presented as to what effect the romance had on Davis's decision to buy or not to buy the business. In short, the existence of a romance between Davis and

Stine was nothing more than a red herring giving rise to speculation, unsupported by any evidence, that, because of their romance, they must have conspired to deceive the Sanderses.

(4) Offer to Buy the Business

The majority says that the jury was justified in believing that Davis agreed to buy the business for $120,000. I disagree.[1]

The only evidence that Davis made an offer to buy the business for any amount came from the mouth of Bucky Sanders. On the other hand, the evidence that Davis made no offer was overwhelming: (1) After the November 4 meeting at which Sanders claimed the agreement was made, Sanders told no one but his wife, Frances; (2) Daughter-in-law Karen Sanders was not told about the agreement even though she owned one-third of the company and was present at the Sanderses' home (where the office is also located) on the day of the alleged agreement; (3) No effort was made to reduce the terms of the agreement to writing, notwithstanding that Sanderses' lawyer (who was also his niece's husband) had been actively involved in their efforts to sell the business; (4) No earnest money was tendered, nor was there any other act or conduct on the part of either party giving rise to an inference that an agreement had been reached; (5) Davis could not legally purchase the business because he did not have an Arkansas investigator's license and had not resided in Arkansas for two years.

There was no evidence of any motive that Davis would have had to deceive Sanders by telling him that he intended to buy the business when he did not intend to do so. There was no evidence of the existence of any other prospective purchasers of the business besides Davis. That there were no other prospects is corroborated by the testimony of the Sanderses' lawyer, Marc Honey, who testified that Davis's purchase of the business was the Sanderses' last

[1] While I agree with the general principle espoused by the majority that the credibility of witnesses and the weight to be given to their testimony are matters for determination by the jury, I do not agree that that principle insulates the appellate court from its obligation, where the appellants have raised the issue, to review the trial court's determination as to whether the evidence was sufficient to submit the issue to the jury in the first place.

opportunity to avoid bankruptcy, and that when Davis did not buy it, the Sanderses were left with no other alternative but to file for bankruptcy.

(5) Enforceability of the Contract

While it is true, as the majority says, that the jury was entitled to believe the Sanderses' testimony, this case should never have gotten to the jury for two reasons: (a) the alleged oral contract, being in violation of the Statute of Frauds, was unenforceable; and (b) the alleged promise of purchase, being merely a promise of future conduct, may not form the basis of a fraud claim.

(a) Statute of Frauds

In its effort to avoid the consequence of the statute of frauds, the majority decides that it is the "better rule . . . that the statute of frauds does not abrogate the common-law remedy for fraud merely because the fraudulent misrepresentation was not in writing." I might agree that this is the better rule where it is undisputed that the representation was, in fact, a fraudulent one. However, this so called "better rule" should not be used in a deceit action as a vehicle to avoid the necessity of proving of the elements of deceit. Under the theory of the majority opinion, an alleged promisor could be held to have falsely promised by virtue of the fact that he did not do what he denies that he ever promised to do. By this circuitous reasoning, the majority holds that, in determining whether Davis made a knowingly false representation to buy Sanders's business, the jury is permitted to infer that Davis's promise was false from the fact that Davis did not buy the business. Consequently, Davis and Stine are compelled to pay damages because Davis did not buy a business that he could not have been legally compelled to buy in the first place.

The majority cites *Betnar v. Rose*, 259 Ark. 820, 536 S.W.2d 719 (1976), and *Bolin v. Drainage District No. 17*, 206 Ark. 459, 176 S.W.2d 459 (1943), in support of the proposition that the statute of frauds will not be permitted to be used as an instrument of fraud. Those cases, however, are clearly distinguishable from the

case at bar. Neither of those cases involved a cause of action for fraud or deceit. In *Betnar v. Rose, supra,* the plaintiff had made a $2,000 down payment on a house pursuant to an oral promise by its owner, the defendant, to sell it. Being an agreement to convey real property, it was clearly within the statute of frauds. The plaintiff decided not to buy the house and sued to get his $2,000 down payment back, contending that the contract was unenforceable under the statute of frauds. The supreme court disagreed, holding that one who pays money in consideration of an oral contract cannot rescind the contract and recover the money unless the other party insists on the statute of frauds and refuses to perform the contract on his part. In *Bolin v. Drainage District No. 17, supra,* a tenant took possession of real property pursuant to an oral agreement and remained in possession for more than a year without paying rent. When the landlord sought to dispossess the tenant and recover the unpaid rent, the tenant contended that he did not have to vacate the premises or pay the rent because the statute of frauds prevented enforcement of a contract for the lease of lands for more than a year. The supreme court disagreed, holding that the statute of frauds was not intended, and could not be used, to permit one to enter upon the lands of another, as a tenant, and after occupying it for more than a year, claim that he could not be dispossessed or required to pay rent because of the statute of frauds.

In the case at bar, if Davis had paid any money to the Sanderses in partial payment for Sanders's security business, I would agree that the principles announced in *Betnar* and *Bolin, supra,* would prevent him from relying on the statute of frauds as the basis of an action for the recovery of his down payment. However, I do not agree that *Betnar* and *Bolin* render the otherwise unenforceable contract enforceable by Sanders merely because Davis did not do what Sanders said that he promised to do. That is exactly the type of agreement intended to be avoided by the statute of frauds.

(b) Promise of Future Conduct

In citing the cases of *Golden Tee, Inc. v. Venture Golf Schools, Inc.*, 333 Ark. 253, 969 S.W.2d 625 (1998), and *Undem v. First*

National Bank, 46 Ark. App. 158, 879 S.W.2d 451 (1994), the majority recognizes the law in Arkansas to be that a promise of future conduct cannot form the basis for a claim of fraud or deceit unless it is shown that the party making the false promise knew at the time that it would not be kept. Even accepting as true the testimony of Bucky Sanders that Davis agreed to buy his business for $120,000, there is simply no evidence that Davis made that promise knowing that he did not intend to keep it. What possible motive could Davis have had to promise Sanders that he was going to do something that there was absolutely no reason for him to do? As I have already pointed out, there was no evidence of other prospective purchasers standing in line to buy the business. There was no evidence of anything that Davis and Stine had to gain by offering the Sanderses any amount of money for their business.

The majority suggests that an inference of Davis's intent not to perform could be drawn from the evidence that: (a) Davis agreed on November 4 to buy the business; (b) without notifying the Sanderses, he formed a rival business on November 9; and (c) the Sanderses' business records were wrongly taken and destroyed to further the formation of the rival business and hinder the Sanderses from taking timely remedial measures. As to the majority's point (a), I will not further lengthen this opinion except to again point out the complete lack of logic of inferring from an alleged promisor's failure to perform an act that he says he did not promise, that he did not intend to perform the act. As to point (b), it is just as illogical to infer that Davis made a promise knowing that he did not intend to perform it, from the fact that he did not *notify* the Sanderses that he would not perform the act that he maintains he never promised to perform. Furthermore, there was no evidence of any advantage gained by Davis during the five days between the date of the alleged promise on November 4 and Davis's formation of a new security business on November 9. What was there about the formation of a new business that could not have been done had Davis not promised to buy the Sanderses' business five days earlier? As to the majority's point (c), as already discussed, there was no evidence offered that either Davis or Stine took or destroyed any of Sanders's records; nor was there any evidence of how the displacement of those records prevented the

enforcement by Sanders of any corrective measures. There was, however, abundant evidence that if Sanders did not quickly sell his business to someone, it would be out of business by the end of the year; and that is exactly what happened.

For the reasons stated above, I would reverse and dismiss this case.

Garry METCALF and John Warren *v.*
TEXARKANA SCHOOL DISTRICT

CA 98-800;
CA 98-803

986 S.W.2d 893

Court of Appeals of Arkansas
Division II
Opinion delivered March 24, 1999

Roachell Law Firm, by: *Richard W. Roachell*, for appellants.

Lavender, Rochelle & Barnette, PLC, by: *G. William Lavender*; and *W. Paul Blume*, for appellee.

SAM BIRD, Judge. In each of these two cases, appellants Garry Metcalf and John Warren appeal the dismissal of their appeals to the Miller County Circuit Court under the

Arkansas Teacher Fair Dismissal Act. Although the cases were not consolidated for trial or for appeal, the facts are essentially the same, the arguments are the same, and they were submitted simultaneously to this court. Therefore, we dispose of them in this one opinion.

Appellants argue on appeal:

> I. The Arkansas Supreme Court erroneously construed Ark. Code. Ann. § 6-17-1506(a) in holding that a teacher may not avail himself of the appeal provisions of the Arkansas Teacher Fair Dismissal Act when he has entered into a "superseding contract" with the District. *McCaskill v. Ft. Smith Public School District*, 324 Ark. 488, 921 S.W.2d 945 (1996).
>
> II. The court should reverse the award of attorney fees granted to the District if the trial court is reversed and the case is remanded for a decision on the merits.

We affirm.

In the spring of 1996, Garry Metcalf was head basketball coach at Arkansas High School and part-time assistant football coach in the Texarkana School District. In the spring of 1996, John Warren was head junior-high coordinator, head football coach for the eighth and ninth grade, ninth-grade basketball coach, and head baseball coach at Arkansas High School. Both men were also certified teachers and had teaching responsibilities.

In early 1996, both men were notified that the superintendent planned to recommend that they be reassigned. Metcalf was to become head coach of the girls track team for the 1996-97 school year; Warren was to become assistant junior-high football coach and assistant junior-high track coach for the 1996-97 school year. Both men requested a hearing before the Texarkana School Board and, after a lengthy hearing, appellants were reassigned. Neither of appellants suffered a pay reduction, and each maintained his classroom duties.

In June 1996, Metcalf and Warren appealed to the Miller County Circuit Court. In October, appellants signed new contracts with the district.

At their trials in circuit court, each of the appellants argued that the reassignment amounted to a nonrenewal of his contract and that the district had failed to comply with the Teacher Fair Dismissal Act and its own personnel policies. The circuit judge held that the Arkansas Supreme Court case of *McCaskill v. Fort Smith Public School District, supra,* controlled the cases and that, since appellants had signed new contracts with the district, they had no right to appeal to circuit court under the Arkansas Teacher Fair Dismissal Act. Their appeal to this court followed.

Arkansas Code Annotated section 6-17-1506 (Repl. 1993) provides:

> (a) Every contract of employment made between a teacher and the board of directors of a school district shall be renewed in writing on the same terms and for the same salary, unless increased or decreased by law, for the next school year succeeding the date of termination fixed therein, which renewal may be made by an endorsement on the existing contract instrument, unless by May 1 of the contract year, the teacher is notified by the school superintendent that the superintendent is recommending that the teacher's contract not be renewed or, unless during the period of the contract or within ten (10) days after the end of the school year, the teacher shall deliver or mail by registered mail to the board of directors his or her resignation as a teacher, or unless such contract is superseded by another contract between the parties.

Arkansas Code Annotated section 6-17-303 (Repl. 1993) provides, "District school boards shall have authority to assign and reassign or transfer all teachers in schools within their jurisdiction upon the recommendation of the superintendent."

In *McCaskill, supra,* our supreme court construed Ark. Code Ann. § 6-17-1506(a) and stated, "[P]ursuant to the very terms of section 6-17-1506(a), by appellant's signing the 1990-91 contract, the 1989-90 contract was superseded and the notice requirements of The Teacher Fair Dismissal Act no longer applied." In response to an argument of appellant, the court stated further, "Appellant simply cannot sign a superseding contract and then wait well past the Act's limitation period for contesting the nonrenewal." 324 Ark. at 493-94, 921 S.W.2d at 948.

At oral arguments, appellants contended that the contracts they signed in October 1996 were "new" contracts rather than "superseding" contracts. However, in his brief before this court, each appellant concedes that "Appellant did indeed sign a superseding contract. *McCaskill* was the law of the land in Arkansas and the trial judge was bound to follow it."

Appellants ask us to reverse the decision of the Arkansas Supreme Court in *McCaskill.* The Arkansas Court of Appeals is not at liberty to overturn a decision of the Arkansas Supreme Court. *See Conway v. State,* 62 Ark. App. 125, 969 S.W.2d 669 (1998); *Nelson v. Timberline Intl., Inc.,* 57 Ark. App. 34, 942 S.W.2d 260 (1997); *Cheshire v. Foam Molding Co.,* 37 Ark. App. 78, 822 S.W.2d 412 (1992); *Myles v. Paragould School District,* 28 Ark. App. 81, 770 S.W.2d 675 (1983).

Because we are unable to provide appellants with the relief requested, we do not consider their argument to reverse the award of attorneys' fees.

Affirmed.

PITTMAN, J., agrees.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. Unfortunately, the arguments in this case on appeal were refined and honed so that the arguments below, which may have had validity, are not properly before us. Thus, I must reluctantly concur in the result in this case. However, I write separately because there are serious issues that need to be mentioned.

Appellants conceded on appeal that the case of *McCaskill v. Ft. Smith Public School District,* 324 Ark. 488, 921 S.W.2d 945 (1996), was the law of the land and that the trial judge was bound to follow it. In making this concession, the parties abandoned several of the issues that they had raised below to the trial court. Several of those issues raised important questions that I believe may not be controlled by the case of *McCaskill.*

First, is the initial question of whether this action by the school board was a nonrenewal of the parties' contracts or a reas-

signment of the parties' duties. This may be a factual determination to be decided on the evidence presented and under the applicable case law. I am of the opinion that these cases are nonrenewals and not reassignments.

Mr. John Warren had been employed with the district for thirteen years. He was the head baseball coach at Arkansas High School during that entire time. For the 1995 school year, Mr. Warren was both the baseball coach and assistant football coach at Arkansas High School. Mr. Warren was very successful in his coaching position. In 1994, the baseball team won the state championship in Division AAAA and had been in the state finals four other years. The team has been district champions eleven out of fourteen years. Mr. Warren was selected by USA Baseball as National Amateur Baseball Coach of the Year for 1994. However, on April 22, 1996, Mr. Warren received a letter from the superintendent notifying him that he was to be reassigned to assistant junior-high track and football coach. Despite the fact that Mr. Warren's pay was not diminished, it is clear from this record that his responsibilities and years of work with a competitive high-school-level state baseball program had been terminated.

Teachers and coaches do not just work for monetary compensation but for personal satisfaction, prestige, professional recognition, and to advance in their careers. It is a natural progression to work from the junior-high level, to the high-school level, on to the collegiate level. Mr. Warren had established himself as one of the top baseball coaches in the state and had achieved national recognition. To be "reassigned" to an assistant junior-high coaching position was a demotion in Mr. Warren's case. In *Western Grove School District v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994), the supreme court noted:

> The School District's proposed 1993-94 Teacher Contract for Terry was not on the same terms or for the same salary as the contract for the previous year. The salary was reduced by about 20 percent and the duties were curtailed. Because of this, the case differs markedly from *Chandler v. Perry-Casa Pub. Sch. Dist. No. 2,* 286 Ark. 170, 690 S.W.2d 349 (1985). In that case, the teacher wanted an assignment as a secondary math teacher but was assigned as a computer instructor. No reduction in compen-

> sation was at issue. We noted that a teacher could not always be assigned to duties of that teacher's preference and that the assignment by the school district appeared to be reasonable. In the case at bar, we agree with the circuit court that what took place was not a reassignment of duties but a nonrenewal of Terry's contract.

The only difference between *Western Grove School District* and our case is the fact that the parties' salaries were not decreased. Despite that difference, the parties' contracts were not on the same terms, and the reassignments were not reasonable. Based on the facts, I believe the factfinder could have found that the parties were not "reassigned" but that their contracts were not renewed.

Even without the determination of nonrenewal or reassignment, the superintendent and board's actions indicate that they considered that these cases should be treated under the Teacher Fair Dismissal Act. Below, the parties argued that there was no remediation by the district of the parties' behavior as required under the Act. Appellants contended that the district did not strictly comply with Ark. Code Ann. § 6-17-1504 which provides that the district shall "document the efforts which have been undertaken to assist the teacher to correct whatever appears to be the cause for potential termination or nonrenewal." In this case, the record does not disclose that there was an effort to notify Mr. Warren of the potential problems that had occurred and no effort to help him correct those problems. Thus, it appears that he was not accorded the protections under the Act. The underlying due process considerations also need further exploration.

Appellants also argued below that under Ark. Code Ann. § 6-17-1510 the board's decision was arbitrary, capricious, or discriminatory and contrary to the reasonable rules and regulations promulgated by the board. In addition, appellants challenged the qualifications and bias of the members of the board.

All of these issues raised below by appellants are not controlled by the case of *McCaskill*. In fact, the only issue that *McCaskill* addresses is the effect that a superseding contract has on the notice provisions set out in Ark. Code Ann. § 6-17-1506. I believe that the trial court erred in summarily holding that *McCaskill* was dispositive of this action without further factfinding for us

to review on appeal. But, as noted by the majority, we are limited in our review of this case because of appellants' issue on appeal.

As I noted earlier, there were several issues presented at the trial court level that I believe have merit. But, I also concur in this decision to express my deep concern for the welfare and protection of teachers' rights. Our educational system is becoming a self-fulfilling prophecy when we treat teachers as interchangeable pins. The system often treats children without imbuing them with awe at the wonders of an inquiring mind, nor the discipline of respecting and training our bodies, and ignores the psychological and moral factors that future generations need. The nostalgia for excellence in education, sports, and good citizenship may be passing as in *Goodbye, Mr. Chips* and as his counterparts become just an historical part of our educational system.

I am deeply concerned with the present structure and procedures afforded our teachers not only under the Act, but in situations of reassignments. As the situation stands, there are no protections or rights of due process for the teachers who are reassigned resulting in a demotion in duties and responsibilities. We do not allow this lack of due process in any other situation. Thus, I believe the "reassignment" of teachers raises issues that need to be addressed by the Legislature.

We are bound by our standards of review and the applicable law. So, we are constrained in certain cases to reach the fair and equitable result. These cases before us may have been two of those situations where the result would have been different, not only if the issues have been raised before us, but if the law was in place providing teachers more protection in their profession. It has been noted that "[t]he kind of work we do does not make us holy, but we make it holy." Surely, we cannot give to the teaching profession any less regard.

Candice J. MATTOCKS *v.* Paul R. MATTOCKS

CA 98-1017 986 S.W.2d 890

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered March 24, 1999

Compton, Prewitt, Thomas & Hickey, P.A., by: *Robert C. Compton* and *Robin J. Carroll*, for appellant.

Burbank Dodson & McDonald, by: *Gary R. Burbank*, for appellee.

JOHN F. STROUD, JR., Judge. Paul R. Mattocks was granted a divorce from Candice J. Mattocks, and the parties were given temporary joint custody of their children pending further proceedings. Mr. Mattocks moved out of the marital home. A subsequent hearing was held on the issues of property division and custody of the two children who were still minors. The chancellor awarded Mr. Mattocks custody of the girls and possession of the house until the youngest daughter reached age eighteen or graduated from high school, whichever event occurred last, at which time the house was to be sold and the profits equally divided. The chancellor ordered an equal division of all other marital property, awarded alimony to Ms. Mattocks for twelve months, and ordered no child support until such time as Ms. Mattocks became employed.

The chancellor denied Ms. Mattocks's posttrial motions for a stay of the proceedings to enforce the decree and for relief from the decree. On appeal Ms. Mattocks contends 1) that the chancellor erred by not causing a record to be made of his *in camera* interview with the minor children, and 2) that she was denied due process at the final hearing because of procedural errors by the trial judge. Because we agree that error was committed on the first point, we reverse and remand; we therefore need not reach the second point.

After making an opening statement, appellee's attorney asked that the children be interviewed in chambers if the chancellor thought it appropriate. The chancellor stated, "[That's] usually the preferred method. It's the least difficult way for the children. We could swear them in, put them on the witness stand like any other witnesses but that's usually not preferred. Is that agreeable with you, Ms. Mattocks, for me to talk to the girls?" Appellant agreed to the interview, the chancellor announced a recess, and

the girls were interviewed in chambers off the record. When court resumed, the chancellor noted, "The girls, they said they would go back home probably."

Appellant contends that this court should find error by holding either that a record must be made of *in camera* interviews with minor children in custody cases, or that a record should be made unless waived by the parties. She argues that because there is no record of the children's testimony and the chancellor made only a vague reference to what they said, she had no chance to rebut the testimony and it is impossible for this court to review the chancellor's decision. Appellant specifically denies that she waived her right to have a record made.

Appellee contends that in a custody case the chancellor is not required, on his or her own motion, to make a record of an interview in chambers with the minor children. He cites *Jackson v. Smith*, 250 Ark. 923, 467 S.W.2d 704 (1971), and *Rush v. Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988), in support of this position. We find those cases distinguishable from the one now before us. The *Jackson* court stated only that it was unwilling to say that the chancellor erred in considering the wishes and attitude of a child interviewed privately in chambers by the chancellor, with the consent or acquiescence of the parents. In *Rush v. Wallace, supra*, attorneys for the parties were present at an unrecorded interview of the child and were permitted to question her. The *Rush* court ruled that a request for a record of the interview was untimely in that no objection was made until the interview was over; the court also noted that no attempt had been made to reconstruct the record under Rule 6(d) of the Arkansas Rules of Appellate Procedure, which provides a means of constructing a record in those cases where no record has been made.

We note that the *Jackson* and *Rush* cases were decided before Administrative Order Number 4 and Arkansas Code Annotated section 16-13-510 (Repl. 1994) were in effect. As of July 1, 1991, Administrative Order Number 4 imposed upon any circuit, chancery, or probate court the duty, "unless waived on the record by the parties," to require a verbatim record of all proceedings per-

taining to any contested matter before it. *In Re Admin. Order No. 4*, 305 Ark. 613 (1991). Additionally, Arkansas Code Annotated section 16-13-510 (Repl. 1994), reads in part as follows:

> (a) *In all cases before the circuit, chancery, or probate courts of this state, a complete record of the proceedings shall be made by the official court reporter, or other reporter designated by the court.* Upon the request of either party or the circuit, chancery, or probate judge, said record shall be transcribed, certified by the reporter as true and correct, and filed with the clerk of the court in which the proceedings were had, not less than ten (10) days before the expiration of time allowed for appeal.
>
> (b) *Nothing contained in this section shall prevent the parties, with the permission of the circuit court, from waiving a complete record of the proceeding.*

(Emphasis added.) Chancery and probate courts were added to subsection (a) by legislative amendment in 1993, but they were not added to subsection (b).

We are unable to find Arkansas case law that applies the above administrative order and statute to *in camera* interviews of children in child-custody cases. We realize that it has been common for chancellors, in the years before and after the effective dates of Administrative Order Number 4 and the amendment to Arkansas Code Annotated section 16-13-510, to speak freely with children in making determinations of child custody. Chancellors in open court sometimes specifically refer to a child's words or actions in the interview. *E.g. Lumpkin v. Gregory*, 262 Ark. 561, 559 S.W.2d 151 (1977).

■ The language of Administrative Order Number 4 requires a chancery court to make a verbatim record of *all proceedings pertaining to any contested matter* unless the parties waive the requirement on the record. No exception is made for matters of child custody. Furthermore, under Arkansas Code Annotated section 16-13-510(a) (Repl. 1994), a chancery court is obligated to take a court reporter into chambers when any matters are contested and also obligated to have the record transcribed upon timely request of parties or the chancery judge. Although section

16-13-510(b) allows parties to waive a complete record in circuit court, no such allowance is made for chancery or probate proceedings.

Administrative Order Number 4 requires a complete record of all proceedings unless waived on the record by the parties. It is undisputed that there was no waiver on the record in this case. A record must be made of *in camera* interviews in matters of child custody under the clear and unambiguous language of section 16-13-510 (1994), which clearly does not allow waiver of the record. Even if a waiver were permitted, we would not view appellant's agreement to the interview and her failure to request a written record as constituting an implied waiver of her right to have the record made.

We therefore find that the chancellor erred in not causing a record to be made of his *in camera* interview with the minor children. As we reverse and remand on the first point, we need not address the second point on appeal.

Reversed and remanded for actions consistent with this opinion.

NEAL, GRIFFEN, CRABTREE, MEADS, and ROAF, JJ., agree.

Emanuel HART *v.* STATE of Arkansas

CA CR 98-608 987 S.W.2d 759

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered March 24, 1999

Montgomery, Adams & Wyatt, PLLC, by: *Dale E. Adams*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. Appellant Emanuel Hart was convicted by a jury of first-degree murder and two counts of committing a terroristic act. He was thereafter sentenced to thirty-five years in the Arkansas Department of Correction. On appeal, appellant contends that the trial court erred in allowing the State to present testimony that he allegedly shot at a vehicle other than the one involved in this case. We affirm.

The evidence presented at trial showed that on February 18, 1996, the appellant, Johnny Stephenson, Derrick Stewart, and Kenneth McArthur were out together at a local nightclub in North Little Rock. While at the club, Stephenson purportedly got into an argument with James Nichols, who was accompanied by Donian Jarrett and Shedric Sabb. Shortly thereafter, both of these groups departed in their vehicles and entered onto Interstate 30. Stephenson testified that when appellant noticed the red Hyundai driven by Nichols, appellant hollered, "There they go [*sic*]" and fired three shots. This testimony was corroborated by Derrick Stewart, who testified that as the red Hyundai began to exit the interstate, the appellant rolled down his window and fired four or five shots at the car. James Nichols testified that as he and his friends exited the interstate, no other vehicles were behind them except a gold Mitsubishi Gallant. Nichols further testified

that although he did not hear gun shots at the time of the shooting, he did realize that Shedric Sabb had been shot while sitting in the back seat. Sabb was later pronounced dead from a gunshot wound.

In a police statement given on February 20, 1996, appellant admitted that he was riding in a gold Mitsubishi Gallant on the morning of February 18, 1996, and that he had fired two shots at a red car that was exiting the interstate because "they [the occupants of the red car] had pissed me off by circling around us, playing with us." Appellant testified that he used a black automatic .380 caliber pistol in self-defense. Ronald Andrejack, a firearm and toolmark examiner with the Arkansas State Crime Laboratory, testified that the three casings found near the scene of the accident were consistent with having been fired from a .9mm Glock semiautomatic handgun, which included bullet components of the .380 caliber class.

Appellant's sole point on appeal is that the trial court erred in allowing Derrick Stewart to testify that he had shot at a Cadillac in the parking lot of the nightclub shortly before the shooting involved in this case. The State offered this testimony as admissible evidence under Ark. R. Evid. 404(b), which the trial court accepted and which appellant now seeks as reversible error.

The admission or rejection of evidence under Ark. R. Evid. 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Brown v. State*, 63 Ark. App. 38, 972 S.W.2d 956 (1998). Arkansas Rule of Evidence 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. 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." If the introduction of testimony of other crimes, wrongs, or acts is independently relevant to the main issue, *i.e.*, relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal, then evidence of that conduct may be admissible with a cautionary instruction by the court. *Regalado v.*

State, 331 Ark. 326, 961 S.W.2d 739 (1998). Thus, if the evidence of another crime, wrong, or act is relevant to show that the offense of which the appellant is accused actually occurred and is not introduced merely to prove bad character, it will not be excluded. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994). However, such relevant evidence may be excluded under Ark. R. Evid. 403 if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.*

Here, we first note that appellant failed to ask for a cautionary instruction that the purpose of Derrick Stewart's testimony was not to show that he had a criminal propensity for shooting weapons at moving cars. Regardless of the fact the appellant did not ask for a limiting instruction, we conclude that Stewart's testimony was relevant in showing that appellant fired shots at the victims with an absence of mistake or accident. Appellant acknowledged in his police statement that he had ready access to his weapon and that he had shot at the victims' car because he was angry at the victims shortly before the incident. There was also testimony that the casings found near the crime scene were consistent with the gun that appellant was found to have possessed and that after the shooting, appellant wanted to disassemble the gold Mitsubishi. Further, Stewart's testimony was part of the *res gestae* of the case by providing corroborating evidence that appellant had possession of a gun before the present shooting, even though appellant had testified that Kenneth McArthur was the actual person in possession of the weapon. We have previously stated that all of the circumstances of a particular crime are part of the *res gestae* of the crime, and all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction. *Hunter v. State*, 62 Ark. App. 275, 970 S.W.2d 323 (1998).

The underlying facts in this case show that appellant admitted to shooting at the victims out of anger, in spite of testimony that the victims did nothing to provoke him. Stephenson testified that when appellant observed the victims' car, he shot at the car a multiple number of times. Stewart testified that he first noticed that appellant had a weapon when appellant shot at and ran behind a Cadillac in the parking lot of the Cameo club, and

that shortly after leaving the club and exiting onto the interstate, appellant began shooting after a red Hyundai stating, "I'm tired of them [*sic*] young punks." There was also evidence from one of the victims that the gold Gallant, in which appellant was a passenger, was at the nightclub earlier that evening and was the only car on the interstate at the time Shedric Sabb was fatally shot. In appellant's own testimony, he stated that "on page 10 of my [police] statement, I said that what really made me shoot is that it pissed me off by their circling around and playing with us. I was referring then to the white Bronco and the Cadillac." Coincidentally, appellant was referring to the victims' car when he stated to police, "well what really made me shoot is when they was blocking, you know. They should have went on — 'cause I didn't know what they was gone do. They had pissed me off by kept [*sic*] circling around us, playing with us." Further, there was evidence that appellant suggested stripping down the gold Gallant after he learned that one of the victims had died. When the evidence of guilt is overwhelming and the error is slight, the appellate court can declare the error harmless and affirm. *Brown, supra.*

Although the dissent feels that *Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413 (1983), and *Lincoln v. State*, 12 Ark. App. 46, 670 S.W.2d 819 (1984), are controlling, we note that this case is distinguishable. In both *Rowdean* and *Lincoln*, evidence was presented that the appellant had either pulled a gun or waved a gun around another person shortly before the shootings that occurred in their present convictions. However, in this case, there was evidence that appellant had actually shot at a Cadillac in the parking lot of the Cameo club and within a short period of time, shot at the victims involved in the present case. In addition, appellant admitted that he was angry at the occupants of the Cadillac when he shot at them. Although appellant shot at two different vehicles, his conduct in the first incident was relevant in showing an absence of mistake or accident for the same type of conduct in the present incident. Therefore, under these circumstances, we cannot say that appellant was unfairly prejudiced by the testimony of Derrick Stewart.

Affirmed.

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

PITTMAN and HART, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. The appellant shot at a Cadillac in the parking lot of a nightclub. Subsequently, he shot at a Hyundai in which the victims were riding while both the vehicle in which the appellant was riding and the Hyundai were traveling down the interstate. The majority concludes that testimony that the appellant shot at the Cadillac was relevant to establish that he fired at the Hyundai with an absence of mistake or accident and that it was part of the *res gestae* by corroborating evidence that the appellant had possession of a gun. The majority also concludes that the evidence of guilt was so overwhelming that any error committed was harmless. Further, the majority bolsters its decision to affirm by relying on the appellant's failure to request a limiting instruction that would preclude the jury from using the testimony to conclude that the appellant had a criminal propensity for shooting at cars.

Pursuant to Rule 404(b) of the Arkansas Rules of Evidence, while evidence of other crimes is not admissible to establish a person's character, it is nonetheless admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Rule 403 of the Arkansas Rules of Evidence provides that even relevant evidence may be excluded if its probative value is outweighed by its prejudicial effect.

According to the abstract, Derrick Stewart was permitted to testify that he saw the appellant shooting and running behind a Cadillac in the parking lot of a nightclub. To Stewart's knowledge, the appellant did not hit the Cadillac or anything else. The appellant also testified at trial. He admitted to shooting at a Cadillac and a Bronco from his car while the vehicles were traveling down the interstate.

The majority holds that Stewart's testimony that the appellant shot at the Cadillac in the parking lot was admissible to show the appellant's lack of mistake or accident when he fired at the Hyundai. However, Stewart's testimony did not reveal the appel-

lant's intent when he fired at the Cadillac in the parking lot. Thus, Stewart's testimony is not helpful in establishing a lack of mistake or accident when he fired at the Hyundai in which the victims were riding. Instead, the testimony provided the exact proof that 404(b) prohibits, that the appellant had a propensity to shoot at cars.

The majority concludes that Stewart's testimony was admissible as *res gestae* evidence. Whether or not the appellant possessed a gun at the time of the shooting was established by the appellant's own testimony; it was unnecessary to rely on Stewart's testimony to establish that the appellant possessed a gun prior to that. If this was the reason Stewart's testimony was admitted, then its probative value was clearly outweighed by its prejudicial effect. Moreover, to permit admission of testimony regarding events surrounding the crime simply because the events occurred undercuts the limitations imposed on such evidence by Rules 403 and 404(b). *See Hunter v. State*, 62 Ark. App. 275, 970 S.W.2d 323 (1998)(evidence of *res gestae* is proper provided it can be established by competent means, sanctioned by law, and afford any fair presumption or inference as to the question in dispute).

The facts of this case bear a striking resemblance to those in *Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413 (1983), and in *Lincoln v. State*, 12 Ark. App. 46, 670 S.W.2d 819 (1984). In *Rowdean*, the appellant, Rowdean, was convicted of first-degree murder. He committed the murder by shooting the victim while they were outside of a nightclub. The Arkansas Supreme Court held that evidence that Rowdean had earlier that night pulled a gun on another person at a drive-in was not admissible under Rule 404(b). In *Lincoln*, the appellant, Lincoln, was convicted of attempted first-degree murder. This court concluded that evidence that earlier on the night Lincoln committed the crime, he waved a pistol around during an argument he had with another person, was not admissible under Rule 404(b). This court should reach the same conclusion regarding the similar testimony presented here. The majority concludes that these cases are distinguishable in part because the appellant admitted that he was angry at the occupants of the Cadillac when he shot at them on the parking lot. The appellant, however, admitted to shooting at a

Cadillac while it was on the interstate. He never testified that he shot at a Cadillac in the nightclub's parking lot.

The majority further concludes that a limiting instruction could have cured any prejudice. The instruction, presumably, would have instructed the jury to consider the fact that the appellant was shooting at other cars on the night in question for the limited purpose of proving such things as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. None of these purposes, however, are applicable, and if none are applicable, then the testimony should not have been introduced.

Finally, the majority concludes that the evidence was overwhelming, and consequently, any error committed was harmless. When the evidence of guilt is overwhelming and the error is slight, this court can declare the error harmless and affirm. *See Brown v. State*, 63 Ark. App. 38, 43, 972 S.W.2d 956, 959 (1998). Appellant was found guilty of first-degree murder, that with the purpose of causing the death of another person, he caused the death of the victim. The jury was also instructed on the lesser-included offense of second-degree murder, that the appellant knowingly caused the death of the victim under circumstances manifesting extreme indifference to the value of human life. Stewart's testimony that the appellant shot at the Cadillac may have prejudiced the jury's deliberations such that they found him guilty of first-degree rather than second-degree murder. Stewart's testimony was not evidence of the appellant's purpose to cause the death of another person when he shot at the Hyundai because his testimony did not establish the appellant's purpose to do so when he shot at the Cadillac. Moreover, the appellant was sentenced to thirty years' imprisonment. This also indicates that he suffered prejudice. *See Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993).

I would reverse and remand.

PITTMAN, J., joins in this dissent.

Allan KINNEBREW *v.* LITTLE JOHN'S TRUCKS, INC.

CA 98-1048 989 S.W.2d 541

Court of Appeals of Arkansas
Division III
Opinion delivered March 24, 1999

Davis, Mitchell, & Davis, by: *Gary Davis*, for appellant.

Hardin, Jesson, & Terry, by: *J. Rodney Mills*, for appellee.

TERRY CRABTREE, Judge. Appellant Allan Kinnebrew appeals the decision from the Workers' Compensation Commission finding that the appellant has failed to prove by a preponderance of the evidence that the injury he sustained on

March 14, 1996, occurred during a time that the appellant was performing employment services. We affirm.

The appellant is a long-haul truck driver employed by the appellee, Little John's Trucks, Inc. The appellant was paid by the mile, plus an occasional per diem.

On March 14, 1996, the appellant delivered a load of cargo to a farm company in New Braunfels, Texas, at approximately 8 a.m. Appellant testified that he was then advised by his dispatcher to proceed to a truck stop in San Antonio, Texas, and wait because they might have a load for him there the next day. Appellant phoned the dispatcher and advised of his arrival at the Flying J Truck Stop. He then parked his truck and was off duty until he received further instructions the following day.

The Department of Transportation requires truck drivers to maintain a detailed "Operator's Log" to document driving and off-duty times. Such regulations require the driver to be off duty for eight hours after ten hours of driving time. The appellant's operator's log for March 14, 1996, the date of the incident giving rise to this claim, reflects that he arrived in San Antonio, Texas, at 11 a.m. and was off duty until 7 p.m. During his time off, the appellant went into the truck stop and did a little shopping. He cleaned the glass in his truck, had the truck cleaned, and then gathered clothes for washing. He then took a number in the shower facility line and waited about an hour and a half for his turn. At approximately 6:45 p.m., a shower finally became available for his use. When he entered the shower stall, he stepped onto a slippery substance, causing him to fall and hit his neck against a ledge and injure his left shoulder as he tried to brace himself.

The appellant was diagnosed with a C4-5 spondylotic bar and underwent an anterior C4-5 diskectomy with fusion on June 19, 1996. The appellant has also been diagnosed with impingement of left rotator cuff or supraspinatus tendon with tendinitis secondary to bulky degenerative left acromioclavicular joint hypertrophy. The administrative law judge (ALJ) found the appellant's claim compensable. Little John's timely appealed the decision to the full Commission. In its opinion and order filed June

10, 1998, the Commission reversed and remanded finding that the claim was not compensable because the appellant was not performing employment services at the time of his injury.

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

This court has affirmed on a number of occasions the Commission's factual findings that a claimant injured while performing a personal task, even while on the employer's premises, was not performing "employment services" for the purposes of compensability under Act 796 of 1993. *Hightower v. Newark Public School System*, 57 Ark. App. 159, 943 S.W.2d 608 (1997). Even if the appellant was acting within the course of his employment under the "traveling salesman exception," the evidence still does not support a finding that the appellant was performing "employment services" when he fell while taking a shower while off duty. Showering is not inherently necessary for the performance of the job he was hired to do. Consequently, we hold that the full Commission did not err when it found that the appellant was not performing employment services at the time of his injury.

Affirmed.

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

Frederick GUIDRY *v.* HARP'S FOOD STORES, INC.

CA 98-1036 987 S.W.2d 755

Court of Appeals of Arkansas
Division I
Opinion delivered March 24, 1999

The Mulkey Attorneys Group, P.A., by: *Jeremy K. Landon* and *Bruce L. Mulkey*, for appellant.

Bassett Law Firm, by: *Tod C. Bassett* and *James M. Graves*, for appellee.

MARGARET MEADS, Judge. This appeal is brought from the trial court's entry of summary judgment in favor of appellee, Harp's Food Stores, Inc. The court found that certain issues decided in a federal civil rights suit brought by appellant precluded appellant from relitigating those issues in a tort suit prosecuted in state court. We reverse and remand.

David Jones, a Rogers city policeman, worked for appellee during his off-duty hours as a loss-prevention officer. On March 25, 1996, he supposedly observed appellant stealing a pack of cigarettes. Appellant was apprehended and arrested and charged with shoplifting. It was later determined that the cigarettes did not come from appellee's store, and the shoplifting charge was *nolle prossed*. As a result of the incident, appellant filed suit in federal court pursuant to 42 U.S.C. § 1983 against David Jones, the City of Rogers, and the city's police chief. In the same action, he sued appellee for battery, assault, false imprisonment, defamation, malicious prosecution, and negligence.[1] The federal court granted summary judgment on the section 1983 claim, ruling that Jones's arrest and detention of appellant was reasonable, even if mistaken, thus entitling Jones to qualified immunity under federal law. *See Johnson v. Schneiderheinz*, 102 F.3d 340 (8th Cir. 1996). Further, the court found that appellant failed to prove that Jones used excessive force in making the arrest, having offered no evidence that he suffered anything beyond minor injury or discomfort. At the conclusion of these findings, the court exercised its prerogative to decline jurisdiction over the state tort claims. *See* 28 U.S.C. § 1367(c)(3) (Supp. 1998).

Following the federal court ruling, appellant filed suit in state court against appellee. According to the complaint, David Jones, in the presence of store employees and customers, wrongly accused appellant of shoplifting, then detained him by use of force. The complaint further alleged that appellee commenced a crimi-

[1] We have not been provided with the pleadings filed in federal court. Our characterization of the federal action is based on statements made by the parties in their motions and arguments below and on the text of the federal court ruling, as abstracted.

nal proceeding against appellant without probable cause. Based upon these allegations, appellant asserted that appellee, acting through its agent, Jones, committed the torts of battery, assault, false imprisonment, malicious prosecution, defamation, and outrage. Appellant also asserted a cause of action for conversion based upon appellee's retention of the cigarettes he was suspected of stealing, and a cause of action for negligence based upon appellee's failure to train its security guards or investigate their backgrounds.

After discovery was undertaken in the case, appellee filed a motion for summary judgment. The motion contended that, at the time of the incident, Jones was acting as a city police officer, not as appellee's employee. However, the gravamen of appellee's argument was that the federal court ruling conclusively established the reasonableness of Jones's actions, thereby leaving no basis for appellant's tort claims. A copy of the federal court ruling was attached to the motion, along with various affidavits, depositions, and answers to interrogatories. Through these exhibits, appellee presented the following evidence: Jones believed he saw appellant put a pack of cigarettes in his pocket without paying for them. Jones then approached appellant, identified himself as a police officer, and asked appellant to accompany him to the manager's office. Appellant refused and called Jones a "racist pig." When appellant tried to leave the store, Jones held him, and a scuffle ensued. Jones warned appellant that he would have to physically restrain him if he kept fighting. Appellant ignored the warnings, and Jones put him on the floor, holding him there until on-duty officers arrived. The cigarettes that appellant was holding were confiscated and were held at appellee's store until they were picked up by the police a week later. The charges against appellant were dropped when the city attorney's office learned that the tax identification number on the cigarettes showed that they did not come from appellee's store.

Appellant responded to the motion by arguing that the findings made by the federal court were based upon Jones's conduct as a police officer as viewed in light of constitutional requirements, not as a private actor viewed in light of state tort law. He attached depositions that were primarily directed to appellee's assertion that Jones was not acting as its employee. The depositions indicated,

however, that up to twenty-five people may have observed the incident and that Jones had received no training or guidance from appellee regarding the apprehension of suspected shoplifters.

After a hearing, the trial judge found that the federal court ruling "knocked out the underpinning" of appellee's state tort claims, thus barring them under the doctrine of collateral estoppel. With regard to the negligence claim, the judge found that there was no causation between appellee's alleged negligence in training Jones and appellant's damages. It is from this ruling that appellant brings his appeal.

Summary judgment, while no longer considered a drastic remedy, is only approved when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the non-moving party is not entitled to a day in court. *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998). The burden of sustaining a motion for summary judgment is on the moving party. *Hawkins v. Heritage Life Ins. Co.*, 57 Ark. App. 261, 946 S.W.2d 185 (1997). On appeal, we must view the evidence in a light most favorable to the nonmoving party. *Id.*

Appellant argues on appeal that the trial court erred in applying the doctrine of collateral estoppel in this case. Collateral estoppel, or issue preclusion, bars relitigation of issues of law or fact actually litigated by parties in the first suit. *Coleman's Serv. Ctr. v. Federal Deposit Ins. Corp.*, 55 Ark. App. 275, 935 S.W.2d 289 (1996). When an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *Id.* The elements of collateral estoppel are: 1) the issue sought to be precluded must be the same as that involved in the prior litigation; 2) the issue must have been actually litigated; 3) it must have been determined by a valid and final judgment; and 4) the determination must have been essential to the judgment. *Fisher v. Jones*, 311 Ark. 450, 844 S.W.2d 954 (1993). The party asserting collateral estoppel has the burden of demonstrating

that the precise issue on which they claim the court and other parties are bound and which is precluded from being raised was decided in the previous case. *Smith v. Roane*, 284 Ark. 568, 683 S.W.2d 935 (1985). A federal court judgment may preclude relitigation of issues in state court. *Scogin v. Tex-Ark Joist Co.*, 281 Ark. 175, 662 S.W.2d 819 (1984).

Appellant's federal action was brought pursuant to 42 U.S.C. § 1983, which provides a cause of action against persons who, under color of law, subject a citizen to deprivation of rights, privileges, and immunities secured by the Constitution. The purpose of section 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights. *Wyatt v. Cole*, 504 U.S. 158 (1992). As best we can tell from the record before us, appellant's section 1983 claim was based upon the assertion that his constitutional rights were violated by David Jones's improper arrest of him and by Jones's use of excessive force. The federal court found that no constitutional violation occurred because Jones was entitled to qualified immunity, having had a reasonable suspicion to detain appellant and probable cause to arrest him. In section 1983 cases involving an allegedly improper arrest, law enforcement officials who reasonably but mistakenly conclude that probable cause to arrest is present are entitled to qualified immunity. *Johnson v. Schneiderheinz, supra.* The qualified-immunity defense protects all but the plainly incompetent or those who knowingly violate the law. *Id.* The issue for immunity purposes is not probable cause in fact, but arguable probable cause. *Id.* Regarding a claim that excessive force was used in effecting an arrest, an officer is entitled to qualified immunity unless the claimant can demonstrate specific facts showing the officer used excessive force. *Edwards v. Giles*, 51 F.3d 155 (8th Cir. 1995). The federal judge in appellant's case ruled that appellant fell short in this regard.

Appellee argues that the federal court's finding that Jones acted reasonably precludes a finding that Jones acted unreasonably, and thus tortiously, in this case. However, the concept of reasonableness cannot be viewed in a vacuum. We must consider the context in which the federal court evaluated Jones's conduct. The standards used to determine whether an officer is entitled to

qualified immunity are lenient in order that officers may pursue their duties without fear of being sued. *See Johnson v. Schneiderheinz, supra.* Therefore, an officers' acts may be viewed as reasonable so long as the officer is not plainly incompetent or knowingly violating the law, and probable cause need only be arguable, not probable cause in fact. Appellant's state law claims would not be subject to the same analysis used by the federal court in determining Jones's entitlement to qualified immunity. For example, appellant's failure to prove the use of *excessive* force would not be fatal to his assault and battery claims, as it was to his section 1983 claim. With regard to appellant's claims for malicious prosecution and false imprisonment, the existence of probable cause would be a defense to such actions. *See Mendenhall v. Skaggs Cos.*, 285 Ark. 236, 685 S.W.2d 805 (1985); *Kellerman v. Zeno*, 64 Ark. App. 79, 983 S.W.2d 136 (1998). However, we have found no case in which arguable probable cause, as used in the qualified-immunity analysis, rather than probable cause in fact was sufficient to sustain the defense. As to appellant's defamation claim, an officer may make a defamatory statement about a suspect, even though his arrest and detention of the suspect were not plainly incompetent or knowingly illegal for section 1983 purposes.

These examples illustrate that the issue sought to be precluded, *i.e.*, whether Jones's conduct was tortious, is not the same as the issue litigated in federal court, *i.e.*, whether Jones was entitled to qualified immunity. Collateral estoppel applies only to those issues of law or fact actually litigated in the first action. *Coleman's Serv. Ctr. v. Federal Deposit Ins. Corp., supra.* The question of whether an issue was previously litigated has been interpreted very narrowly for purposes of collateral estoppel. *In re Estate of Goston v. Ford Motor Co.*, 320 Ark. 699, 898 S.W.2d 471 (1995).

We also note that collateral estoppel does not bar a subsequent action where a federal court has made an express reservation of rights as to future litigation. *See Virden v. Roper*, 302 Ark. 125, 788 S.W.2d 470 (1990) (appellant's section 1983 federal court action dismissed based on abstention doctrine); *Coleman's Serv. Ctr. v. Federal Deposit Ins. Corp., supra* (federal court dis-

missed part of appellee's complaint without prejudice). In the case at bar, the federal court, much like the court in *Virden v. Roper*, decided not to retain jurisdiction of state law claims. Therefore, appellant's right to litigate those claims in the future was reserved.

Before we leave the collateral-estoppel issue, we wish to address a matter that was the subject of much discussion during the oral argument of this case. As noted earlier, a section 1983 action is based upon a person's depriving another of his constitutional rights while acting under color of law. Because the federal court rendered a decision on the section 1983 claim, the question arose as to whether the court must necessarily have concluded that David Jones was acting as a city police officer rather than as appellee's employee during the incident that is the subject of this case. Both appellant and appellee agree that the federal court made no explicit finding on this issue. Appellee's counsel argued that the federal court implicitly found that Jones was acting as a police officer, although he acknowledged that the issue was not contested in federal court. Collateral estoppel does not bar an issue unless the issue is actually litigated and essential to the judgment in the first action. *Fisher v. Jones, supra.* We are not convinced that Jones's status as a private actor or state actor was actually litigated or essential to the judgment in the federal court action. Therefore, we decline to decide the case on this basis.

In addition to his ruling on the collateral-estoppel question, the trial judge ruled that appellant could not show that his damages were proximately caused by appellee's failure to properly train Jones or investigate his background. A careful reading of the court's comments reveals that this ruling was also based upon the federal court's finding that Jones's actions were reasonable. In light of our holding, this part of the summary judgment must also be reversed.

Finally, we are urged by appellee to affirm the trial court's ruling on the basis that the facts, even if viewed in a light most favorable to appellant, establish no liability on appellee's part. We have the authority to affirm a trial court's decision on a different basis than that asserted by the court. *In re Estate of Goston v. Ford Motor Co., supra.* However, we are not convinced that

arguments relating to the merits of the state causes of action were fully developed below. Appellant's response to the motion for summary judgment focused on appellee's argument that it was not responsible for Jones's conduct and the doctrine of collateral estoppel. We are reluctant to hold that appellant's proof, as contained in the exhibits to his response, is insufficient. Sufficiency of proof was not the thrust of appellee's motion. In reviewing the propriety of a motion for summary judgment, we 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).

Reversed and remanded.

BIRD and GRIFFEN, JJ., agree.

CONTINENTAL EXPRESS, INC. *v.* Marty FREEMAN

CA 98-1068 989 S.W.2d 538

Court of Appeals of Arkansas
Division IV
Opinion delivered March 24, 1999

Roberts Law Firm, P.A., by: *Bud Roberts* and *Bruce D. Anible*, for appellant.

The Cortinez Law Firm, P.L.L.C., by: *Christopher D. Anderson*, for appellee.

ANDREE LAYTON ROAF, Judge. Continental Express, Inc. (Continental), appeals a decision of the Workers' Compensation Commission reversing an administrative law judge

and finding that appellee Marty Freeman had met his burden of proving by objective medical evidence that he had sustained a compensable injury. On appeal, Continental argues: 1) the Commission erred in its interpretation and application of Ark. Code Ann. § 11-9-102 (Supp. 1997), the portion of our workers' compensation statute that defines a compensable injury; and 2) the Commission failed to consider the record as a whole in finding that Freeman had suffered a compensable injury. We affirm.

Freeman began work for Continental as a trailer mechanic on March 4, 1996. On March 25, 1996, he injured his lower back while steadying a ladder that had slipped out from under a co-worker who had climbed to the top to change a light on a trailer. While the co-worker was hanging from the top of the trailer, Freeman angled the ladder under him and held it while he climbed down.

According to Freeman, his back started hurting, and his right leg "started feeling kind of funny." He immediately reported the accident to his supervisor. He presented that day to Dr. Darien Wilbourn at the Medistat Clinic in Little Rock and was diagnosed with lumbar strain. Dr. Wilbourn took Freeman off work, prescribed physical therapy, and referred Freeman to orthopaedic surgeon Dr. Joe W. Crow, who concurred with the diagnosis. Dr. Crow treated the injury with steroid injections and additional physical therapy. Reports from the physical therapist who treated Freeman indicated the presence of muscle spasms. Freeman was subsequently referred to neurosurgeon Dr. Steven L. Cathey who, based in part on an MRI conducted on May 14, 1996, concluded that Freeman would not benefit from lumbar disc surgery.

Continental initially accepted the injury as compensable and paid temporary total disability benefits (TTD) through December 4, 1996. However, when Freeman sought additional TTD, Continental controverted the claim. A hearing was held before an administrative law judge (ALJ) in which Freeman's testimony and his medical records were the only evidence submitted. Included in the medical records was the report of an MRI conducted on February 1, 1990, which was substantially similar to the report

from the MRI that was conducted on May 14, 1996. The ALJ denied Freeman benefits in an order that stated in pertinent part that he failed to prove by objective medical evidence that he sustained a compensable injury.

The Commission reversed, finding that the physical therapist's report of muscle spasms constituted objective medical evidence. It, however, denied Freeman additional benefits, finding that he failed to present any evidence that he was still within his healing period; Freeman did not file a cross-appeal.

Continental first argues that the Commission erred in its interpretation and application of Ark. Code Ann. § 11-9-102(16), in finding that Freeman's injury was compensable, because it misinterpreted the physical therapist's chart in concluding that Freeman exhibited muscle spasms on March 29, 1996, and April 2, 1996. Continental asserts that the chart was "sloppy" and specifically cites the misalignment of the "S" and "O," which respectively designate subjective and objective information for the March 29 entry. Continental further contends that the March 29 entry which states: "R (right) lumbar and gluteal pain and spasm" provides no objective evidence because "[p]ain is obviously a subjective complaint, and it is logical to conclude that on 3-29-96, the Appellee merely complained of spasms, since the physical therapist included the word 'spasm' in the same sentence with the purely subjective pain complaints." Regarding the April 2, 1996, entry on the physical therapist's chart, which begins with "Ms. (Muscle) spasm," Continental argues that "[i]t is logical to conclude that this is a subjective complaint by Appellee since the physical therapist has consistently followed a pattern of recording subjective complaints first for each day's entries, and because this entry is followed by another entry regarding subjective complaints of pain."

In the alternative, Continental argues that even if the physical therapist did "opine" that Freeman had observable muscle spasms, the physical therapist is not qualified to state a medical opinion within a reasonable degree of medical certainty, as required by Ark. Code Ann. § 11-9-102(16)(B). Continental further claims

that the Arkansas Workers' Compensation Commission has held that a chiropractor is not qualified to state a medical opinion within a reasonable degree of medical certainty and that the same principle should apply to physical therapists. It asserts that chiropractors and physical therapists have very similar levels of training, and neither occupation is as well trained and educated in medical science as a medical doctor. These arguments are unpersuasive.

To be compensable, Freeman's injury to his back had to be established by medical evidence, supported by "objective findings." Ark. Code Ann. § 11-9-102(5) provides in pertinent part:

> (A) "Compensable injury" means:
>
> (i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence

Ark. Code Ann. § 11-9-102(5)(D) provides that a compensable injury must be established by medical evidence, supported by "objective findings" as defined in section 11-9-102(16). "Objective findings" are defined as findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i); *see Daniel v. Firestone Bldg. Prods.*, 57 Ark. App. 123, 942 S.W.2d 277 (1997). In *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997), this court held that muscle spasms can constitute objective medical evidence. The court in *Hart* cited the following definition of muscle spasm contained in Stedman's Medical Dictionary 1304 (23d ed. 1976): "1. An involuntary muscular contraction. . . . 2. Increased muscular tension and shortness which cannot be released voluntarily and which prevent lengthening of the muscles involved; [spasm] is due to pain stimuli to the lower motor neuron."

When we review workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and

we affirm if those findings are supported by substantial evidence. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue on appeal 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 the Commission's decision. *Id.* We hold that there is substantial evidence to support the Commission's decision.

Regarding Continental's argument that the Commission erred in interpreting the physical therapist's progress notes, our review is hindered by the way that it abstracted these documents. The progress notes are not completely abstracted. Of particular note, the alleged misalignment of the "S" and "O" is not reflected in the abstract. It is the appellant's burden to abstract the record to demonstrate error, and we will not go to the record to determine whether reversible error occurred. *Couch v. First State Bank*, 49 Ark. App. 102, 898 S.W.2d 57 (1995). Furthermore, contrary to Continental's assertion, the progress notes as abstracted do not reveal any consistent pattern for listing whether pain or spasm or both were present. The entries for 4-3-96 and 4-4-96 state only that there were no muscle spasms present. The entry for 4-1-96 states only: "Movement Sunday aggravated symptoms. Felt good until then." The entry for 3-29-96 lists the location of pain first, then the presence of spasm, and the entry for 4-2-96 notes the presence of spasm first, then identifies the location of the pain. Under these circumstances, a conclusion by this court that the Commission's interpretation of the progress notes was error would be nothing more than an impermissible substitution of our opinion for that of the Commission. *High Capacity Prods. v. Moore, supra.*

■ ■ Also unpersuasive is Continental's alternative argument that the findings of muscle spasms by a physical therapist cannot constitute objective findings because a physical therapist is unqualified to state a medical opinion to a reasonable degree of

medical certainty. In the first place, Continental's argument rests on the faulty premise that an objective finding is somehow synonymous with or otherwise based on medical opinion. No Arkansas court has ever made such a connection. In *Keller v. L. A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), we held that "objective findings" are based on observable criteria perceived by someone other than the claimant. *See Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998). We cannot disagree with the Commission's statement in the instant case that a "physical therapist would surely be trained in techniques designed to detect muscle spasms during physical therapy."

Continental next argues that by finding that Freeman sustained a compensable injury, the Commission failed to consider the record as a whole. Continental cites the similarity between the results of the MRIs conducted before and after the injury, and it asserts that when the record as a whole is considered, Freeman failed to produce objective findings establishing that he sustained a compensable injury. This argument also fails to persuade.

As noted above, the Commission correctly found that muscle spasms constituted objective findings for the purpose of establishing compensability. Accordingly, the similarity between the 1990 and 1996 MRI results are of no moment. It is well settled that an employer takes an employee as he finds him and employment circumstances that aggravate preexisting conditions are compensable. *St. Vincent Infirmary Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

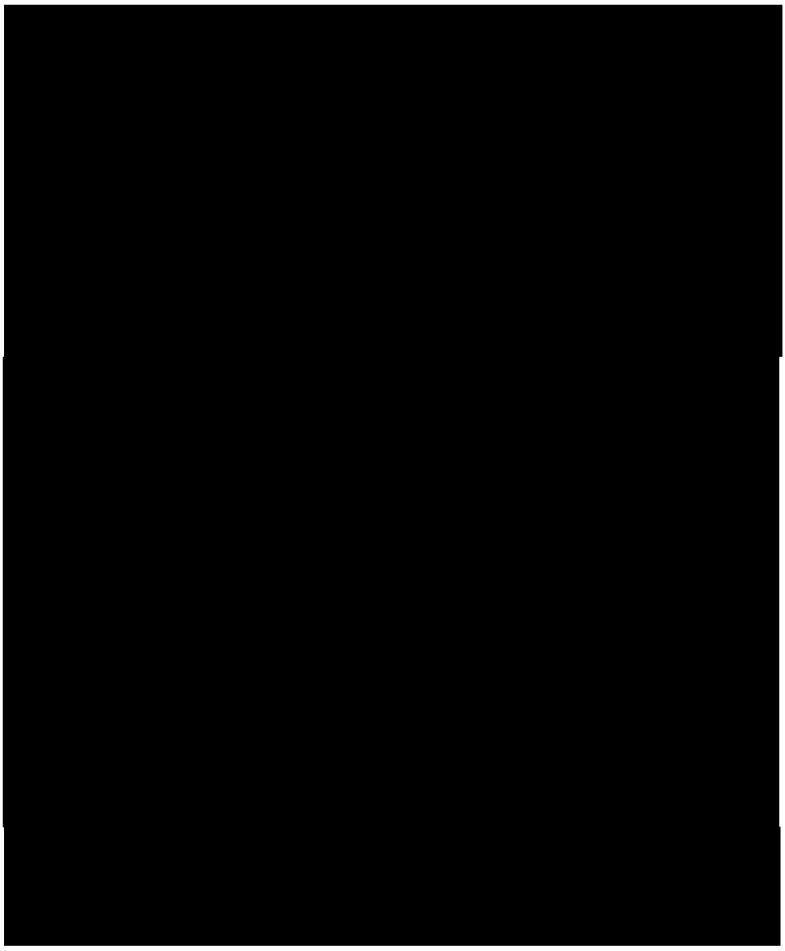
Affirmed.

JENNINGS and NEAL, JJ., agree.

Frank HENSLEE *v.* Joe and Pamela RATLIFF

CA 98-1133 989 S.W.2d 161

Court of Appeals of Arkansas
Division III
Opinion delivered April 7, 1999



Rose Law Firm, A Professional Association, by: *Richard T. Donovan*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. This case concerns a transaction in which appellant deeded 200 acres of land to appellees. Approximately two years after the transaction, appellant filed suit in Jefferson County Chancery Court to have the deed construed as a mortgage rather than a sale. The case went to trial, and the chancellor found that the deed effected a conveyance, not a mortgage. Appellant appeals from that ruling, raising three issues. We find no error and affirm.

Appellant, a former legislator, businessman, and the holder of a real estate broker's license since 1984, owned 200 acres of what was primarily timber land in Jefferson County. He was in the habit of procuring funds by deeding the land to another for cash and retaining an option to repurchase. In 1993, he made such an arrangement with Dr. W.D. Brainard. By 1995, the arrangement required appellant to pay Dr. Brainard $26,000 or lose the land. Appellant approached several persons about borrowing money to pay off the Brainard debt and several other debts. One man, Shelby Taylor, offered to buy the land for $85,000. Appellant

rejected this option and instead approached appellee Joe Ratliff. On September 28, 1995, the two men entered into the transaction that is the subject of this case. Appellant executed a deed conveying the 200 acres to appellees, subject to the terms of an Offer and Acceptance containing the following relevant provisions: Joe Ratliff, referred to as "Buyer", was to "pay $36,000 for the property in cash." Appellant, referred to as "Seller" was given a one-year option to "repurchase" the property for $41,000, plus reimbursement of reforestation expenses, not to exceed $10,000. He was also given the option, within the two years following, to repurchase the property by paying $5,000 per year to keep the option alive. Finally, appellant reserved for himself, for as long as the repurchase option was in effect, hunting rights on the land and the exclusive use of a deer camp.

In 1996, appellant paid appellees $5,000 to extend his option to repurchase the property. In March 1997, a fire allegedly caused by a Union Pacific train damaged 130 acres of timber on the property. A dispute arose between appellant and appellees as to who would benefit from a tort claim to be asserted against Union Pacific. Appellant filed suit, asking that he be declared the equitable owner of the property and that appellees be declared mortgage holders. Appellees answered that the deed between the parties evidenced a purchase rather than a loan, making them the outright owners of the property and owners of the claim against Union Pacific.

After a hearing, the chancellor held that appellant had not met his burden of proving by clear and convincing evidence that the transaction was meant to be a loan rather than a sale. He declared appellees owners of the land at the time of the fire loss and the proper recipients of any recovery from Union Pacific.[1]

Appellant's first argument is that the chancellor erred in finding the parties' transaction was a sale rather than a mortgage. A grantor may show that a deed, absolute on its face, was intended only to be security for the payment of a debt and thus was in

[1] Appellant exercised his option to repurchase the land from appellees on October 1, 1997, several months after the fire.

actuality a mortgage. *Newport v. Chandler*, 206 Ark. 974, 178 S.W.2d 240 (1944); *Duvall v. Laws, Swain & Murdoch, P.A.*, 32 Ark. App. 99, 797 S.W.2d 474 (1990). A court of equity will treat a deed, absolute in form, as a mortgage when it is executed for the loan of money or as security for a debt. *Nelson v. Nelson*, 267 Ark. 353, 590 S.W.2d 293 (1979). However, the law presumes that a deed, absolute on its face, is what it appears to be. *Davis v. Davis*, 48 Ark. App. 95, 890 S.W.2d 280 (1995). The party claiming that a deed is in fact a mortgage has the burden of proving it. *Id.* The evidence establishing the transaction as a mortgage must be clear, unequivocal, and convincing. *Wensel v. Flatte*, 27 Ark. App. 5, 764 S.W.2d 616 (1989). Clear and convincing evidence is that degree of proof that will produce in the trier of fact a firm conviction of the allegations sought to be established. *Balch v. Leader Federal Bank*, 315 Ark. 444, 868 S.W.2d 47 (1993).

On appeal, chancery cases are reviewed *de novo*, but we will not reverse the chancellor's findings unless they are clearly erroneous. *Brown v. Cole*, 27 Ark. App. 213, 768 S.W.2d 549 (1989). Our test on review in a case such as this one is not whether we are convinced that there is clear and convincing evidence to support the chancellor's findings but whether we can say that the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Davis v. Davis, supra.*

The question of whether a deed absolute on its face, when construed together with a separate agreement or option to repurchase, amounts to a mortgage or a conditional sale depends on the intention of the parties in light of all attendant circumstances. *Duvall v. Laws, Swain & Murdoch, P.A., supra.* The chancellor may consider the written terms of the parties' contract, the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances, and the acts and declarations of the parties. *Wimberly v. Scoggin*, 128 Ark. 67, 193 S.W. 264 (1917).

The parties' proof at trial reveals circumstances that point to the transaction's character as a mortgage as well as circumstances that point to its character as a conditional sale. Appellant testified

that he did not regard the transaction as a sale. He stated that he told appellee Joe Ratliff he did not want to sell the property, and he turned down an offer from Shelby Taylor to buy the property for $85,000. He presented expert testimony that the land was worth approximately $100,000, considerably more than the $36,000 paid by appellees. He also testified that, during the period when appellees held legal title, he made improvements on the deer camp located on the property. On the other hand, appellee Joe Ratliff testified that he had refused to loan money to appellant, but told him that he (Ratliff) would buy the property. Ratliff estimated the value of the land to be $40,000. He presented evidence that, at the time the transaction was closed, he and his wife paid a prorated portion of the 1995 property taxes and paid the 1996 taxes on October 9, 1997, the day before they were due. They also paid an additional premium for liability insurance on the property and defended a lawsuit involving a road on the property. Although appellees did not reforest the land, they spoke with a surveyor and the Forestry Department about reforesting in the future. Finally, they presented the testimony of Jimmy Dill, president of the Pine Bluff Title Company. Dill testified that he issued an owner's title insurance policy rather than a mortgagee's policy and that he took other steps that were indicative of a sale, such as using real-property-transfer tax stamps and issuing a 1099 tax form.

When evidence in a case is conflicting or evenly poised or nearly so, the judgment of the chancellor who had the opportunity to see and hear the witnesses in evaluating the evidence is persuasive. *O'Bannon v. O'Bannon*, 268 Ark. 823, 597 S.W.2d 825 (Ark. App. 1980). In reviewing questions such as the one presented in this case, great weight should be given to the opinion of the chancellor. *Davis v. Davis, supra.* In light of the language used in the parties' deed and contract, appellant's familiarity with real estate transactions,[2] and the circumstances surrounding the case, we cannot say that the chancellor's finding was clearly erroneous.

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[2] A factor that distinguishes this case from *Ehrlich v. Castleberry*, 227 Ark. 426, 299 S.W.2d 38 (1957).

It is also noteworthy that appellant and appellees agreed at trial that appellees could not have forced appellant to pay the consideration named in the Offer and Acceptance for reconveyance. When such payment cannot be compelled, the transaction is generally regarded as a conditional sale. *See Newport v. Chandler, supra*; *Duvall v. Laws, Swain & Murdoch, P.A., supra.*

The final two points on appeal concern the trial court's finding that appellees were entitled to the settlement proceeds with Union Pacific and appellant's claim that the transaction was usurious. Because these issues are dependent upon resolution of the first issue in appellant's favor, we need not address them.

Affirmed.

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

Douglas JOBE *v.* WAL-MART STORES, INC.

CA 98-668 987 S.W.2d 764

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered April 7, 1999

Stuart Vess, for appellant.

Mike Roberts, for appellee.

JOHN E. JENNINGS, Judge. Douglas Jobe has appealed from the decision by the Workers' Compensation Commission that denied his claim for workers' compensation benefits based on a finding that Jobe's incisional hernia injury caused by repetitious heavy lifting over a gradual period of time was not a "compensable injury" within the meaning of Ark. Code Ann. § 11-9-102(5)(A)(ii)(a) (Supp. 1997). Jobe contends that the record does not contain a substantial basis for the decision denying his claim for benefits. We affirm.

Jobe worked for Wal-Mart in the shipping department at its warehouse distribution center in Searcy, Arkansas, and testified that he was in excellent health before September 6, 1994. Some four months or so before September 1994, Jobe transferred to the nonconveyable area. Production in the nonconveyable area con-

sisted of 125 boxes or pieces of merchandise per hour involving such cumbersome, large, and heavy items as air conditioners and home entertainment centers. Jobe testified that when he handled that merchandise it would frequently impact against his abdomen or stomach.

Sometime in 1989, Jobe underwent an appendectomy after his appendix ruptured. He denied suffering any residual pain or symptoms in his abdominal region after the 1989 appendectomy. Jobe could not identify a specific event or occurrence on September 6, 1994, that involved an injury. However, he testified that at one point during the day he went to the bathroom and noticed blood in his stool. He also noticed that he had to stop and rest on account of dizziness, which he thought was heat related. His sensation of fatigue and dizziness increased to the point that he was concerned about losing consciousness while driving home from work on September 6, 1994. While bathing at home after work that day, Jobe felt a sensation as if he had been struck in the stomach with a sledgehammer. That sensation was followed by severe rectal bleeding. He was rushed to the emergency room of Baptist Medical Center where he ultimately came under the care and treatment of Dr. Charles Rogers, Jr., a Little Rock surgeon, because of the bleeding in his GI tract.

Dr. Rogers eventually diagnosed Jobe's condition as an incisional hernia caused by gradual deterioration of the tissue surrounding the old appendectomy incision and Jobe's heavy lifting at Wal-Mart. Repeated surgical attempts to repair the condition have been tried without success. Jobe testified at the hearing before the Commission's administrative law judge that he has undergone at least thirteen surgical procedures and has not worked since September 6, 1994. Dr. Rogers' opinion concerning the nature, origin, and cause of Jobe's condition and that it was caused by the heavy lifting done at Wal-Mart is not disputed in the record. However, the administrative law judge denied Jobe's claim for temporary total disability benefits from September 6, 1994, to a date yet to be determined, as well as his claim for medical benefits associated with his incisional hernia. The ALJ found that Jobe's injury was neither a hernia within the meaning of Ark. Code Ann. § 11-9-523 nor a gradual-onset compensable injury

caused by rapid repetitive motion within the meaning of Ark. Code Ann. § 11-9-102(5)(A)(ii)(a). The Commission affirmed and adopted that decision.

When the Commission denies coverage because a worker has failed to meet his burden of proof, the substantial-evidence standard of review requires that we affirm the Commission if its opinion displays a substantial basis for the denial of relief. *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997). In determining the sufficiency of the evidence to sustain the findings of the Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988).

The Commission held that the claim is controlled by the definition of "compensable injury" found in the Workers' Compensation Law as it was revised by Act 796 of 1993. That definition is codified at § 11-9-102(5)(A) and reads, in pertinent part, as follows:

> "Compensable injury" means:
>
> (i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;
>
> (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is

not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(*a*) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition;

(*b*) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence;

(*c*) Hearing loss which is not caused by a specific incident or which is not identifiable by time and place of occurrence;

(iii) Mental illness as set out in § 11-9-113;

(iv) Heart, cardiovascular injury, accident, or disease as set out in § 11-9-114;

(v) A hernia as set out in § 11-9-523.

Both parties acknowledge that appellant's injury does not meet the requirements for a hernia injury as set out in § 11-9-523, and that it does not constitute an "accidental" injury (meaning one caused by a specific incident and identifiable by time and place of occurrence) within the meaning of § 11-9-102(5)(A)(i). Thus, we must review the Commission's decision to determine whether the record provides a substantial basis for its finding that Jobe failed to prove that the incisional hernia caused by gradual heavy lifting at Wal-Mart was a compensable injury caused by rapid repetitive motion.

The Commission adopted the opinion of the ALJ that relied upon Jobe's testimony that the production schedule required him to handle 125 nonconveyable items per hour. Jobe testified that the work was not rapid, that it was too slow for him, and that he was accustomed to faster work on a conveyor line where merchandise was back to back. Based upon that testimony, the Commission concluded that Jobe failed to prove that his incisional hernia was caused by rapid repetitive motion; his work was repetitive but not rapid. We have previously observed that rapid repetitive motion claims require proof that tasks associated with an injury be repetitive and that the repetitive motion be rapid. *Lay v. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

In our view, the Commission's opinion displays a substantial basis for its denial of the relief sought.

Affirmed.

BIRD and ROAF, JJ., agree.

GRIFFEN, J., concurs.

PITTMAN and NEAL, JJ., dissent.

WENDELL L. GRIFFEN, Judge, concurring. Jobe contends that the record does not contain a substantial basis for the decision denying his claim for benefits. I reluctantly disagree and join the decision to affirm the Commission despite my conviction that denial of compensation in this instance contravenes the historical purposes for which workers' compensation legislation was created.

Jobe's testimony that his work was not rapid provided the substantial basis for denying his claim. However, Jobe's claim shows, with painful clarity, the draconian effect that the changes to our Workers' Compensation Law has on injured workers. Jobe presented clear, credible, and uncontroverted proof that his injury resulted from the gradual effect of heavy lifting on his job at Wal-Mart. Dr. Rogers' opinion is undisputed that the weakened abdominal wall from the appendectomy coincided with the heavy lifting at Wal-Mart to produce the incisional hernia that has prevented Jobe from returning to work since September 6, 1994.

Yet the present definition of a "compensable injury" leaves Jobe uncompensated. He knows that his injury occurred at Wal-Mart. Wal-Mart knows that his injury occurred because of his work there. But because Jobe's heavy lifting was not rapid, he cannot receive compensation for his injury and the thirteen surgeries that he has sustained.

Whatever the rationale might have been for adding the rapid repetitive motion requirement to the definition of compensable injury, the requirement plainly discriminates against workers like Jobe who work on difficult, heavy, and repetitive jobs that are not rapid but that result in serious injury nonetheless. Jobe's gradual-onset injury would have plainly been compensable under prior

law based upon this record because it arose out of and in the course of his employment, with no determination as to whether it was rapid or slow, repetitive or static.

Although the more restrictive definition of a compensable injury enacted by Act 796 was intended to reduce the number of gradual-onset claims that workers might assert against their employers under the workers' compensation law, its long-term effect may be to expose employers to more expensive liability in tort than they faced under prior workers' compensation law. For example, now that Jobe's claim has been held noncompensable, Wal-Mart cannot assert the exclusive-remedy provision of the Workers Compensation Law as a bar to a civil action in tort. Jobe might assert a tort claim against Wal-Mart based on its statutory duty to provide a safe workplace prescribed by Ark. Code Ann. § 11-2-117(a), which reads:

> Every employer shall furnish employment which is safe for the employees therein and shall furnish and use safety devices and safeguards. He shall adopt and use methods and processes reasonably adequate to render such an employment and place of employment safe and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of the employees.

If employees such as Jobe file and pursue tort actions against their employers for gradual-onset injuries that do not involve rapid repetitive motion, it is likely that the potential exposure facing those employers for defending those claims might be greater than the cost of providing compensation benefits when one adds the potential recoveries for pain and suffering possible in jury verdicts.

Workers' compensation was designed to make this litigious and expensive process unnecessary for workers and employers, while ensuring that injured and disabled workers such as Jobe would not be doomed to poverty while awaiting the outcome of the tort process. It is regrettable that the scheme of social legislation that was supposed to provide prompt treatment and compensation to injured workers has developed into a process whereby hard-working people are left injured, uncompensated, and plagued by medical expenses simply because they work at tasks that are too

slow to be rapid and too infrequent to be deemed repetitive. Although I am obligated by the rule of law and our judicial role to affirm the result in this case, neither the rule of law nor my duty to interpret the revised workers' compensation statute can blind and muzzle me concerning the harsh result our decision means for this diligent injured worker.

JOHN MAUZY PITTMAN, Judge, dissenting. This case calls into question a finding of the Workers' Compensation Commission to the effect that loading and unloading 125 extremely heavy items per hour does not constitute rapid repetitive motion. The appellant's job was to load and unload items from a cart 125 times per hour. The items were all very big and heavy — like entertainment centers and 2400 BTU air conditioners — and the cart held seven items. Every hour appellant made eighteen trips with his cart and handled the extremely heavy items he transported approximately 250 times.

I agree with appellant's argument that the Commission should have considered the nature of the work in determining whether it was being performed rapidly. When determining whether motion is rapid and repetitive for purposes of the Workers' Compensation Act, the Commission must consider all of the individual movements involved. *Baysinger v. Air Systems, Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996). Viewed in this light, I do not think it reasonably could be said that appellant's motion was not rapid as well as repetitive. Had the legislature wished to define rapidity in absolute terms, it could easily have specified the number of movements per hour that would be required before motion would be considered rapid. Because the Commission did not define rapidity in such absolute terms, I believe that rapidity is a relative term under the Act that must be defined in context of the work involved. Lifting a pencil twenty times per minute may not be rapid, but lifting a piano twenty times per minute would be a different matter entirely.

I respectfully dissent.

NEAL, J., joins in this dissent.

ARKANSAS DEPARTMENT OF HUMAN SERVICES *v.*
Curtis WELBORN and Christine Welborn

CA 98-890 987 S.W.2d 768

Court of Appeals of Arkansas
Division III
Opinion delivered April 7, 1999

Elisabeth McGee, Office of Chief Counsel, for appellant.

Ronald W. Metcalf, for appellees.

TERRY CRABTREE, Judge. This case arises from a state administrative hearing that found that the appellant, Arkansas Department of Human Services (DHS), could terminate a federal adoption subsidy, which had been payable to the appellees, Curtis and Christine Welborn. This appeal is brought in response to a decision of the Pulaski County Circuit Court reversing the administrative law judge's ruling. The circuit judge entered his order on April 6, 1998, finding that the hearing officer acted erroneously, without substantial evidence, and in an arbitrary and capricious manner in interpreting 42 U.S.C. § 673. On appeal, appellant argues that we should reverse the circuit judge's order. We disagree and affirm.

On December 6, 1993, appellees adopted two special-needs children through the Adoption Services Unit of the Department of Human Services in Arkansas: James, who was born August 8, 1982, and Thomas, who was born June 26, 1983. At that time, appellees signed an Adoption Assistance Agreement for Federal IV-E Funded Assistance, wherein they acknowledged the terms under which the federal government would provide funding to parents of special-needs adopted children pursuant to 42 U.S.C. § 673. Appellees renewed that agreement on December 6, 1994. This agreement remained effective until December 6, 1995, and provided payment to appellees of $4,050 annually for James and $4,200 annually for Thomas.

In December 1993 appellees, Thomas, and James, moved to Tampa, Florida. Approximately two years later, in October 1995, the boys were placed in a private Christian boarding school in Florida. In November 1995 the boys were placed in another hospital and then in the Children's Home of Tampa Bay. September 1995 was the last time either of the boys lived in appellees' home. Since then, the boys have been enrolled in and referred to various residential care facilities in Florida and remained there at the time this case was heard.

In March 1996 appellees filed a Petition to Terminate Parental Rights in Florida. No action was taken by the Florida court on appellees' petition and instead, on March 21, 1996, the Florida Department of Health and Rehabilitative Services (DHRS) took the two children into protective custody. In April 1996, DHRS filed a petition against appellees alleging that they refused any offer of services to assist the family, refused to take the children back into their home, and refused to pick up the children from the treatment facility. Appellees then entered into an agreement with DHRS to pay DHRS child support by assigning their federal subsidy check to Florida on a monthly basis. However, in April 1996, the Arkansas Division of Children and Family Services unilaterally terminated appellees' monthly federal IV-E maintenance

payments based on the agency's determination that appellees were no longer emotionally supporting Thomas or James.

Meanwhile, on October 18, 1996, appellees filed a Motion to Set Aside Adoption in the Chancery Court of Sebastian County, Arkansas. The motion was denied because the one-year statue of limitations for challenging adoption decrees in Arkansas had run.

On April 17, 1997, appellees requested an administrative hearing on the issue of termination of the adoption subsidy. The ALJ held the hearing, and on July 21, 1997, she issued her order upholding the agency's decision to terminate the adoption subsidy because appellees had "violated the terms of the Adoption Assistance Agreement and the federal statute relating to this issue when they emotionally and physically abandoned Thomas and James in Florida." However, the ALJ found that "[t]he placement of Thomas and James in a residential treatment facility did not, per se, disqualify the Welborns from receiving the assistance." Then, in July 1997, a state court in Florida found James and Thomas "dependent" under Florida law.

■ ■ A state agency's interpretation of federal law, as opposed to its findings of fact, is not entitled to deference. *Alexander v. Pathfinder, Inc.*, 906 F. Supp. 502 (E.D. Ark. 1995), *rev'd in part on other grounds*, 91 F.3d 59 (8th Cir. 1996); *see also DeLuca v. Hammons*, 927 F. Supp. 132 (S.D.N.Y. 1996). In this case, we review a question of law; therefore, we employ a *de novo* standard of review. *See Alexander, supra.*

The "Adoption Assistance Agreement for Federal IV-E Funded Assistance" reflects the terms of the federal statute. At issue is 42 U.S.C. § 673(a)(4), which provides in part:

> (A) no payment may be made to parents with respect to any child who has attained the age of eighteen (or, where the State determines that the child has a mental or physical handicap which warrants the continuation of assistance, the age of twenty-one),

> and (B) *no payment may be made to parents with respect to any child if the State determines that the parents are no longer legally responsible for the support of the child or if the State determines that the child is no longer receiving any support from such parents.*

(Emphasis added.)

The ALJ reasoned that the term "support" in the above-quoted provision must mean "more than mere monetary payments" because "[t]o define the term otherwise would be redundant as to the legal responsibility issue." The ALJ found that the clause, "if the State determines that the child is no longer receiving any support from such parents," would be rendered meaningless unless the word "support" was read to include emotional as well as financial support. We find this interpretation to be clear error.

A comparison of subsection (A) and subsection (B) exposes the fallacy in this reasoning. Subsection (A), in essence, says that assistance payments stop when the child is eighteen unless the child is handicapped; parents of handicapped children may receive assistance payments until the child is twenty-one. This dovetails with subsection (B), which says that support stops when the parents are no longer legally responsible for supporting the child, or when the parents are no longer actually supporting the child. Taking subsection (A) by itself, it could be argued that parents of handicapped children should receive assistance payments until the child is twenty-one just because the child is handicapped. Subsection (B) says that having a handicapped child over eighteen is not enough; the parents, although not legally required to support the child, must actually support the child to qualify for assistance payments. This language, by defining and restricting the application of subsection (A), serves an important purpose and consequently is not "redundant as to the legal responsibility issue." The ALJ's decision was based on faulty reasoning and an illogical enlargement of the scope of the statute.

The purpose of this statute is to provide funds, including monetary supplements for parents of special-needs adopted children. This is evidenced not only through the statute's title, "Adoption Assistance Program," but also within the text of the statute. Consequently, we do not believe that the language "no payment may be made to parents . . . if the State determines that the child is no longer receiving any support from such parents" means that the State may terminate the subsidy if the parents fail to provide emotional support to the children.

We recognize that the ALJ found appellees had no intention of reuniting with the two boys. The ALJ specifically stated in her final order:

> It is clear from the Welborns' answers to the Interrogatories as well as from Mr. Welborn's testimony at the administrative hearing that, the Welborns do not "have any plans for a future relationship with either Thomas or James." The Welborns have not spoken to Thomas or James since March 1996.

However, this finding and other similar findings made by the ALJ matter not. The federal statute does not condition the continuation of subsidy payments upon a State's determination of whether parents provide emotional support for special-needs adopted children.

Based upon our *de novo* review of the question of law presented, we are convinced that the ALJ erred in her interpretation of 42 U.S.C. § 673.

Affirmed.

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

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

June 2, 1999

D. Franklin Arey, III, Chief Counsel; *Elisabeth McGee*, Deputy Counsel, for appellant.

Ronald W. Metcalf, for appellees.

TERRY CRABTREE, Judge. In its petition for rehearing, the appellant, Arkansas Department of Human Services, asserts that we applied the wrong standard of review in reaching our decision in *Arkansas Dept. of Human Services v. Welborn*, 66 Ark. App. 122, 987 S.W.2d 768 (1999). Appellant claims that we improperly applied a *de novo* standard of review rather than a "clearly wrong" standard of review as in *Ramsey v. Dept. of Human Services*, 301 Ark. 285, 783 S.W.2d 361 (1990).

Appellant's reliance on *Ramsey* is misplaced. We are not bound by the standard of review that the court applied in *Ramsey* because in that case, the administrative agency only interpreted state law. In the case at bar, the administrative law judge

attempted to interpret federal law. For that reason, *Ramsey* is distinguishable.

Even if appellant was correct in its argument that we should apply the "clearly wrong" standard of review, the argument would have no effect because we expressly found that the ALJ clearly erred when we stated, "We find this interpretation to be *clear error.*" *Welborn*, 66 Ark. App. 122, 125, 987 S.W.2d 768, 770 (emphasis added).

The petition for rehearing is denied

MOUNTAIN HOME MANUFACTURING *v.*
David K. HAFER

CA 98-1196 991 S.W.2d 127

Court of Appeals of Arkansas
Division III
Opinion delivered April 14, 1999

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

John A. Crain, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellee David K. Hafer brought a workers' compensation claim against appellant Mountain Home Manufacturing, alleging that he sustained compensable pulmonary injuries when his left lung collapsed on April 16, 1996, and again on May 13, 1996. The Workers' Compensation Commission found his pulmonary condition to be compensable and awarded related medical benefits and temporary total disability benefits. Mountain Home Manufacturing now appeals, raising two arguments for reversal.

First, it contends that the Commission erred in its construction and application of Ark. Code Ann. § 11-9-114 (Repl. 1996), which provides:

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his burden of proof.

Specifically, the appellant argues that the Commission erred in finding that circumstances elevated Mr. Hafer's normal work activities to the level of extraordinary and unusual exertion on April 16, 1996. The appellant's remaining argument is that the decision of the Commission is not supported by substantial evidence. We find no error and affirm.

When reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if supported by substantial evidence. *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

At the hearing before the Commission, Mr. Hafer testified on his own behalf. He stated that he was employed with Mountain Home Manufacturing as a truck loader. On April 16, 1996, he was loading steel I-beams that were ten to fifteen feet in length and weighed 370 pounds. One of his co-workers was lifting the I-beams with a forklift, and Mr. Hafer was seeing to it that the I-beams were balanced so that they would not fall off the forklift as they were being loaded. Mr. Hafer testified that "I was trying to scoot the beams over to get them balanced" and "when I lifted up, I felt something." At first he thought he had hurt his back, but soon realized that this was not the problem when he became short of breath and felt tired. He discontinued working, and on the following day he visited his family physician, Dr. Paul Wilbur.

Dr. Wilbur diagnosed a left pneumothorax and referred Mr. Hafer to Dr. William Ford. Dr. Ford admitted Mr. Hafer into the hospital, where he stayed for two days. While there, Mr. Hafer was treated with oxygen and the placement of a chest tube. After being released, he rested for two weeks and returned to work.

Mr. Hafer testified that, on May 13, 1996, he suffered another injury at work. On that day, he was assisting in lifting some long scraps of metal when he suffered a recurrence. He went to the emergency room, and was treated by Dr. Ford on the following day. Mr. Hafer underwent a surgical procedure and remained hospitalized for eight days. Thereafter, he took about a month off work. Then, upon realizing that he wasn't physically able to return to work for Mountain Home Manufacturing, he began working as a manager for a fast-food restaurant.

On cross examination, Mr. Hafer was asked about the level of exertion that he encountered on April 16, 1996, when he first suffered an injury. Mr. Hafer testified:

> The exertion I did on April 16 wasn't necessarily unusual. I had exerted myself like that many times before, and there was nothing out of the ordinary on this day. The exertion for the I-beams on April 16 was more than for the scrap pieces on May 13.

On redirect examination, Mr. Hafer testified:

> The unusual fact about this day was that we were in a rush to get the truck out. If I recall correctly, it was supposed to leave that afternoon and it wasn't going to leave. We were rushed to get it out. That is why I had to help. Normally I would be by myself on a truck. Also, the way it was stacked was unusual.

Mr. Hafer also indicated that, for the type of lifting that he was performing that day, there was normally more help and more equipment.

In the Commission's opinion, it acknowledged Mr. Hafer's testimony in which he denied doing anything out of the ordinary on the day of the initial injury. However, it nonetheless found that he satisfied the requirements of Ark. Code Ann. § 11-9-114 (Repl. 1996), and that he established entitlement to compensation. The Commission reasoned:

> Claimant's foregoing testimony notwithstanding, a careful review of his earlier comments leads us to the conclusion that he was engaged in "extraordinary" exertion when his first pneumothorax occurred. For instance, claimant testified that another forklift would have normally been used to assist with the task now at issue. However, none were available and, at the same time, a "rush" was on the job "because the truck needed to leave." Claimant thus found himself trying to "scoot" 370 pound I-beams into proper position on a forklift with nothing more than his own physical effort. Furthermore, while claimant acknowledged that he had been involved with moving heavier items, he also stated that "we always had more help and more equipment for that kind of thing." So far as claimant could recall, the I-beams were the heaviest type of item that two people had "tried to do." We are persuaded that these circumstances elevated claimant's otherwise normal work activity to the level of "extraordinary and unusual" exertion on April 16, 1996, which in turn precipitated claimant's resulting pneumothorax.

The appellant's first point on appeal is that the Commission erred in its interpretation and application of Ark. Code Ann. § 11-9-114(b)(1) (Repl. 1996). It asserts that the Commission erroneously concluded that, because the circumstances on April 16, 1996, were unusual, the pulmonary disorder was compensable.

The appellant submits that the correct test is whether the exertion, not the circumstances, was extraordinary and unusual in comparison to Mr. Hafer's normal work activities, and further submits that the exertion on the day at issue was not unusual and thus did not give rise to a compensable pulmonary injury.

We disagree with the appellant's first contention. It is apparent from its opinion that the Commission did not base its conclusion on unusual circumstances alone. Instead, it stated, "We are persuaded that these circumstances elevated claimant's otherwise normal work activity to the level of 'extraordinary and unusual' *exertion* on April 16, 1996[.]" (Emphasis ours.) Therefore, it correctly construed and applied the applicable statute.

The appellant's remaining argument is that the Commission's decision is not supported by substantial evidence. It contends that no substantial evidence supports the conclusion that Mr. Hafer's exertion on April 16, 1996, was extraordinary or unusual, particularly in light of his own testimony to the contrary. The appellant also contends that the Commission erred in finding a causal connection between Mr. Hafer's work and his injury. For this proposition, the appellant cites the following excerpt from the Merck Manual of Diagnosis and Therapy:

> Spontaneous pneumothorax: Air enters the pleural space without antecedent trauma. The process is known as simple spontaneous pneumothorax when it occurs in a previously healthy person with only localized pulmonary disease. . . . Most spontaneous pneumothoraces occur without associated exertion.

The appellant argues that, because most spontaneous pneumothoraces occur without exertion, a fair-minded person could not conclude that the exertion involved in this case was causally connected with Mr. Hafer's pneumothorax.

We find that there was substantial evidence to support the Commission's decision. While Mr. Hafer testified that his job was usually strenuous and often involved heavy lifting, he also enumerated factors that demonstrated unusual and extraordinary exertion on the day of employment at issue. He stated that

he was in a hurry due to time constraints, that more equipment and help was normally implemented to lift the I-beams, and that the beams were the heaviest items that two people tried to lift. As for the appellant's argument that there was lack of evidence as to causation, we note the following opinion expressed in a letter written by Dr. Ford:

> Mr. Hafer was seen in my office today. Now that he is four weeks from his recurrent spontaneous pneumothorax, I was able to visit with him and answer his questions regarding the reason for these two spontaneous lung collapses.
>
> David revealed to me that on both occasions, these incidents happened while he was working. During the first incident David was lifting and straining to pick up some heavy material. The type of work that David does is a large contributor to these pneumothoraxes. Since both of these episodes happened while he was working, I feel very strongly that this condition is indeed work related.

The Commission was entitled to believe the opinion of Mr. Hafer's treating physician, and it amounted to substantial evidence that Mr. Hafer's injuries were caused by his work activities.

Affirmed.

PITTMAN and CRABTREE, JJ., agree.

Kendell CAMP *v.* STATE of Arkansas

CA CR 98-873 991 S.W.2d 611

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered April 14, 1999

Martin E. Lilly, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in this case, Kendell Camp, was convicted at a jury trial of third-degree

domestic battery for having beaten his wife. He was fined $500 and ordered to pay $211 in court costs. On appeal, appellant contends that the trial court erred in allowing a police officer to testify as to statements made by the victim and in admitting a report made by the officer about his interview of the victim. He also contends that the trial court erred in admitting an affidavit that was filed by the victim in support of her request for an order of protection. We affirm.

At trial, the victim refused to testify. Over appellant's objection, the State was then allowed to introduce Officer Barry Holt's testimony concerning the victim's statements to the officer at the hospital some three hours after the alleged incident and the officer's written report of that interview. The trial court expressly found that the evidence was admissible under both Ark. R. Evid. 803(2) (excited-utterance exception) and 804(b)(5) (residual-hearsay exception when witness is unavailable).

■ In his first point for appeal, appellant argues that the trial court erred in admitting the the officer's testimony and report under Rule 804(b)(5). He makes no argument that the trial court's ruling under Rule 803(2) was erroneous.[1] Therefore,

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[1] Appellant does attack this ruling in his reply brief, but an argument cannot be raised for the first time in a reply brief. *Jordan v. State,* 323 Ark. 628, 917 S.W.2d 164 (1996).

The dissenting judges concede that appellant abandoned the excited-utterance argument by not arguing it in his initial brief. Nevertheless, they argue that, because the trial court's ruling on that question was wrong, we must reverse. Specifically, they argue, "[A]ll we can tell is that the appellant abandoned his Rule 803(2)-based allegation of error. The appellant's abandonment of this issue does not, however, permit the majority to assume that the trial court's Rule 803(2) decision was correct. If the trial court's Rule 803(2) ruling was correct, the majority should explain why." In other words, according to the dissent, we cannot affirm a judgment unless we search the record and conclude that every ruling adverse to an appellant was, in fact, a correct one, even in the absence of argument by the appellant on appeal. While a rule somewhat akin to that may be the law in cases where one is sentenced to life imprisonment or death, it simply is not the law in other cases. *See* Ark. R. App. P.—Crim. 14; *see also* Ark. Sup. Ct. R. 4-3(h). When an issue is not argued on appeal in an ordinary case, the issue is considered abandoned and is not addressed. *See Fink v. State,* 280 Ark. 281, 658 S.W.2d 359 (1983); *see also King v. State,* 323 Ark. 671, 916 S.W.2d 732 (1996); *Pearrow v. Feagin,* 300 Ark. 274, 778 S.W.2d 941 (1989); *Flowers v. State,* 30 Ark. App. 204, 785 S.W.2d 242 (1990). We do not hold that the trial court's ruling under Rule 803(2) was, in fact, correct; we do not reach the

since one of the trial court's stated grounds for having admitted the officer's testimony and report is not challenged on appeal, we need not decide whether the trial court erred in admitting the evidence. In other words, even if we were to assume that appellant's argument as to the applicability of Rule 804(b)(5) was correct, we still would not reverse in light of appellant's failure to attack the trial court's independent, alternative basis for its ruling. *See* Ark. R. App. P.—Crim. 14; *Pearrow v. Feagin*, 300 Ark. 274, 278-79, 778 S.W.2d 941, 943 (1989) (where trial court expressly based its decision on two independent grounds and appellant challenged only one on appeal, supreme court affirmed without addressing either).

Also admitted over appellant's hearsay objection was an affidavit executed by the victim on the day after the battery. The affidavit was apparently filed with the chancery court, in conjunction with the victim's complaint for divorce from appellant, in an effort to obtain an order of protection. The trial court found this evidence admissible under Rule 804(b)(5). On appeal, appellant contends that the trial court erred in so ruling. The State argues

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issue. We hold that, by abandoning the argument on appeal, appellant has waived the right to have the propriety of the ruling decided.

The dissenting judges next maintain, as did appellant's counsel at oral argument, that appellant did argue in his first brief that the court's ruling under Rule 803(2) was erroneous because he stated as much in his "argument heading." This position is interesting and might be debatable had it not long ago been decided that this was not the law. *See Brockwell v. State*, 260 Ark. 807, 545 S.W.2d 60 (1976) (mere statement of point for appeal is insufficient argument for reversal; point waived if not argued); *see also Dougan v. State*, 330 Ark. 827, 957 S.W.2d 182 (1997) (mere mention of an alleged error in a subheading of one's brief, without any argument or citation to authority, will not be addressed).

The dissent further maintains that appellant did, in fact, raise the excited-utterance argument in his initial brief because "he touch[ed] on facts related to the excited utterance exception." However, with all due respect, to discern this argument on the basis of the hints and traces mentioned in the dissent (*i.e.*, appellant's eight-word parenthetical mention that the victim's statement was made three hours after the battery, which mention appears in a paragraph devoted to the residual-hearsay exception of Rule 804(b)(5)) requires a degree of sensitivity bordering on precognition. A fair reading of the briefs in this case leads to the inescapable conclusion that appellant simply abandoned the excited-utterance argument in his brief (a fact that the dissent both admits and denies), that the State discussed the issue in its own brief in such a manner that awakened appellant's interest in the argument, and that appellant responded by advancing the argument for the first time in his reply brief.

that the affidavit was cumulative to the collective information provided to the jury through the officer's testimony and report, and that any error in its admission was harmless. Appellant argues that the affidavit was not merely cumulative because it contained "substantially more information than was originally provided to Officer Holt." Again, we conclude that we need not decide whether the trial court erred in admitting the evidence.

The law is well settled that prejudice is not presumed, and we will not reverse absent a showing of prejudice. *Bell v. State,* 334 Ark. 285, 973 S.W.2d 806 (1998). Our courts have refused to find prejudicial error where the evidence in question was merely cumulative to evidence otherwise admitted at trial. *See Henderson v. State,* 322 Ark. 402, 910 S.W.2d 656 (1995); *Griffin v. State,* 322 Ark. 206, 909 S.W.2d 625 (1995); *Gibson v. State,* 316 Ark. 705, 875 S.W.2d 58 (1994); *Hooper v. State,* 311 Ark. 154, 842 S.W.2d 850 (1992); *Shaver v. State,* 37 Ark. App. 124, 826 S.W.2d 300 (1992).[2]

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[2] While appellant argues on appeal that his rights under the Confrontation Clause were violated by admission of the affidavit, his abstract fails to reflect that he objected to introduction of the affidavit on that ground below. Therefore, we will not analyze the admission of the affidavit under the constitutional standard of "harmless beyond a reasonable doubt." *See Griffin v. State,* 322 Ark. 206, 221, 909 S.W.2d 625, 633 (1995).

The dissenting judges maintain that appellant's Confrontation Clause argument was properly preserved when, immediately after the trial court denied appellant's *hearsay* objection by reference to Rule 804(b)(5), appellant asked the court for the basis of its finding that the statement was trustworthy. They argue that, since case law holds that "'particularized guaranties of trustworthiness' of evidence is the touchstone of a Confrontation Clause argument," appellant's request effectively raised the constitutional argument. However, as the dissent notes, "equivalent circumstantial guarantees of trustworthiness" is an *express requirement* under the terms of Rule 804(b)(5), the very rule that the trial court had just referenced and which it again referenced in response to appellant's request. The law is clear that, in order to preserve an argument for appeal, one must make a specific objection sufficient to apprise the trial court of the particular error alleged. *Ayers v. State,* 334 Ark. 258, 975 S.W.2d 88 (1998); *Anthony v. State,* 332 Ark. 595, 967 S.W.2d 552 (1998); *Foreman v. State,* 328 Ark. 583, 945 S.W.2d 926 (1997). An appellant cannot change the grounds for his objection on appeal, but is bound by the nature and scope of his argument at trial. *Ayers v. State, supra.* It is also clear that a hearsay objection is insufficient to preserve for appeal a Confrontation Clause argument. *Gatlin v. State,* 320 Ark. 120, 895 S.W.2d 526 (1995); *Killcrease v. State,* 310 Ark. 392, 836 S.W.2d 380 (1992). Under the circumstances presented here, we cannot conclude that the mere

Here, we conclude that the information contained in the affidavit was cumulative to that which was introduced through the officer's testimony and his report, whose introduction appellant has failed to demonstrate was improper. While appellant argues that the affidavit contained substantially more information, we cannot agree. The affidavit detailed the physical attack on the victim for which appellant was prosecuted. It further stated that appellant had abused the victim for some ten years and had threatened to kill her if she went to the police. According to appellant's abstract of the record, this same information was contained in either the officer's testimony or his written report or both. Under these circumstances, we conclude that the information in the affidavit was merely cumulative to the evidence otherwise introduced at trial, and any error in its admission was not prejudicial.[3]

Affirmed.

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

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mention of the word "trustworthy" was sufficient to apprise the trial court of any Confrontation Clause argument.

[3] The dissenting judges concede that we have correctly described the contents of appellant's abstract. They also acknowledge the longstanding rule that we will not go to the record to reverse. Yet, they proceed to make two inconsistent and faulty arguments. First, the dissent states that the majority's conclusion that the affidavit was cumulative to the officer's report is based on speculation and cannot stand because, while appellant's abstract indicates that some *unknown portions* of the report were excised before it went to the jury, the abstract "fails to show what information was excised." Second, the dissent argues that this case should be reversed on account of something that they say appears in the transcript but not in appellant's abstract. We cannot agree with either of these arguments. The first is based on the dissenting judges' assumption, unsubstantiated by the abstract, that the abstracted version of the officer's report is not the redacted version shown to the jury. In any event, both arguments are contrary to longstanding rules governing appellate practice. Rule 4-2(a)(6) of the Rules of the Arkansas Supreme Court requires that an appellant present us with an abstract of those parts of the record that are necessary to an understanding of the issues presented for decision. Clearly, the burden is on an appellant to bring up a record sufficient to demonstrate reversible error. *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997). The record on appeal is limited to that which is abstracted. *Allen v. State,* 326 Ark. 541, 932 S.W.2d 764 (1996) (reversing the court of appeals and reinstating a conviction where this court had gone to the record to reverse). We will not examine the transcript of a trial to reverse a trial court. *Id.* Here, as abstracted by appellant, the affidavit was cumulative to the report.

HART and NEAL, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. The evidence used to convict the appellant was inadmissible hearsay. Even though the victim, the appellant's wife, Cindy Camp, did not testify at trial, the trial court permitted Officer Barry Holt to repeat in court her out-of-court statements to him. His written report of that statement was also introduced into evidence. The trial court expressly found that both were admissible as an excited utterance pursuant to Ark. R. Evid. 803(2) and as an exception to the hearsay rule pursuant to Ark. R. Evid. 804(b)(5). Relying again on Rule 804(b)(5), the trial court also permitted the State to introduce into evidence Cindy Camp's affidavit that she executed on the day after the battery in connection with her complaint for divorce from the appellant.

Neither Holt's testimony regarding Cindy Camp's statement nor his written report was properly admitted. First, neither was admissible pursuant to Rule 803(2), the "excited utterance" exception to the hearsay rule. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The theory behind the excited utterance exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." *Luedemann v. Wade*, 323 Ark. 161, 164, 913 S.W.2d 773, 775 (1996). It must be established that "the utterance was made soon enough after the accident for it to reasonably be considered a product of the stress of accident, rather than of intervening reflection or deliberation." *Id.* "An excited utterance must have been made before there was time to contrive and misrepresent; that is, it must have been made before reflective and deliberative senses took over." *Id.* at 165, 913 S.W.2d at 775.

Barry Holt testified extensively regarding his taking of Cindy Camp's statement. He first obtained from her basic information, such as her name and date of birth. He then asked her what happened. After taking the report, he read it back to her and asked if it accurately reflected her comments. Cindy Camp agreed that it did, and she signed the report. Holt testified that three hours

passed between the time Cindy Camp told him the incident occurred and the time he made contact with her. Cindy Camp had time to contact a friend who met her at the hospital.

Mrs. Camp, after meeting a friend, was interrogated by Holt. She then was given an opportunity to review the report to make sure that it accurately reflected her remarks. Three hours passed between the incident and the time she gave the statement. In view of these facts, we must conclude that Cindy Camp's remarks to Holt were born of deliberation and reflection rather than an excited condition. *See Luedemann, supra* (officer's testimony regarding a statement given to him at an accident scene regarding how an accident occurred was not an excited utterance despite the officer having arrived "minutes" after the accident occurred); *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996), *cert. denied*, 520 U.S. 1242 (1997)(officer's testimony regarding a witness's choosing the defendant out of a photographic lineup was a deliberate and reflective act rather than an excited utterance).

Moreover, neither Holt's testimony nor his written report was admissible pursuant to Rule 804(b)(5). That rule provides that a statement is not excluded by the hearsay rule if the declarant is unavailable as a witness if it has "equivalent circumstantial guarantees of trustworthiness" of other exclusions provided by Rule 804(b). The evidence lacked such equivalent circumstantial guarantees of trustworthiness. *See Doles v. State*, 275 Ark. 448, 631 S.W.2d 281 (1982)(witness's statement given to the police shortly after the crime occurred was not admissible pursuant to Rule 804(b)(5)). It should be noted that investigative reports by the police are specifically excluded as an exception to the hearsay rule. Ark. R. Evid. 803(8)(i). This further indicates that the report lacked such guarantees.

The majority states that the appellant failed to challenge in his initial brief the admissibility of the evidence pursuant to Rule 803(2). The majority concludes that because the appellant did not do so, there is a separate ground for affirming the introduction of the evidence that went unchallenged on appeal, thus obviating any need for discussing the admissibility of the evidence pursuant to

Rule 804(b)(5). The general rule is that if an appellant presents a meritorious allegation of error, the appellant wins. Here, the appellant has raised an allegation of error that the majority assumes, without deciding, is meritorious; therefore, the appellant ought to win. The majority says the appellant should have appealed an alternative ruling by the court and cites Ark. R. App. P.—Crim. 14 and *Pearrow v. Feagin*, 300 Ark. 274, 278-79, 778 S.W.2d 941, 943 (1989). Neither support this proposition. On its face, Rule 14 does not. At most, *Pearrow* holds that, in a civil case, if an appellant wants to obtain reversal of the trial court's denial of a counterclaim, the appellant must argue that there was not a valid procedural basis for denying the counterclaim and must argue the counterclaim would have been meritorious if it had been allowed. *Pearrow* does not hold that a defendant in a criminal case must present, on appeal, arguments that would show that the evidence was not admissible under any theory articulated by the trial court or under any conceivable theory.

The majority stands on its head the familiar case law principle that we will affirm a trial court's ruling for any reason if the ruling was correct. Here, the majority opinion erroneously equates an appellant's abandonment of an issue by failing to argue it on appeal, with a concession by the appellant that the trial court's ruling is correct. We submit, given the procedural posture of this case, that all we can tell is that the appellant abandoned his Rule 803(2)-based allegation of error. The appellant's abandonment of this issue does not, somehow, permit the majority to assume that the trial court's Rule 803(2) decision was correct. If the trial court's Rule 803(2) ruling was correct, the majority opinion should explain why. In fact, for reasons we have previously explained, the trial court's ruling was wrong.

In any event, appellant's argument was raised in his initial brief. The argument heading in appellant's brief reads, "THE TRIAL COURT ERRED IN ADMITTING A POLICE OFFICER'S HEARSAY TESTIMONY UNDER ARKANSAS RULE OF EVIDENCE 803(2) AND 804(b)(5)." The appellant then noted facts related to the appellant's claim that the excited

utterance exception did not apply. Specifically, the appellant noted that Holt testified that Cindy Camp seemed upset when he contacted her and that three hours passed between the time the incident occurred and when Holt met her.

In *Dixon v. State*, 260 Ark. 857, 862, 545 S.W.2d 606, 609 (1977), an appellant raised points for reversal, "without any citation of authority and actually without any real argument. . ." The Supreme Court of Arkansas adopted the position of the Supreme Court of Oklahoma and concluded that "[a]ssignments of error presented by counsel in their brief, unsupported by convincing argument or authority, will not be considered on appeal, unless it is apparent without further research that they are well taken." Given that the appellant cited authority to this court regarding the excited utterance exception to the hearsay rule, that he presented an argument touching on facts related to the excited utterance exception, that he argued the point both below and in his reply brief, and, most importantly, that it is apparent without further research that his argument is well taken, it is untenable for the majority to dodge the issues presented here by asserting a perceived procedural violation on the part of the appellant. For these same reasons, the cases cited by the majority for the proposition that the appellant failed to challenge the admissibility of the evidence pursuant to Rule 803(2) are distinguishable.

Also, Cindy Camp's affidavit was not properly admitted pursuant to Rule 804(b)(5). *See Poe v. State*, 291 Ark. 79, 83, 722 S.W.2d 576, 578 (1987)("[O]rdinary affidavits taken under oath do not carry the same trustworthiness as the exceptions to hearsay listed in Rule 804.") The majority concludes that the affidavit introduced into evidence was merely cumulative to Holt's testimony and the report. Consequently, its admission, the majority holds, was harmless. However, since both the testimony and the report were not properly admitted, the affidavit was not cumulative.

Moreover, the majority resorts to speculation to conclude that the affidavit was cumulative to Holt's testimony and his written report. The affidavit provided that the appellant threatened to

kill Cindy Camp and that the violence had continued for ten years. Holt did not testify to this. Limiting our review to the abstract, whether this information was or was not put before the jury through Holt's written report is a matter of speculation by the majority because the trial court excised portions of the report, and that fact is borne out by the abstract. The appellant's abstract of Holt's written report fails to show what information was excised from it before it was given to the jury. Thus, the majority cannot conclude that the affidavit was cumulative to the report without resorting to speculation or examination of the record to determine what version of the report the jury read. Were we to inspect the record, we would see that the affidavit was not cumulative to Holt's written report because the trial court excised its passages regarding Cindy Camp's statements that the appellant threatened to kill her and that the violence had continued for ten years before it was admitted into evidence.

The affidavit provided other information not to be found in either Holt's testimony or his written report. The affidavit provided that the appellant had choked her during an incident of physical abuse that occurred six months earlier. The affidavit further provided that she was afraid of the appellant and that there was an "immediate and present danger of domestic abuse. . . ." The prejudicial impact of this information is obvious.

Further, the majority concludes that the abstract does not reflect that the appellant argued at trial that the admission of the affidavit violated the Confrontation Clause and that consequently, the issue was not preserved for appellate review. Thus, the majority also concludes that it will not analyze the admission of the affidavit under the constitutional standard of harmless beyond a reasonable doubt. According to the abstract, the trial court stated that the affidavit was admissible pursuant to Rule 804(b)(5). The appellant asked, "Can I inquire of Your Honor what facts or basis that the Court is relying on to make a finding that the statement is trustworthy?" The trial court replied, "No, you can't. I ruled 804(b)(5)." Certainly, the "particularized guaranties of trustworthiness" of evidence is the touchstone of a Confrontation Clause

argument. *See Idaho v. Wright*, 497 U.S. 805, 815 (1990). The appellant's own remarks did not limit his objection to Rule 804(b)(5), and the trial court summarily terminated any further discussion. In view of the appellant's abstracted request that the trial court analyze the trustworthiness of the evidence, his Confrontation Clause argument was properly preserved. As argued by the appellant at trial and on appeal, the introduction of the affidavit was contrary to the protection afforded the appellant by the Confrontation Clause. *See generally Wilson v. City of Pine Bluff*, 6 Ark. App. 286, 292, 641 S.W.2d 33, 37 (1982)("The [C]onfrontation [C]lause prevents the state from trying the defendant by using *ex parte* affidavits or depositions in lieu of examination and cross-examination of the witnesses in front of the trier of fact.") Further, the admission of the affidavit must be analyzed under the constitutional standard of harmless beyond a reasonable doubt.

Granted, our case law mandates that an issue must be raised both at trial and on appeal before it may be addressed, that the abstract must reflect that it was so raised, and that an appellate court cannot go to the record to reverse. In order to affirm, the majority narrowly read the appellant's abstract and argument on appeal. Further, it concludes that evidence was cumulative without being able to determine from the abstract whether it was cumulative. Our case law does not mandate this outcome.

I respectfully dissent.

NEAL, J., joins in this dissent.

Mike SANTIFER and Terri Santifer *v.*
ARKANSAS PULPWOOD COMPANY, Inc.

CA 98-933 991 S.W.2d 130

Court of Appeals of Arkansas
Division II
Opinion delivered April 14, 1999

Robert L. Depper, Jr., for appellants.

Harrell & Lindsey, P.A., by: *Paul E. Lindsey* and *Christina S. Carr*, for appellee.

JOSEPHINE LINKER HART, Judge. This is a breach-of-contract case. Appellee, Arkansas Pulpwood Company, Inc., signed a contract with appellant, Terri Santifer, to purchase standing timber on a sixteen-acre tract that she and her husband, appellant Mike Santifer, owned. The timber contract that appellee and Terri Santifer signed had a warranty-of-title provision that appel-

lee alleged appellants breached. According to appellee, appellants had breached the warranty-of-title provision because another timber company had an unrecorded deed, without an acknowledgment, to the timber that it had purchased from the appellants' predecessor-in-title. Appellee sued appellants in Ouachita County Circuit Court and sought damages of $16,500. The circuit court, sitting as the trier-of-fact, returned a verdict in appellee's favor and awarded appellee the $16,500 in damages it requested. The circuit court entered a judgment in appellee's favor, which appellants challenge on appeal. We affirm the judgment as to appellant Terri Santifer and reverse and dismiss the judgment as to appellant Mike Santifer.

In July 1997, appellee filed an amended complaint against appellants in Ouachita County Circuit Court. Therein, appellee alleged that in August 1996, pursuant to a contract, it purchased from Terri Santifer for $10,000 the timber located on certain land that she owned. Appellee alleged further that the timber contract had a warranty-of-title provision that Terri Santifer breached. Appellee alleged that Terri Santifer breached the warranty-of-title provision in that a predecessor-in-title to her land, William Marks, had previously conveyed the timber thereon to a third party, the Becton Timber Company, Inc. Appellee alleged further that "[appellant] Mike Santifer was involved in this transaction, acquiesced to the sale, made certain representations to [appellee] and is liable with Terri Santifer for the breach of warranty of title." With regard to damages, appellee stated in its complaint, "As a result of [appellants'] breach of warranty-of-title in the timber deed, [appellee] is entitled to recover judgment against the [appellants] for the damages suffered by [appellee]. Those damages consist of $16,500.00 paid by [appellee] to Becton Timber Co., Inc. to settle Becton's prior claim and ownership of the timber."

In August 1997, appellants filed an answer to appellee's amended complaint. In essence, appellants denied that they had breached the warranty-of-title provision of the timber contract. In January 1998, the case went to trial before the circuit court. After hearing the testimony of several witnesses, including appellants and a co-owner of appellee, the circuit court allowed counsel

to submit posttrial briefs and took the matter under advisement. On March 27, 1998, the circuit court issued a letter opinion setting forth findings of fact and conclusions of law. Therein, the circuit court set forth its finding that Terri Santifer had sold standing timber to appellee pursuant to a timber contract and that she had breached the warranty-of-title provision in the contract in that another timber company, the Becton Timber Co., had an unrecorded deed to the timber when she sold the timber to appellee.[1] Moreover, the court found that appellant Mike Santifer was liable for breach of the contract's warranty-of-title provision even though he had not signed the contract. The court also found that appellee was entitled to $16,500 in damages. Subsequently, on April 13, 1998, the circuit court caused to be entered a judgment in appellee's favor that incorporated its letter opinion. It is this judgment that appellants challenge on appeal.

Appellants raise three allegations of error. First, they assert that the circuit court erred in concluding that appellee was not estopped from claiming that they had breached the warranty-of-title provision of the timber contract. In addition, they maintain that the circuit court erred in awarding appellee $16,500 in damages. Finally, appellants contend that the circuit court erred in finding appellant Mike Santifer liable for breach of the warranty-of-title provision of the timber contract even though he did not sign the contract.

The standard that we apply when we review a judgment entered by a circuit court after a bench trial is well established. We do not reverse such a judgment unless we determine that the circuit court erred as a matter of law or we decide that its findings were clearly against the preponderance of the evidence. *Riffle v. United Gen. Title Ins. Co.*, 64 Ark. App. 185, 984 S.W.2d 47 (1998). Disputed facts and determination of the credibility of witnesses are within the province of the circuit court, sitting as the

[1] We note that appellants could have, but did not, challenge the correctness of this conclusion of law by arguing on appeal that Becton Timber Company's timber deed was invalid because it was unacknowledged and unrecorded and, therefore, would not prevent appellee from having good title to the timber as a *bona fide* purchaser, pursuant to Ark. Code Ann. § 14-15-404(b) (Repl. 1998).

trier of fact. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d. 464 (1998).

Appellants' first allegation of error is procedurally barred from our review. Appellants assert that the circuit court erred in failing to conclude that appellee was estopped from recovering damages based upon their breach of the warranty-of-title provision in the timber contract at issue. In essence, appellants base their estoppel argument on testimony by John Dawson, III, a co-owner of appellee, in which he admitted Mike Santifer had told him that L.D. Becton had a deed to the timber at issue, which he had obtained from appellants' predecessor-in-title, William Marks, and that appellant Mike Santifer had told him that L.D. Becton's timber deed had expired. Appellants failed to raise this estoppel theory in their initial answer to appellee's complaint and also failed to raise it in their answer to appellee's amended complaint. Estoppel is an affirmative defense and, as such, must be raised at trial by the defendant in his or her answer or by an amendment thereto. *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997). However, the affirmative defense of estoppel can be raised at trial, even though the defendant failed to plead it in his answer, by the express or implied consent of the parties. *Id.*; *Arkansas Dept. of Human Servs. v. Cameron*, 36 Ark. App. 105, 818 S.W.2d 591 (1991). Even if appellants raised the estoppel issue by an implied amendment of their answer to appellee's amended complaint, they are still procedurally barred from obtaining review of this issue because they failed to obtain a ruling from the circuit court on it. Examination of the circuit court's order, its letter opinion, and its rulings during trial shows that the appellants never obtained a ruling on the estoppel issue that they present to us. Because they failed to do so, our review of this allegation of error is barred. *See Killam v. Texas Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990).

For their second allegation of error, appellants contend that the circuit court erred in awarding appellee damages of $16,500. According to appellants, appellee was not entitled to $16,500 in damages because it failed to take reasonable steps to mitigate damages after appellee discovered that appellants had

breached the warranty-of-title provision of the timber contract at issue. Appellants' allegation of error in this regard is meritless because they failed to put before the circuit court proof of the manner in which appellee could have taken action to mitigate its damages and proof of the amount of damages that might have been avoided had appellee taken such action. *See Minerva Enterprises, Inc. v. Howlett,* 308 Ark. 291, 824 S.W.2d 377 (1992).

Finally, appellants assert that the circuit court erred in determining that appellant Mike Santifer was liable for breach of the warranty-of-title provision in the timber contract at issue. With regard to Mike Santifer's liability, the circuit court set forth the following findings of fact and conclusions of law in its March 27, 1998, letter opinion:

> Another issue concerns the liability of [appellant] Mike Santifer. The written contract between these parties was signed only by Terri Santifer. The document prepared by [appellants] included Mike Santifer as a signatory, but this document was revised at the direction of [appellants] to list only the name of Terri Santifer. The reason for deleting the name of Mike Santifer was that Mike Santifer had had financial difficulties and the presence of his name on a public record by which he would receive certain monies might cause the attachment of those monies by creditors. All of the negotiations associated with this agreement were between [appellee] and Mike Santifer. [Appellee] agreed to accommodate [appellants] in this regard and list only Terri Santifer on the contract, even though Mike Santifer should have been listed because of his curtesy interest. [Appellee] relied upon the representations of [appellants] and as a result has been damaged. [Appellants] are, therefore, estopped to claim that Mike Santifer should not be held liable. Accordingly, [appellant] Mike Santifer is jointly and severally liable with Terri Santifer.

At trial, appellee's co-owner, John Dawson, III, testified that in August 1996, appellee paid Terri Santifer $10,000, pursuant to the timber contract at issue, for the timber described therein. Mr. Dawson testified further that he negotiated the purchase of the timber with Mike Santifer only and that Mike Santifer told him that he owned the land upon which the timber was located and that he had recently purchased it. He also testified that after he

and Mike Santifer finished their negotiations for the purchase of the timber, appellee's "office" prepared a timber contract that stated Mike Santifer and Terri Santifer were grantors. Moreover, he testified that appellants' lawyer had redrafted the timber contract so as to note only Terri Santifer as the grantor. With regard to why appellants' counsel made this change in the timber contract, Mr. Dawson stated, "[Appellants' attorney] advised us that Terri Santifer was the one that had to sign . . . come to find out later that Mr. Santifer had some lien or something with the State and owed the State money and he didn't want this timber money to be caught up in that so he wasn't going to sign the timber deed."

At trial, on direct examination, Mike Santifer stated that he and his wife had purchased the sixteen acres, on which the timber at issue was located, from William Marks in May 1996. On cross-examination, Mike Santifer admitted that he had a state tax lien against him and that was the reason he did not want his name on the timber contract and did not want his name on the check that appellee used to pay for the timber. He also admitted that if his lawyer had not advised him not to sign the timber contract, he would have done so. Moreover, he admitted that when he was negotiating the sale of the timber with appellee's co-owner, John Dawson, III, he was speaking on behalf of himself and his wife and he also admitted that he felt as much a party to the timber contract as his wife.

The circuit court erred in concluding that Mike Santifer was estopped from denying his liability for breach of the warranty-of-title provision. Four elements are necessary to establish estoppel. They are: 1) the party to be estopped must know the facts; 2) the party to be estopped must intend that his conduct be acted on or must act so that the party asserting the estoppel had a right to believe it was so intended; 3) the party asserting the estoppel must be ignorant of the facts; and 4) the party asserting the estoppel must rely on the other's conduct and be injured by that reliance. *City of Russellville v. Hodges,* 330 Ark. 716, 957 S.W.2d 690 (1997).

With regard to the first element of estoppel — knowledge of the facts — there was no proof before the circuit court that appellant Mike Santifer knew Becton Timber Company's timber deed was valid when appellee entered into the timber contract with his wife, Terri. John Dawson, III, admitted that appellant Mike Santifer told him that he believed Becton Timber Company's deed had expired before appellee purchased the timber at issue from Terri Santifer. Appellee never proved that appellant Mike Santifer did anything with regard to Becton Timber Company's deed except tell what he believed to be the truth about it, which was that it had expired. Moreover, with regard to the fourth element of estoppel — reliance on the other's conduct — there was no proof before the circuit court that appellee purchased the timber at issue in reliance on assurances from Mike Santifer that, despite his not signing the timber contract as a grantor, he would warrant the good title of the timber at issue. In summary, the circuit court would have been correct if it had merely concluded that appellant Mike Santifer was estopped from denying that he had told John Dawson, III, that Becton Timber Company's timber deed had expired, but it erred in concluding that he was estopped from denying his liability for breach of the warranty-of-title position of the timber contract.

For the reasons set forth above, we affirm the judgment at issue as to appellant Terri Santifer and reverse the judgment as to appellant, Mike Santifer, and dismiss.

Affirmed in part and reversed and dismissed in part.

ROGERS and STROUD, JJ., agree.

Judy BEAVER *v.* BENTON COUNTY CHILD SUPPORT UNIT

CA 98-927 991 S.W.2d 618

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered April 14, 1999

Odom & Elliott, by: *Conrad T. Odom*, for appellant.

Bassett Law firm, by: *Curtis L. Nebben*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that appellant failed to prove that she sustained a compensable back injury. On appeal, appellant argues that there is no substantial evidence to support the Commission's denial of benefits. We disagree and affirm.

Appellant began working for appellee in October of 1995. She was employed as an investigator, and her duty was to pursue noncustodial parents for enforcement of child-support obligations. On April 28, 1997, appellant was attending a two-week instructional seminar that was held at the Holiday Inn Civic Center in Fort Smith. A supervisor and other employees of appellee were also attending the seminar. The purpose of the seminar was to train employees in new computer software that the State was installing. Appellee provided an allowance for two dinner meals and lunch each day. However, no one was required to eat at a certain location or as a group. The lunch break was considered free time and everyone could do as they pleased. On April 28, the group went to eat lunch at the Holiday Inn Civic Center. Appellant testified that when she was approaching the buffet she slipped on the wet floor. She grabbed onto a coworker who broke her fall enough that she only hit the floor with her right knee. Appellant did not seek medical treatment but finished lunch and completed the remainder of the seminar. Appellant finally sought medical treatment on June 5, 1997. The medical evidence reveals that appellant was diagnosed with pyriformis syndrome and retropatellar pain syndrome. On June 9, 1997, appellant saw Dr. James M. McKenzie who believed appellant had sciatica. An MRI was performed on July 8, 1997, which revealed a central disc herniation at L4-5. Appellant subsequently filed this claim for benefits in connection with her fall on April 28, 1997.

On appeal, appellant argues that there is no substantial evidence to support the Commission's finding that she was not performing employment services at the time of her injury. We disagree.

On appellate review of workers' compensation cases we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). We should affirm the Commission's ruling if there is any substantial evidence to support the findings made. *Id.* 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 is performing "employment services" when he is "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 the case of *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), the claimant argued, on public policy grounds, that her break advanced her employer's interest by allowing her to relax, which in turn helped her to work more efficiently throughout the rest of her work shift. Under former law, the definition of compensable injury did not include a strict requirement that the injury occur while the worker was performing employment services, and a claimant's activities at the moment of injury were relevant only to the separate and broader question of whether the injury arose out of and in the course of the employment. *See id.* It is clear that, under former law, the claimant's injury while en route to the break area would have been in the course of her employment pursuant to the personal-comfort doctrine. *See Lytle v. Arkansas Trucking Services*, 54 Ark. App. 73,

923 S.W.2d 292 (1996). However, the personal-comfort doctrine is no longer the law. Now, Act 796 of 1993 applies and, although the claimant's break may have indirectly advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do. Consequently, we held in *Harding* that the Commission did not err in finding that appellant was not performing employment services when she was injured.

Like the case of *Harding*, Act 796 of 1993 is applicable to the case before us. Here, appellant was on her lunch break walking up to the lunch buffet line when she slipped on a wet floor. According to the record, lunch was considered free time. Ms. Kay Crabb, director of Child Support Enforcement Unit in Benton County, testified that lunch with the group was not mandatory because, if it had been, the other ladies who did not eat with the group would not have had their lunches compensated. She also said that the people in the group were free to do whatever they wanted on their lunch break.

Also, it does not appear from the record that the registration fee for the conference included meals served on site at the conference. In fact, the record indicates that it was discretionary with each county whether it would pay for lunches or dinners for employees at the seminar. According to Ms. Crabb, there were certain people in their office who could not afford to pay for their lunches every day, and that that was something that was discussed when obtaining approval for the payment of lunches for all the employees. It appears from the record that appellee was paying for the employees' lunches, not for its own benefit, but for the benefit of its employees. Usually, any person who works an eight-hour day has an uncompensated lunchtime. Fortunately for these employees, appellee paid for their lunches.

The Commission found that:

> [t]he claimant was not benefitting her employer at the time of the incident. Whether or not the respondents were paying for lunch is of no moment. As in *Jackson*, once the claimant began to actively participate in lunch, she was on her lunch break and was no longer performing an "employment activity." The claimant

> was neither pursuing noncustodial parents nor training in the new computer program, her purpose for attending the seminar. The alleged injury did not occur within the time and space boundaries of claimant's employment, as required by Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 1996). There is no authority under Act 796 of 1993, which we must strictly construe, that suggests the claimant was performing employment services.

After reviewing the record, we cannot say that there is no substantial evidence to support the Commission's decision that appellant was not engaged in employment services at the time she fell. We agree with the Commission that the fact that the appellee paid for the lunches is of no moment, and it was inconsequential that appellee encouraged the group to eat together when viewed against all of the other evidence. There is substantial evidence to support a finding that appellant was not advancing her employer's interest when she was on her lunch break walking to the buffet. Because we have affirmed this case on appellant's first issue, we need not address her second point on appeal.

Affirmed.

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

BIRD, J., concurs.

SAM BIRD, Judge, concurring. I agree with the majority that appellant was not performing employment services at the time of her injury, but I write separately because I believe the Commission, in reaching that result, has misinterpreted Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 1996) and prior decisions of this court in stating that appellant's injury is not compensable because it did not occur while she was in the process of pursuing noncustodial parents or training on the new computer program.

The Commission's narrow interpretation has already been rejected by this court in cases where we have held that the term "employment services," within the meaning of section 11-9-102, does not mean that for an employee's injury to be compensable, it must occur while the employee is engaged in the performance of the precise employment task to which he or she has been assigned.

For example, in *Crossett School District v. Fulton*, 65 Ark. App. 63, 984 S.W.2d 833 (1999), we held that an injury was compensable when the employee fell on ice in the employer's parking lot where she was retrieving from her car reading glasses that she needed to do her assigned work; and in *Fisher v. Poole Truck Line*, 57 Ark. App. 268, 944 S.W.2d 853 (1997), we held that a truck driver's injury was compensable even though it occurred when the employee was in an automobile accident while he was transporting in his own car the results of a physical examination that his employer had required before giving him a work assignment. In neither of those cases was the employee performing his or her assigned work tasks at the time of the injuries, yet the injuries were found to be compensable.

While it is true that Act 796 of 1993 requires us to strictly construe its provisions, I do not believe that strict construction requires that the Act always be interpreted in a way that will most likely deny benefits. The term "strict construction" is a two-edged sword. The Act does not require that its terms be strictly construed only against the employee. Arkansas Code Annotated section 11-9-101 (Repl. 1996) states that the purpose of the workers' compensation law is to provide benefits "to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment. . . ."

In the instant case, I agree that appellant was not engaged in employment services while she was on her lunch break, notwithstanding that her employer was paying for the lunch. However, I do not agree with the Commission's denial of the claim because she was not, at the moment of her injury, pursuing noncustodial parents or training on the new computer program.

Patricia PATTERSON *v.* FRITO LAY, INC., and
Lumberman's Mutual Casualty Company

CA 98-1016 992 S.W.2d 130

Court of Appeals of Arkansas
Division I
Opinion delivered April 14, 1999

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

Rieves & Mayton, by: *Eric Newkirk*, for appellees.

TERRY CRABTREE, Judge. Patricia Patterson appeals the decision of the Workers' Compensation Commission reversing the administrative law judge's finding that she sustained a compensable bilateral knee injury as a result of rapid repetitive motion. Appellant argues that the Commission erred in finding: (1) that the activities performed were not rapid and repetitive; (2) that the work activities of the appellant were not the major cause of her gradual-onset injury; and (3) that there was no basis for finding that the testimony of the appellant and her corroborating witnesses was not credible. We agree and therefore reverse and remand the findings of the Workers' Compensation Commission.

The appellant worked as a store representative for Frito Lay beginning in late November 1994. For a year prior to that, she worked as a swing store representative before her promotion to her current position. Goldie Powell, appellant's supervisor, explained that a store representative has more overall responsibilities than a swing store representative. Appellant contends that she developed her bilateral knee problems as a result of her employment after her promotion in November 1994. She discontinued working in March of 1995 due to the problems she was experiencing with her knees and sought medical treatment for her knee conditions at that time. Although she was having problems with both knees, only the left knee is at issue here.

At the hearing held on June 27, 1997, appellant contended that her left knee problems resulted from rapid repetitive motion of her left knee and were therefore a compensable injury. Conversely, the appellee contended that appellant's left knee problems were not compensable under Act 796. The full Commission found that the appellant did not meet all requirements for gradual-onset injuries. Such injuries are controlled by Ark. Code Ann. § 11-9-102(5)(A)(ii) (Supp. 1997), which states that an employee must prove by a preponderance of the evidence that she sustained internal or external damage to her body as a result of an injury that arose out of and in the course of employment, the employee must establish the compensability of a claim with medical evidence, and that evidence must be supported by objective findings. Arkansas Code Ann. § 11-9-102(5)(A)(ii) sets forth exceptions in which the employee must also prove that the "resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment." Furthermore, Ark. Code Ann. § 11-9-102(5)(A)(ii)(a), the specific provision governing this claim, requires the appellant to prove that the injury was caused by "rapid repetitive motion."

This court reviews decisions of the Workers' Compensation Commission to see if they are supported by substantial evidence. *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992).[1] Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether this Court might have reached a different result from that reached by the Commission, or whether the evidence would have supported a contrary finding. This court will not reverse the Commission's decision unless fair-minded persons considering the same facts could not have reached the same conclusion. *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998). It is the function of

[1] This standard of review has been challenged several times but has been left unresolved by the Arkansas Supreme Court because the issue was not raised before the Commission. *See Scarbrough v. Cherokee Enterprises*, 306 Ark. 641, 816 S.W.2d 876 (1991).

the Commission to determine the credibility of the witnesses and the weight to be given their testimony.[2] *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). However, the Commission may not arbitrarily disregard any witness's testimony. *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998). It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted, and when it does so, its findings have the force and effect of a jury verdict. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998). The Commission is not required to believe the testimony of the claimant or any other witness. The testimony of an interested party is always considered to be controverted. *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998). Even though the Commission is insulated to a certain degree from appellate review, its decisions are not insulated to the degree it would make appellate review meaningless. *Jordan v. J.C. Penney Co.*, 57 Ark. App. 174, 944 S.W.2d 174 (1997). Furthermore, benefits are not always denied to a claimant who has been untruthful.[3] *Boyd v. General Industries,* 22 Ark. App. 103, 733 S.W.2d 750 (1987).

The appellant asserts that the Commission erred when it found that the appellant's work activities were not "rapid and repetitive" as required by statute. The Commission evidently took the testimony of the appellant as true that she spent forty percent of her time on her knees moving back and forth stocking the lower shelves. However, because the appellant went to four different stores, the Commission concluded that she only spent ten percent of her time on her knees. This logic is flawed and there is no basis in the record for the conclusion reached by the Commission. The appellant and two other witnesses testified to a greater percentage of the time that the appellant was required to work on her

[2] The fact that the ALJ's decision is not to be considered, even in regard to the credibility of witnesses, may very well be a violation of due process of law. However, we do not consider that issue because it was not raised below. *See Scarbrough, supra.*

[3] Obviously, if the claimant was untruthful regarding one of the essential elements of the claim, the claimant would not be able to meet his burden of proof.

knees. Even the sole witness for the appellee indicated a higher percentage. We are firmly convinced that this conclusion of the Commission was in error. Based on our opinion that the Commission's determination that the appellant was not in a position putting pressure on her knees for more than ten percent of the time was error, we must now turn to whether the appellant's movements were rapid and repetitive.

The Commission concluded that the appellant's testimony concerning the number of back and forth movements was not credible, but even if it were, the Commission opined that the facts are more similar to the facts in *Lay v. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997) than in other cases, namely, *Kildow v. Baldwin Piano & Organ*, 58 Ark. App. 194, 948 S.W.2d 100 (1997) (reversed on other grounds *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998)), and *Rudick v. Unifirst Corp.*, 60 Ark. App. 173, 962 S.W.2d 819(1998). The facts in the *Lay* case are dissimilar to the facts of this case. In *Lay*, the UPS driver had long periods of time that he had to drive between locations. Further, the appellant's injury was to his elbow, which was not placed and used in an unusual position. While the appellant in this case had breaks in between the times that she was on her knees stocking the shelves, the times that she was on her knees she was, out of necessity, moving back and forth. Just as in *Baysinger v. Air Systems, Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996), we feel the Commission's interpretation of what is rapid and repetitive is too restrictive. The Commission must consider the positioning of the part of the body as well as the number of movements the claimant has to undergo to determine if the movement is "rapid and repetitive." In this case, the Commission's analogy of the appellant's movements to that of a person "standing on one's feet taking small steps from side to side to side" is clearly not applicable to the facts of this case. While stepping from side to side on one's feet is a normal function, resting on one's knees moving back and forth is not a normal function of the knee.

We are concerned with the statement in the Commission's opinion that the claimant's testimony is never considered uncontroverted (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Lambert v. Gerbert Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985)). We recognize that we have held on numerous occasions that a party's testimony is never considered uncontroverted. However, the Commission's opinion seems to indicate that only the claimant's testimony is never considered uncontroverted. We would point out that Act 796 of 1993 requires that neither party be given the benefit of doubt. To consider one party's testimony always controverted without considering the same for the opposing party would fly in the face of this clear mandate.

Considering the flawed logic upon which the Commission based its opinion as to whether the appellant's movements were rapid and repetitive, we find that fair-minded people could not reach the same conclusion as the Commission and reverse the Commission's decision as to the first issue.

The appellant also asserts that the Commission erred in finding that the appellant failed to prove that the work activities were the major cause of her gradual-onset injury. The Commission stated in its opinion, "Rather, all opinions addressing causation refer directly to claimant's work of standing on concrete floors 12 to 15 hours per day."

The appellant sought treatment from Charles W. Himmler on March 24, 1995. Dr. Himmler noted that the appellant suffered from rheumatoid arthritis and prescribed anti-inflammatory medication as well as rest for two weeks. In a follow-up letter of April 27, 1995, Dr. Himmler again referred to rheumatoid disease and opined that the arthritis flared up because of excessive work hours. On June 23, 1995, Dr. Himmler noted that the appellant's knees were worse and that the original diagnosis of rheumatoid arthritis might have been incorrect. He also noted that there was no other joint involvement and that the problem might be overuse syndrome.

On August 8, 1995, the appellant consulted Dr. Abraham. Dr. Abraham agreed with Dr. Himmler that the appellant suffered from overuse syndrome and noted that the problem might have been triggered by her excessive standing on concrete floors.

Dr. Martin saw the appellant on October 24, 1995. Dr. Martin stated in a report that while the appellant was working for Frito Lay, she was required to do a lot of walking, standing and climbing. He also noted that the appellant's pain was much worse when she would get up from a sitting position with squatting, standing or stair climbing.

In his deposition, Dr. Martin testified as to the nature of the appellant's injury:

> She had chondrosis, which means that the cartilage is disrupted, just on the back of the kneecap. The kneecap articulates with the end of the femur on the thigh bone, and anytime the knee is bent there is an increasing pressure on the knee cap at that articulation, sometimes a force up to six times the body weight just across the joint. The cartilage on the kneecap had cracks in it and was roughened up. It almost looks like crab meat that is hanging on the back side of the kneecap as opposed to the smooth cartilage surface. . . .The condition was chondrosis, which is a degeneration of sorts of the cartilage on the back of the kneecap due to wear and tear.
>
> Sometimes we see this condition as a result of normal activities, but most often it's overuse, for example someone training for a marathon or someone working on weights and doing too many squats or just too many stairs, too many up-and-down motions, squatting.

When asked about causation, Dr. Martin testified that he could state with a reasonable degree of medical certainty that it "would be her work and the squatting activities that she was doing at the time."

We well understand that the Commission makes determinations of credibility. When the determination must be made between competing medical opinions, the Commission decides which to believe. However, in this case, the medical

opinions are not opposed. Dr. Himmler initially diagnosed the appellant as suffering from arthritis but later determined that because the appellant's problem did not have other joint involvement, he questioned that diagnosis and felt it was more of an overuse syndrome. Later, this was substantiated by Dr. Abraham. The appellant was finally seen by Dr. Martin, who performed surgery on the appellant. He clearly stated that the overuse was due to activity that involved bending the knee. The medical opinions are not in conflict but demonstrate the development of a diagnosis that was appropriate for the appellant. There is no testimony whatsoever that Dr. Martin's diagnosis and treatment was incorrect. It is notable that Dr. Martin testified that the pressure on the knee where it articulated with the thigh femur was often six times greater than the person's body weight and that the injury was at the knee where the patella is next to the thigh femur. It is abundantly clear that the injury was a direct result of the appellant's work activities. We do not believe that fair-minded people could reach the same decision as the Commission on the second issue, and therefore reverse.

The final issue argued by the appellant is that there is no basis for the Commission's finding that the appellant and the appellant's witnesses were not credible. We agree. Again, we are well aware of the long-standing rule of law that the determination of the credibility of the witnesses and the weight given their testimony are matters exclusively within the province of the Commission. *Graham v. Turnage Employment Group*, 60 Ark. App. 150, 960 S.W.2d 453 (1998). However, the Commission is not totally insulated from judicial review on credibility issues. *Jordan v. J.C. Penney Co.*, 57 Ark. App. 174, 944 S.W.2d 547 (1997). The Commission may not arbitrarily disregard the testimony of any witness. *See Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998). Where, as here, the appellant alleges that the Commission arbitrarily disregarded the testimony of witnesses, there must be some articulated fact in the Commission's opinion that supports its findings. In this case, there is none. The Commission merely stated that it had reviewed the record and determined that the appellant lacked credibility.

The Commission is limited to reviewing the record and, thus, the demeanor of the witnesses is not an issue. The Commission must glean from the record an indicia of credibility. Because it is limited to the record, the Commission must be able to clearly state the reasons for its determination of credibility, especially when that determination is contrary to the findings of the ALJ who actually observed the witnesses. We cannot discern from the abstract any indication that the witnesses were untruthful. In fact, the contrary is true. The testimony was reasonably consistent throughout, including the testimony of the sole witness for the appellee. Due to the fact that the Commission failed to state its reasons for its determination that the appellant lacked credibility, and the lack of evidence in the record to support such a finding, we conclude that the Commission arbitrarily disregarded the testimony of the witnesses and reached its conclusion based on speculation and conjecture.

Even if we were to conclude, which we do not, that the Commission properly found that the appellant lacked credibility, that would not end our inquiry. We must then look to the remaining evidence to see if the decision of the Commission is supported by substantial evidence and whether fair-minded people could reach the same decision as the Commission. *Kuhn v. Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996). We cannot conclude that they would. The remaining evidence would not support the decision of the Commission. As discussed *supra*, the Commission's analysis is flawed regarding its interpretation of whether the work activities of the appellant were rapid and repetitive and whether the injury was supported by objective medical findings. Considering the remaining evidence, it is clear that there is insufficient evidence to support the Commission's decision and that fair-minded people could not reach the same result.

We reverse the decision of the Commission and remand for an award of benefits.

GRIFFEN and NEAL, JJ., agree.

Ruby WORLEY *v.* RIVER OAKS WATER IMPROVEMENT DISTRICT No. 48 of Garland County

CA 98-1126 990 S.W.2d 562

Court of Appeals of Arkansas
Division I
Opinion delivered April 28, 1999

Appellant, pro se.

Owen, Farnell & Garner, by: *Ray Owen, Jr.*, for appellee.

JOHN E. JENNINGS, Judge. Ruby Worley brings this appeal from the circuit court's order dismissing her appeal from county court because she neglected to file the affidavit required by Ark. Code Ann. § 16-67-201(c) (1987). Appellant raises two issues on appeal. First she contends that the appellee waived the affidavit requirement. Second she argues that the appeal was nonetheless perfected because the circuit clerk accepted the record

and her payment of filing fees. We find merit in the first issue raised and reverse and remand for trial.

By order of January 2, 1998, the county court approved the formation of the River Oaks Water Improvement District, the appellee. Appellant, proceeding pro se because her attorney had died, filed a timely notice of appeal from that decision. The appeal was lodged in the Garland County Chancery Court. On March 16, 1998, counsel for appellee wrote the court asking for an expedited hearing on the ground that the case concerned a matter of public interest. On March 26, appellant filed a pleading objecting to appellee's request, and she made demand for a jury trial based on her understanding that the appeal to "circuit court" was de novo. On April 3, the court granted appellee's request for an expedited hearing and scheduled it for April 24. On April 21, appellant filed a motion in which she questioned the jurisdiction of the chancery court and asked for the case to be transferred to circuit court. On the day of the hearing, appellee filed a motion to dismiss the appeal in which it argued that dismissal was appropriate because the chancery court lacked jurisdiction and because appellant's notice of appeal failed "to state with specificity any points of Appeal and thus is defective and the appeal should be dismissed." By order of April 24, the chancellor transferred the appeal to circuit court.

On April 27, 1998, appellee filed a motion to dismiss the appeal in the circuit court on the ground that appellant had failed to file the affidavit required under Ark. Code Ann. § 16-67-201(c) (1987). Appellant responded to the motion arguing that appellee had waived this requirement. After a brief hearing, the trial court granted appellee's motion to dismiss by order dated May 26, 1998, holding that the filing of the affidavit was a jurisdictional requirement. Appellant filed a motion for reconsideration in which she argued that the appeal was perfected without the affidavit because the record and fees had been accepted by the circuit clerk. The court denied appellant's motion, and this appeal followed.

Arkansas Code Annotated section 16-67-201(a) (1987) provides that appeals from county court shall be granted as a mat-

ter of right to the circuit court "by the party aggrieved filing an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken." Subsection (c) of the statute provides that the aggrieved party "shall swear in the affidavit that the appeal is taken because the appellant verily believes that he is aggrieved and is not taken for vexation, or delay, but that justice may be done him." Early case law provided that the filing of the appeal affidavit was a jurisdictional prerequisite. *Town v. Wilson,* 7 Ark. 386 (1846); *McJenkin v. State Bank,* 7 Ark. 232 (1846); *Bank of the State v. Hinchcliffe,* 4 Ark. 444 (1842). The court subsequently took a different view and held that the affidavit was not a jurisdictional requirement in that its filing was for the sole benefit of the opposing party and could be waived. *Stricklin v. Galloway,* 99 Ark. 56, 137 S.W. 804 (1911); *Elder v. Crabtree,* 59 Ark. 177, 26 S.W. 817 (1894); *Wilson v. Dean,* 10 Ark. 308 (1849). *Cf. Moore v. Mears,* 273 Ark. 411, 619 S.W.2d 662 (1981). Such a waiver occurs when the opposing party appears and takes substantive steps in the matter without moving to dismiss the appeal on that ground. *Tuggle v. Tribble,* 173 Ark. 392, 292 S.W. 1020 (1927); *Wulff v. Davis,* 108 Ark. 291, 157 S.W. 384 (1913).

Here, appellee asked for and received an expedited hearing and filed a motion to dismiss for reasons other than appellant's failure to file the affidavit. Under these circumstances, we hold that appellee waived this requirement and that the trial court erred in dismissing the appeal. Because we reverse on this point, it is not necessary for us to address appellant's second argument.

Reversed and remanded.

ROGERS and GRIFFEN, JJ., agree.

Luther SHAVERS III *v.* STATE of Arkansas

CA CR 98-897 991 S.W.2d 622

Court of Appeals of Arkansas
Division II
Opinion delivered April 28, 1999

Maxie G. Kizer, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Appellant is appealing from the revocation of his suspended sentence. On appeal, he argues that the trial court erred in sentencing him to serve more than the time remaining on the original sentence imposed by the trial court. We affirm.

On February 2, 1995, appellant entered a plea of guilty to breaking or entering. An order entitled "Judgment and Commitment Suspended Sentence" entered on February 8, 1995, provided:

> [Appellant] is hereby sentenced to serve a term of (5) five years in the Arkansas Department of Correction.
>
> However, imposition of sentence is suspended conditioned on [appellant's] paying the fine and court cost ordered herein, and [appellant] is placed under the supervision of a probation officer of the Adult Probation Department, and [appellant] shall comply with their rules and regulations and with all conditions or probation prescribed by the Court.

The trial court then entered a subsequent order purporting to amend the previous order on the State's motion to convert the fine to restitution payments.

On July 31, 1996, the State filed a petition to revoke. On December 16, 1996, appellant entered a guilty plea to the petition, and the trial court sentenced him to five years, with imposition of the sentence suspended.

On August 4, 1997, the State filed another petition to revoke. After a revocation hearing, the trial court concluded that appellant had violated the conditions of his suspended sentence and sentenced him to the Arkansas Department of Correction for the balance of the suspended sentence imposed on December 16.

Appellant's sole argument on appeal is that his current sentence is illegal because the trial court actually imposed a sentence and then suspended execution of the sentence in the February 1995 order. He contends that as a consequence any sentence imposed upon revocation was limited to the remainder of the sen-

tence imposed in 1995, rather than the balance of the suspended sentence imposed in December 1996. We address only appellant's specific argument on appeal.

Appellant relies on the holding in *Lewis v. State,* 62 Ark. App. 150, 970 S.W.2d 299 (1998), as support for his argument. However, that opinion was reversed by the Arkansas Supreme Court in *Lewis v. State,* 336 Ark. 469, 986 S.W.2d 95 (1999). The defendant in *Lewis* entered a plea of guilty pursuant to Act 346 of 1975, the First Offenders Act, codified at Ark. Code Ann. § 16-93-303 (Supp. 1997). His punishment was "fixed at three (3) years in the Arkansas Department of Correction, with imposition of said sentence suspended" conditioned on Lewis's compliance with the terms of supervised probation. Upon revocation, the trial court sentenced Lewis to ten years of imprisonment, with seven years suspended.

Lewis argued that the sentence imposed was illegal because the trial court sentenced him to a period of imprisonment greater than the fixed term remaining on the suspended sentence. His argument was based on the premise that the trial court actually sentenced him to three years of imprisonment rather than placing him on probation, and that because the trial court then suspended the three-year sentence, it could not later revoke the suspended sentence and impose a new sentence.

The supreme court held that Lewis clearly entered his guilty plea pursuant to the probation terms under Act 346, and was given probation conditions that specifically referred to the act under which no adjudication of guilt or sentence is imposed. The court further noted that although Lewis's original order indicated that the three-year term was "fixed" by the trial court, the order provided that imposition of sentence was suspended — not that *execution* of the sentence was suspended. The court held that the trial court correctly sentenced Lewis since once the State was able to show by a preponderance of the evidence that Lewis failed to comply with the conditions of his probation, the trial court was authorized to impose any sentence on him that might have been

imposed originally for the offense of which he was found guilty. *See* Ark. Code Ann. § 5-4-309(d) and (f) (Repl. 1997).

Judgments are generally construed like other instruments; the determinative factor is the intention of the court, gathered from the judgment itself and the record, including the pleadings and the evidence. *DeHart v. State*, 312 Ark. 323, 849 S.W.2d 497(1993). In the case at bar, the 1995 order indicated that imposition of sentence was suspended — not that execution of the sentence was suspended, and that the suspension was conditioned upon appellant's compliance with certain terms. Here, as in *Lewis,* the trial court's usage of the language suspended imposition of sentence reveals that the trial court intended no sentence to be entered, and showed only that appellant was required to comply with the conditions of his suspended sentence. *See Lewis*, 336 Ark. at 475, 986 S.W.2d at 99. Thus, we conclude that it was the intention of the trial court to suspend imposition of appellant's sentence, not impose an actual sentence.

Appellant entered a plea of guilty to a class D felony, breaking or entering, for which the term of imprisonment is not more than six years. *See* Ark. Code Ann. § 5-4-401(a)(5). Thus, consistent with § 5-4-309(f), the trial court properly sentenced appellant to forty-seven months and nineteen days of imprisonment, a term less than the six years to which it could have originally sentenced him.

Affirmed.

HART and STROUD, JJ., agree.

Gudrun RAY *v.* UNIVERSITY of ARKANSAS

CA 98-1215 990 S.W.2d 558

Court of Appeals of Arkansas
Division I
Opinion delivered April 28, 1999

Martin & Kieklak, by: *Kenneth J. Kieklak*, for appellant.

Nathan C. Culp, for appellees.

WENDELL L. GRIFFEN, Judge. Gudrun Ray appeals the Workers' Compensation Commission's determination that her injury is not compensable, arguing that the decision is not supported by substantial evidence. The Commission found that Ray was not performing employment services at the time of her injury. We reverse and remand for an award of benefits.

Ray has worked for the University of Arkansas as a food-service worker for approximately eight years. Working in the cafeteria at the University of Arkansas, appellant was entitled to two unpaid thirty-minute breaks and two paid fifteen-minute breaks each day. On April 17, 1997, during one of her paid fifteen-

minute breaks, appellant slipped in a puddle of salad dressing as she was getting a snack from the cafeteria to eat during her break. Mary Carolyn Godfrey, Assistant Director for Dining Services, testified that the University provides free meals for cafeteria workers as inducement for the employees to remain on the premises. Godfrey stated that the workers' fifteen-minute breaks are occasionally interrupted if a student asks a worker for assistance. Godfrey testified that if a worker on break is approached by a student, the worker is required to leave her break and address the student's needs.

To qualify for workers' compensation benefits, appellant must satisfy the four requirements of Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 1997). Arkansas Code Annotated section 11-9-102(5)(A) (Repl. 1997) defines "compensable injury" as "an accidental injury causing internal or external physical harm . . . arising out of and in the course of employment." The test for determining whether an employee is acting "within the course of employment" is whether the injury occurred "within time and space boundaries of employment, when the employee is carrying out employer's purpose or advancing employer's interests directly or indirectly." *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997).

On appellate review of workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). We should affirm the Commission's ruling if there is any substantial evidence to support the findings made. *Shaw v. Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991). It is the function of the Commission to determine the credibility of the witnesses and the weight to be given to their testimony. *Wade v. Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). From our review of the record, we should affirm the Commission if we can find any substantial evidence to support the findings made by the Commission. *Johnson, supra.*

When, as here, the Commission denies coverage because the claimant failed to meet her burden of proof, the sub-

stantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *McMillian v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997); *see also Shaw, supra.* In determining the sufficiency of the evidence to sustain the findings of the Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988).

■ The Commission found appellant was not performing "employment services" at the time of her injury, stating that this finding took into consideration the fact that appellant was paid for her fifteen-minute break and was required to leave her break to help students, with obvious benefit to the University. The Commission found it compelling that appellant was reaching for an apple for personal consumption when she slipped and fell and was not assisting student diners or "otherwise benefitting the employer." We hold that appellant was performing employment services at the time she was injured based on the fact that appellant was paid for her fifteen-minute breaks and was required to assist student diners if the need arose. Appellant's employer gleaned benefit from appellant being present and required to aid students on her break. We find *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), distinguishable. In *Harding*, an employee was injured when she tripped over rolled-up carpet as she exited an elevator on her way to a smoking area. Harding argued that her employer gained the benefit of her being more relaxed, which in turn helped her to work more efficiently throughout the rest of her work shift. In denying benefits, we

held that an employee is performing "employment services" when engaged in the primary activity that he was hired to perform or in incidental activities that are inherently necessary for the performance of the primary activity. *Id.* We stated that "although appellant's break may have indirectly advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do." *Harding*, 62 Ark. App. at 139, 970 S.W.2d at 304.

Unlike the employer in *Harding*, the University of Arkansas required Ray to be available to work during her break and paid her for the time she was on break, presumably because she was required to help students. The University of Arkansas was clearly benefitted by Ray's being in the cafeteria and available for students during her paid break. The benefit was not tangential as in *Harding*, but was directly related to the job that Ray performed and for which she was paid. In distinguishing *Harding*, we specifically note that, unlike the break in *Harding*, the appellee employer in this case furnished food for its resting employees and paid for the break to induce them to be available to serve students even during the break period.

When a claimant is doing something that is generally required by his or her employer, the claimant is providing employment services. *See Shults v. Pulaski County Special Sch. Dist.*, 63 Ark. App. 171, 976 S.W.2d 399 (1998). In *Shults*, we found that the claimant who was employed as school custodian and was injured when he fell upon entering employer's premises sustained a compensable, work-related injury. This finding was based on the fact that part of his job duties included disabling the school alarm system upon entering the building and on the fact that the injury occurred after the claimant saw that the alarm was already disabled and attempted to enter the building quickly to investigate. *Id.* We specifically addressed the Commission's statement that "merely entering upon the premises of one's employer was not sufficient to bring one within the employment services provision of Act 796." *Shults*, 63 Ark. App. at 173, 976 S.W.2d at 401. We stated that the claimant's "duty was an activity that carried out the employer's purpose or advanced the employer's interests, and therefore constitutes employment services." *Id.* at 174, 976

S.W.2d at 401. Similarly appellant Ray was performing a duty that advanced appellee's interests. Just as it was not dispositive whether or not the alarm system had already been disarmed on the day of the accident in *Schults*, *supra*, it is not dispositive whether appellant was, at the specific time of her injury, assisting a student.

Whether an employer requires an employee to do something has been dispositive of whether that activity constituted employment services in a number of cases. For example, in *Coble v. Modern Business Systems*, 62 Ark. App. 26, 966 S.W.2d 938 (1998), we held that absent evidence that the claimant was required or expected by her employer to replace hosiery during the workday, in the event of a run in her hosiery, there was substantial evidence to support the finding that she was not performing "employment services" at the time of her automobile accident, which occurred while she was returning from a trip to the mall during her lunch break in an attempt to replace pantyhose containing a large run. Conversely, in *Fisher v. Poole Truck Line*, 57 Ark. App. 268, 944 S.W.2d 853 (1997), we held that the claimant was performing employment services when he traveled from his employer's premises to retake a required urine test and was injured on his return trip. Our holding was based on the fact that the claimant was *required* by the employer to take the urine test. Thus, it is clear that when an employer requires an employee to be available for work duties, the employee is performing employment services.

There is not a substantial basis for the denial of benefits. Although she was on a break, Ray was required to be available to help students and was paid for her time. Ray was providing employment services despite the fact that her fall occurred when she was going to get an apple for herself during a paid break rather than going to serve a student.

Reversed and remanded.

BIRD and MEADS, JJ., agree.

Rushun Abdul FOSTER *v.* STATE of Arkansas

CA CR 98-1035 991 S.W.2d 135

Court of Appeals of Arkansas
Division III
Opinion delivered April 28, 1999

Gregory E. Bryant, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. The appellant, Rushun Foster, entered conditional guilty pleas in two cases pursuant to Arkansas Rule of Criminal Procedure 24.3(b). In CR 97-1704, appellant pleaded guilty to possession of cocaine with intent to deliver, simultaneous possession of drugs and firearms, maintaining a drug premise, possession of drug paraphernalia, and possession of marijuana. These charges arose from the execution of a search warrant of a residence on January 2, 1997. In CR 97-1279, appellant pleaded guilty to possession of cocaine with intent to deliver, possession of drug paraphernalia, and maintaining a drug premise. These charges arose from the execution of a second search warrant of the same residence on January 13, 1997. On appeal, appellant argues that the lower court erred by failing to

suppress the evidence obtained by police officers during the execution of the two search warrants.

In reviewing the denial of a motion to suppress evidence, we make an independent examination based upon the totality of circumstances and reverse only if the decision is clearly against the preponderance of the evidence. *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997). We recognize that the Fourth Amendment incorporates the common-law requirement that police officers must knock and announce their identity before entering a dwelling. *Wilson v. Arkansas*, 514 U.S. 927 (1995). In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous, futile, or that it would inhibit the investigation of the crime by, for example, allowing the destruction of evidence. *Hale v. State*, 61 Ark. App. 105, 968 S.W.2d 627 (1998).

Appellant asserts that the facts in the affidavit supporting the search warrant executed on January 2 were stale and that the affidavit did not state sufficient facts to justify a no-knock search. Appellant failed to argue below that the facts in the affidavit supporting the search warrant were stale. The appellate court has repeatedly held that it will not address arguments, even constitutional arguments, raised for the first time on appeal. *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997).

It is the duty of a court confronted with the question to determine whether the facts and circumstances of a particular entry justified waiving the knock-and-announce requirement. *Hale, supra.* Here, the circuit court found that the no-knock entry was appropriate in light of the officers' reasonable suspicion that knocking and announcing their presence would have been dangerous. We will not reverse that finding unless it is clearly against the preponderance of the evidence. *Id.*

Detective Johnny Gravett testified that after a confidential informant conducted a drug buy at the residence for the police, the informant told Gravett that there were weapons in the house and that gaining access to the house would be difficult. Gravett's affidavit also contained generalizations about the possi-

bility that evidence could be destroyed and that officers' safety could be compromised if the police knocked and announced themselves before entry. These generalizations alone are not enough to justify waiving the knock-and-announce requirement. *See Richards v. Wisconsin*, 520 U.S. 385 (1997). However, knowing that weapons were seen inside the residence, we believe that the police officers could have been endangered if they knocked and announced themselves. Therefore, based upon the totality of the circumstances, we believe that a no-knock entry was justified.

Next, appellant argues that the warrant authorizing the January 13 search did not authorize a no-knock search, and therefore, it was unlawful. In compliance with the warrant, this search was conducted at night. Upon review of the record, we find that the police officers complied with the knock-and-announce requirement. Detective Ralph Breshears testified:

> The police announced their presence and said, 'Little Rock Police Search Warrant,' and I heard a very large crash from the rear of the residence and several on my squad began to scream they had a subject running. The SWAT team went on and made entry into the residence and attempted to secure the residence while we pursued [appellant, who had] jumped through the back window and fled on foot.

In this instance, the police entered the residence only after they had announced themselves and their purpose and heard a crash from inside the house.

Even assuming that the police did not properly knock and announce themselves, we believe that their entry was justified. In order to conduct a no-knock search, it is not necessary that the search warrant specifically dispense with the knock-and-announce requirement, because the reasonableness of the officers' decision to make a no-knock entry may be evaluated as of the time of the entry. *See Richards, supra.* Here, Detective Breshears indicated that he had seen weapons in the house during the first search only days before, that the weapons had been readily accessible to the occupants of the house, and that the occupants of the house had an unrestricted view of its surroundings. In light of this, the officers acted reasonably in their no-knock entry to ensure their

safety and to pursue appellant, who was attempting to flee. As a result, we fail to see how the trial court erred.

We cannot say that the trial court's ruling on the motion to suppress was clearly against the preponderance of the evidence. We believe that the two no-knock entries into appellant's home were reasonable under the circumstances.

Affirmed.

BIRD and NEAL, JJ., agree.

Harold L. BARKER *v.* Syble D. BARKER

CA 98-838 992 S.W.2d 136

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered April 28, 1999

Jack W. Barker, for appellant.

Ronald L. Griggs, for appellee.

MARGARET MEADS, Judge. Harold and Syble Barker married on November 9, 1970, and separated on March 3, 1997. A decree of divorce was entered in the Union County Chancery Court on April 9, 1998, granting appellant a divorce, dividing appellant's pension equally between the parties pursuant to a qualified domestic relations order, awarding appellee alimony of $100 per week, and dividing the marital property unequally in favor of appellee due to appellant's depletion of the parties' savings account shortly before he filed for divorce. Appellant appeals the $100 per week alimony award, asserting that the chancellor abused his discretion in determining the amount of alimony to be paid. We agree, and we reverse and remand this issue to the chancellor.

An award of alimony is not mandatory, but is solely within the chancellor's discretion, and such an award will not be reversed absent an abuse of that discretion. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993). If alimony is awarded, it should be set at an amount that is reasonable under the circumstances. *Mitchell v. Mitchell*, 61 Ark. App. 88, 964 S.W.2d 411 (1998). The

purpose of alimony is to rectify, insofar as is reasonably possible, the frequent economic imbalance in the earning power and standard of living of the divorced parties in light of the particular facts of each case. *Id.*; *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998).

The primary factors to be considered in awarding alimony are the need of one spouse and the other spouse's ability to pay, *Mulling v. Mulling*, 323 Ark. 88, 912 S.W.2d 934 (1996), but certain secondary factors may be considered in setting the amount of alimony. *See, e.g.*, *Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980); *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997). These secondary factors include (1) the financial circumstances of both parties, (2) the amount and nature of the income, both current and anticipated, of both parties, and (3) the extent and nature of the resources and assets of each of the parties. *Id.* Ordinarily, fault or marital misconduct is not a factor in an award of alimony. *Mitchell, supra.*

In the present case, the parties had been married for approximately twenty-seven years. Both parties are retired; appellant receives $675 per month from his Teamster's pension and $872 monthly in Social Security benefits, and appellee receives $447 per month in Social Security benefits. There are no other sources of income. At the hearing, the chancellor ordered the marital home to be sold; because appellant had failed to preserve marital assets by spending most of the parties' savings at casinos, he further ordered that appellee receive the first $7,500 in profit from the sale of the house, with the balance of the profit, if any, to be divided equally. The remainder of the personal property was divided equally among the parties, with the exception of those items that were non-marital property. The chancellor ruled appellant's pension was marital property and ordered that it be divided equally between the parties. In awarding alimony, the chancellor's order provides, "There is a substantial disparity in incomes of these parties and [appellant] should pay to [appellee] the sum of $100.00 per week alimony."

Without the alimony award, adding each party's Social Security check and one-half of the pension yields the following monthly income:

APPELLANT:	$872.00 + 337.50 =	$1209.50
APPELLEE:	$447.00 + 337.50 =	$ 784.50

We agree that these figures reflect a substantial disparity in the incomes of the parties, and therefore we find that an alimony award is justified.

However, the chancellor's award has resulted in an even greater disparity in the parties' incomes and has not rectified the economic imbalance between the parties. Taking into consideration the alimony award ordered by the chancellor, the parties' monthly income is:

APPELLANT:	$1209.50 – $433.40 =	$ 776.10
APPELLEE:	$ 784.50 + $433.40 =	$1217.90

Appellee argues that the chancellor awarded her alimony to compensate for appellant squandering the parties' retirement savings immediately prior to filing for divorce. We disagree. The chancellor addressed that concern separately when he ordered that appellee be given the first $7,500 in profit from sale of the marital home. The sole basis stated by the chancellor for awarding alimony was to address the substantial disparity in the parties' income.

For the reasons stated above, we find that the chancellor abused his discretion in ordering appellant to pay $100 per week alimony, and we reverse and remand to the chancellor for a determination of the proper amount of alimony.

Reversed and remanded.

HART, ROGERS, and STROUD, JJ., agree.

BIRD and GRIFFEN, JJ., dissent.

SAM BIRD, Judge, dissenting. I respectfully dissent from the majority opinion because I do not believe that the chancellor abused his discretion in determining the amount of alimony to be paid to the appellee.

As the majority opinion correctly points out, an award of alimony is not mandatory, but is solely within the chancellor's discretion, and such an award is not reversed unless this court determines that the chancellor abused his discretion in making the award. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993). The purpose of alimony is to rectify, insofar as is reasonably possible, the frequent economic imbalance in the earning power and standard of living of the divorced husband and wife. *Mitchell v. Mitchell*, 61 Ark. App. 88, 964 S.W.2d 411 (1988). The alimony award must always depend upon the particular facts of each case. *Dean v. Dean*, 222 Ark. 219, 258 S.W.2d 54 (1953). The primary factors to consider in determining whether to award alimony is the need of one spouse and the ability of the other spouse to pay. *Mitchell v. Mitchell, supra.* To balance these primary factors, a chancery court should consider certain secondary factors, including the financial circumstances of both parties; the amount and nature of the income, both current and anticipated, of both parties; the extent and nature of the resources and assets of each of the parties; and the earning ability and capacity of both parties. *Anderson v. Anderson, supra.*

During the hearing, the appellant testified that he "cashed in" $17,000 in his and appellee's retirement savings in 1996 or 1997, that he gave various sums to family members, and that he paid $2,000 to the IRS. Appellant admitted that he lost $10,000 of their savings at gambling casinos. According to appellant's abstract, he testified as follows: "I spent several thousand dollars when I went to the casinos. I had a few drinks and I was broke. I took somewhere in the neighborhood of $10,000 with me. When I sobered up, I was broke."

The appellee, who was seeking $150 in alimony per week, testified that the appellant had actually squandered all of the $17,000 that they had accumulated as retirement savings, not just

the $10,000 that he admitted to losing at the casino. She stated that appellant had been paying temporary alimony of $100 per week before the divorce decree was entered, some of which she used to pay their $176 monthly house payment.

In his order, the chancellor noted that there was a substantial disparity in the incomes of the parties and ordered appellant to pay appellee $100 per week in alimony. He also noted that the appellant's squandering of marital funds justified an unequal division of certain marital property, and stated that this division should occur when the marital home is sold. The chancellor ordered that, from the proceeds of the sale of the marital home, the appellee should be paid $7,500 and the remaining proceeds should be divided equally between the parties. It should be noted that half of that $7,500 would have been received by appellee upon the sale of the house anyway, so that the effect of what the chancellor did was to award appellee only $3,750 to compensate her for the appellant's squandering of all the couple's savings, including $10,000 that appellant admitted losing on his gambling trip.

Based upon the testimony, I do not agree that the chancellor abused his discretion in awarding appellee $100 per week in alimony. The amount the appellant receives in social security retirement is $872; by contrast, appellee receives $447 in social security retirement. Further, appellant admitted that he lost $10,000 of the couple's retirement savings, and there was testimony that he actually squandered their entire $17,000 in savings. Without the award of alimony, the chancellor's unequal distribution of the proceeds from the sale of the home does not adequately compensate appellee for appellant's irresponsible conduct that resulted in the loss of their entire savings. Therefore, I do not believe it was an abuse of the chancellor's discretion to award appellee $100 per week in alimony, and I would affirm.

GRIFFEN, J., joins in this dissent.

Viola WILSON *v.* Fremont JOHNSTON and Altha Johnston

CA 98-1015 990 S.W.2d 554

Court of Appeals of Arkansas
Division I
Opinion delivered April 28, 1999

Pike & Bliss, by: *George E. Pike, Jr.*, and *Deborah Pike Bliss*, for appellant.

Appellees, pro se.

MARGARET MEADS, Judge. This case involves a dispute over a private-way easement. On May 8, 1963, the John Matthews Company filed of record in Pulaski County, Arkansas, a replat of Lot 16, Block 49, Lakewood, dividing it into Lots 16 and 17, and a plat and bill of assurance of Lot 17, Block 49, Lakewood that contained the following language:

> Grantor herein, its successors and assigns, reserves a private way over and across the extreme northwest portion of Lot 17, Block 49, LAKEWOOD, which private way is more particularly described as, having a frontage of 29 feet, more or less, on the southeast line of Shore Point Road, extending from Shore Point Road easterly 16.5 feet along the south line of said Lot 5, Block 50, thence southerly 56.2 feet across the west part of said Lot 17, Block 49, to the northeast corner of said Lot 16, Block 49,

> thence northwesterly 55 feet along the northeast line of said Lot 16, Block 49, to Shore Point Road, all as shown on said attached plat, which private way, being a part of said Lot 17, Block 49, LAKEWOOD, shall be forever appurtenant to and may be used as a private way or private road exclusively by the owners of said Lots 16 and/or 17, Block 49, LAKEWOOD, their heirs, successors and assigns forever.

Appellant, Viola Wilson, purchased Lot 16 in 1964 and used part of the common private way to construct a concrete driveway. Several years later, appellees, Fremont and Altha Johnston, purchased Lot 17 and, in constructing their own driveway, added on to the existing concrete drive appellant had built in the private way. A strip of land included in the private way, roughly ten feet wide and thirty feet long, was not paved and remains in its natural state. This strip of land (the "property") is the focus of appellant's lawsuit.

Over the years, appellant used the property to gain access to her backyard for various tasks such as moving sod and firewood to the backyard, delivering lumber for a shed, servicing the air conditioner, and bringing her riding lawn mower to the front yard. Appellees occasionally objected to such use and had asked that parked vehicles be moved off the property. Due to the ruts caused by service trucks and the frequent muddy condition of the property, appellant decided that she would pave the property. However, because appellees objected to her use of the property and to the paving, appellant filed a complaint for declaratory judgment and injunction in Pulaski County Chancery Court to determine her rights with regard to the property. She also requested that she be allowed to pave the remaining portion of the private way and to extend the privacy fence already in existence on her property.

After a hearing, the chancellor determined that although both parties used the property for driveways to their respective homes, for thirty-one years the property had been maintained as a "buffer," and appellant could not utilize the property for anything other than a "buffer." Appellant's requests to pave the property and to extend her privacy fence were denied. Moreover, the

chancellor found that appellees have the responsibility of maintaining the "buffer" and ordered that they could not take any action that would detrimentally affect appellant's property. Appellant contends on appeal that the chancellor erred in narrowing the width of the private-way easement that was defined by metes and bounds in the recorded plat.

Although this court tries chancery cases *de novo* on the record, we will not reverse unless we determine that the chancery court's findings of fact were clearly erroneous. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). Upon our *de novo* review, we hold that the chancellor was clearly erroneous in restricting appellant's right to use the entire area of the easement as a private way.

An easement is a property right and as such is entitled to all the constitutional safeguards afforded to other property rights. *Southwestern Bell Tel. Co. v. Davis*, 247 Ark. 381, 445 S.W.2d 505 (1969). In general, an express easement may be created by a written instrument. *Kennedy v. Papp*, 294 Ark. 88, 741 S.W.2d 625 (1987).

> The grant of an easement normally will control its location if the location is specified therein. The grant should identify an easement's location with specificity. In other words, the description of the easement requires such that a surveyor can go on the land and locate the easement from such description. . . .

25 AM. JUR.2d, *Easements and Licenses* § 74 (1996).

In addition, an appurtenant easement runs with the land and serves a parcel of land known as the dominant tenement, while the parcel of land on which the easement is imposed is known as the servient tenement. *Winningham v. Harris*, 64 Ark. App. 239, 981 S.W.2d 540 (1998). Thus, in this case we are concerned with an express easement, created by the metes and bounds description contained in the bill of assurance filed of record for Lot 17, Block 49, Lakewood. Because the land upon which the private way is located is owned by the appellees, their land is the

servient tenement, and appellant's private way is the dominant tenement.

Appellant argues that the chancellor erroneously applied the law pertaining to undefined easements in reaching his decision that appellant was not allowed to use the ten- by thirty-foot strip of property included in her private way; we agree.

Although we acknowledge that an easement that is not described by metes and bounds or defined with specificity is subject to "lines of reasonable enjoyment," *see, e.g., Howard v. Cramlet*, 56 Ark. App. 171, 939 S.W.2d 858 (1997), that is not the situation in the case at bar. Here, there is an express easement specifically established by metes and bounds for use as a private way by both appellant and appellees, and the chancellor can neither diminish the area nor restrict the usage of this private way.

The chancellor also clearly erred in taking into consideration the fact that the area had not been constantly used by appellant as a means of ingress and egress to her backyard and in determining that the area was a "buffer." We agree with the reasoning of the South Dakota Supreme Court in *Salmon v. Bradshaw*, 173 N.W.2d 281 (S.D. 1969), wherein the court held that owners of the servient tenement could not restrict the dominant tenement owner's use of an express easement. The court ruled:

> Plaintiffs are accordingly entitled to the free and uninterrupted use and enjoyment of the entire easement area for the clearly expressed purposes of the grant. The includes the "last inch as well as the first inch." It is immaterial whether or not plaintiffs made use of the full rights of the easement area in the past. Where "the language of the grant clearly gives the grantee a right in excess of the one actually used, such right would still exist notwithstanding the exercise of a lesser privilege." An easement created by an express grant is not lost by mere nonuser or partial use.

173 N.W.2d at 285 (citations omitted).

For the reasons cited above, we find that appellant is entitled to use the entire area of the easement as a private way.

The chancellor's findings that the ten- by thirty-foot strip of property within the easement must be used as a "buffer" only and that appellant is not entitled to use the property as a private way are clearly erroneous; therefore, we reverse the chancellor on this point.

As to the chancellor's denial of appellant's request to pave the remainder of the private way, appellant has not cited to this court, and we have been unable to find, any law that would specifically allow her to pave the property. However, we note that appellant, as the owner of the dominant estate, is responsible for preparation, maintenance, improvements and repair of the way "in a manner and to an extent reasonably calculated to promote the purposes for which it was created . . . causing neither an undue burden upon the servient estate nor an unwarranted interference with the rights of common owners . . . ." *Barraclough v. AP&L Co.*, 268 Ark. 1026, 1030, 597 S.W.2d 861, 863 (Ark. App. 1980) (citations omitted). Appellant, in addition,

> has the right to do everything necessary to preserve the easement, and the right to repair a way is fully established . . . The question of what acts of repair are reasonable in the use and enjoyment of an easement is one of fact in each particular case, and depends on the extent and character of the lawful use of the easement. *Craig v. O'Bryan*, 227 Ark. 681, 686, 301 S.W.2d 18, 21 (1957) (citing *Doan v. Allgood*, 141 N.E. 779 (Ill. 1923)).

In *Barraclough, supra*, this court also pointed out that the general rule which provides that once the character of an easement is fixed, no material alterations can be made in the physical conditions which are essential to the proper enjoyment of the easement except by agreement, is a restriction on the owner of the *servient* estate rather than on the owner of the *dominant* estate. Thus, we hold the chancellor clearly erred in finding that appellees are responsible for maintaining the easement. Appellant is the one who bears this responsibility, and she may do whatever is necessary to preserve the easement, including reasonable repairs and improvements. As to the specific question of whether or not appellant may pave the remainder of the easement, we remand this

issue to the chancellor to determine whether this is a reasonable repair.

As to the issue of whether appellant may place a fence along the edge of the private way, we cannot say the chancellor was clearly erroneous. As a general rule,

> [A] grant of an easement or right of way does not, by implication, include the right to have such way kept open to the sky for light and air, and the grant is not interfered with by building over the way, provided there is no interference with reasonable use of the easement as a passageway. . . . Of course, if a structure is contrary to the terms of grant of way, it cannot lawfully be erected; if the grant shows an intention of the parties that the way should not be interfered with by overhead obstructions, such intent will be given effect.

25 AM. JUR.2d, *Easements and Licenses* § 99 (1996). Further, in the case of an easement by grant, the creation is evidenced by the language and circumstances of the grant, and the extent of the easement is to be ascertained from the language construed in the light of relevant circumstances. *Jordan v. Guinn & Etheridge*, 253 Ark. 315, 485 S.W.2d 715 (1972).

Here, the easement was granted as a private way for use by the owners of both Lots 16 and 17. The easement does not contemplate a fence being erected in conjunction with the parties' use of the property as a private way. Moreover, if appellant were allowed to construct a fence, it would restrict appellees' use of the property as a private way because the fence would block their access to the property and interfere with their reasonable use of the easement as a private way. Therefore, we affirm the chancellor on this issue.

Reversed in part; remanded in part; affirmed in part.

BIRD and GRIFFEN, JJ., agree.

B.W. DALTON *v.* ALLEN ENGINEERING COMPANY

CA 98-967 989 S.W.2d 543

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 5, 1999

Davis, Mitchell & Davis, by: *Gary Davis*, for appellant.

Anderson, Murphy & Hopkins, L.L.P., by: *Randy P. Murphy* and *David A. Littleton*, for appellees.

JOHN B. ROBBINS, Chief Judge. Appellant B.W. Dalton suffered an injury to his lower back while working for appellee Allen Engineering on March 26, 1987. Allen Engineering accepted the claim as compensable and paid medical benefits, which included compensation for back surgery. Several rounds of litigation followed, and the appellee was ultimately ordered to compensate Mr. Dalton for a 15% permanent anatomical impairment and 25% wage-loss disability. Since the injury, Mr. Dalton has continued to take prescription medication for pain. The controversy in this appeal pertains to approximately $3100 that Mr. Dalton spent on these prescription drugs between March 8, 1996, and April 25, 1997. Mr. Dalton sought compensation for these expenses after the appellee refused to reimburse him. After a hearing on the issue, the Commission refused to award any compensation, finding that continued drug treatment during the time period at issue was no longer reasonable or necessary treatment for the compensable injury. Mr. Dalton now appeals, arguing that the Commission's denial of additional medical benefits was not supported by substantial evidence.

When the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of

relief. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

Mr. Dalton was the only witness at the hearing before the Commission. He testified that, in 1987, he was working for the appellee when a piece of equipment fell on him and injured his spine. At the time of the accident he was on an assignment in Georgia, and he subsequently received medical treatment in that state. He underwent surgery, began seeing Dr. Austin Grimes in 1990, and continued under his orthopedic care until 1994, when he was referred to a general practitioner, Dr. H.R. Duckworth. Dr. Duckworth continued to treat Mr. Dalton through the date of the hearing.

While under the care of Dr. Grimes, Mr. Dalton underwent conservative measures including therapy and medication. The medication prescribed by Dr. Grimes included Voltaren, Parafon, Zantac, and Darvocet. In late 1993, Dr. Grimes told Mr. Dalton that he had nothing else to offer him and referred him to Dr. Duckworth for further prescriptions. Since that time, Dr. Duckworth has continued to prescribe the same medication that Mr. Dalton was receiving under the care of Dr. Grimes.

Mr. Dalton testified that he has pain in his lower back that goes down into his hip, and muscle spasms that shoot into his left leg and foot. He indicated that any kind of lifting or pushing exacerbates the pain. As for the drugs that he takes, Mr. Dalton testified, "I have to take medication and probably will need it for the rest of my life."

Dr. Grimes gave a deposition in which he discussed the extent to which Mr. Dalton should have continued taking the medication. He testified:

> In November of 1994 I said that he should not be taking all that Darvocet. I have not changed my opinion other than to qualify it by saying that I don't know what the situation is currently so I don't know whether he needs it or not. Darvocet is a narcotic pain medication. It has addiction potential. Most physicians try to get the patient away from that type of medication.
>
> . . . .
>
> All four of these drugs are consistent with a back pain complaint, and they are frequently prescribed. Darvocet is not a major narcotic, but at the same time, it is an addicting drug. The other medications are not considered addictive drugs. Darvocet is not a medication that we feel any hesitancy in prescribing short term. But if the medication is continuing to be prescribed it attacks the symptoms and not the problem.

Despite Dr. Grimes's reservations regarding the medication that he expressed in 1994, he also stated in his deposition:

> I would defer to Dr. Duckworth with respect to Mr. Dalton's present prescription medications and treatment. The doctor seeing the patient must make the decision as to when to change medications.
>
> . . . .
>
> There are all sorts of methods of dealing with problems of continuing taking medications when it is probably not doing as much good as it has in the past. It becomes more of a crutch than an actual benefit. But neither this gentleman nor anyone else, should be cut off cold turkey from their medications.

Shortly before the hearing, Dr. Duckworth referred Mr. Dalton to a pain center program, and Dr. Grimes had this to say about it:

> I responded in November of 1994 that I did not believe that taking this much medication was necessary seven years after the incident. Mr. Dalton has been referred to the pain center. I think the fact that he has been referred to the pain center is justification enough to whatever physician had written the orders for these drugs. The problem is that pain is subjective. The fact that he is being referred to a pain management center I think is reason enough to fill these medications at this one particular time. Normally, with pain center referrals, medication is stopped. After he is seen in the pain center program, I think the medications should

> stop. Only one person should write prescriptions for the patient and whatever pain center management should be instituted from there. Additional medication prescriptions are not written in order to avoid interference with the treatment program.
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> . . . .
>
> I would agree with the idea that he is requiring pain medication and should be seen in a pain management clinic.

In a letter written on December 13, 1994, Dr. Duckworth stated:

> The last time that I saw the patient was September 2, 1994 at which time he was still having low back pain which appeared to be lower back muscle spasm. His medications were prescribed as follows: Zantac 150 mg. b.i.d., Voltaren 75 mg. b.i.d., Darvocet N 100 q four hours PRN for pain, and Parafon Forte 500 mg. b.i.d.
>
> I agree with Dr. Grimes that seven years after this accident that his medication intake may be excessive. Probably he will need the Zantac if he continues to take the Voltaren. Darvocet and Parafon Forte should be taken only on a PRN basis. Also I feel that possibly a cheaper medication could be substituted for the Voltaren and the results would be equal. Certainly he doesn't need to take 100 Darvocet N per month as was indicated in your communication.

After reviewing Dr. Grimes's deposition in this matter, Dr. Duckworth gave the following opinion in a letter dated April 23, 1997:

> I reviewed the oral deposition as given by Dr. Austin Grimes of Little Rock. I essentially agree with the testimony of Dr. Grimes in regard to the above workman's comp case. The last time I saw Mr. Dalton he seemed to have considerable pain either real or imagined. As you know there is no simple way of determining a patient's level of pain. After seeing the patient I feel that his medication level is justified.
>
> I do think that Mr. Dalton should be in a pain control clinic or center. I think that they should be allowed to prescribe the necessary treatment for Mr. Dalton.

In denying compensation for the oral medication prescribed by Dr. Duckworth between March 8, 1996, and April 25, 1997,

the Commission relied on the opinions of Drs. Duckworth and Grimes. It noted that, as early as November 1994, Dr. Grimes expressed the belief that Mr. Dalton's medication was excessive. It also referenced Dr. Duckworth's letter of December 1994, in which he agreed that the medication may be excessive and indicated his willingness to limit the prescriptions. As for Dr. Grimes's testimony regarding the pain center program, the Commission found that he was recommending prescription medication one time only prior to admission into the program, rather than ongoing medication. In denying additional benefits, the Commission stated, "The opinions of Dr. Grimes and Dr. Duckworth support a finding that it is excessive for the claimant to be taking this medication over eleven years after his compensable injury."

For reversal, Mr. Dalton argues that there is no substantial evidence to support the Commission's finding that the medications prescribed were excessive and, thus, noncompensable. He notes that both Drs. Grimes and Duckworth were authorized treating physicians, and that neither gave the opinion that he should not be taking any medication. Indeed, Mr. Dalton continued his drug treatment under the supervision of Dr. Duckworth, who continued to prescribe the medication for the alleviation of his work-related back condition. Under these circumstances, Mr. Dalton submits that the continued treatment was reasonable and necessary.

The appellant bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. *Morrow v. Morrow*, 5 Ark. App. 260, 635 S.W.2d 283 (1982). The medical benefits owed under the Workers' Compensation Act are only those that are reasonable and necessary. Ark. Code Ann. § 11-9-508(a) (Repl. 1996). In the instant case, we find that the Commission erred in refusing to award *any* benefits for Mr. Dalton's continuing pain medication.

There is a substantial basis to support the finding that not all of the claimed treatment was reasonable and necessary in light of some of the opinions expressed by Drs. Grimes and Duckworth. However, there is no substantial basis to support the Com-

mission's finding that *none* of the claimed treatment was compensable, because at no time did either of appellant's physicians give an opinion that the drug treatment should have been eliminated altogether. Instead, both doctors agreed that some prescription medication was necessary, and suggested only that the dosages may have been excessive. Indeed, in denying benefits, the Commission relied on the fact that the treatment was excessive, but never found that *all* of the treatment was unreasonable and unnecessary.

Even back in November 1994, Dr. Grimes only thought that Mr. Dalton should not be taking all of the medication being prescribed; he did not say that he should be cut off entirely. Indeed, he stated in his deposition that "neither this gentleman nor anyone else, should be cut off cold turkey from their medications." And, while Dr. Duckworth generally agreed in 1994 that the medications should be reduced, he continued to prescribe the full doses, which demonstrated that he thought the full medication was still necessary to treat the back pain. Then, in April 1997, Dr. Duckworth stated, "After seeing the patient I feel that his medication level is justified." In his deposition, Dr. Grimes stated, "I would defer to Dr. Duckworth with respect to Mr. Dalton's present prescription medications and treatment."

Mr. Dalton clearly established the need for further medication, and there was no evidence to the contrary. Therefore, we reverse and remand for the Commission to determine, if it can, in the performance of its fact-finding function, the extent of medication that was not excessive and the cost of such medication.

Reversed and remanded.

PITTMAN, HART, and ROGERS, JJ., agree.

JENNINGS and BIRD, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. As the majority states, the employer has liability only for those medical expenses that are reasonable and necessary; the claimant has the burden of proof in this regard; and the Commission's decision must be affirmed if it displays a substantial basis for the denial of

relief. The majority also accurately sets out the relevant facts. And while I cannot disagree with the majority view that perhaps some of the medication was reasonable and necessary, it was incumbent upon the claimant to show the amount.

Given that two of his treating physicians testified that the amount of medication he was taking was excessive, I cannot say that the Commission's opinion is not supported by substantial evidence. I therefore respectfully dissent.

BIRD, J., joins.

Ode WARD *v.* Mike ADAMS, *et al.*

CA 98-754 989 S.W.2d 550

Court of Appeals of Arkansas
Division I
Opinion delivered May 5, 1999

Lyons, Emerson & Cone, P.L.C., by: *Jim Lyons*, for appellants.

Michael R. Gott, P.A., for appellees.

JOHN B. ROBBINS, Chief Judge. This case concerns a boundary-line dispute. Appellant Ode Ward appeals the order of a Craighead County chancellor that dismissed Ward's 1996 complaint against appellees Mike Adams, his wife Rebecca Adams, and Buddy Frank Smith, which asserted that Ward had acquired ownership of a disputed thirty-foot strip of property by acquiescence or by adverse possession. Appellant argues that this finding of the chancellor was clearly erroneous. We disagree and affirm.

Chancery cases are reviewed de novo on appeal. *Lammey v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998). We will not reverse a chancellor's finding of fact in a boundary line dispute case unless the finding is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.* The location of a boundary line is a question of fact. *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 witnesses and the weight to be

accorded their testimony. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996).

The undisputed facts in this case indicated that Ms. Henson, Mr. Staggs, and Mr. Ward owned adjacent parcels of land, and that Ms. Henson had the most northerly of the tracts. Just to the south was Mr. Staggs' property, and just south of Mr. Staggs was the land owned by appellant Ward. Directly to the east of the eastern boundary lines of these three properties was the land belonging to the appellees. Appellees grew wheat on their land; appellant grew cotton on his. The question in this case pertains to the location of their common boundary line. Aerial photographs of this farm land taken yearly by the Agriculture and Soil Conservation Service were introduced indicating a relatively straight line from north to south along the three properties that abutted the land of appellees. Appellees contended that the big oak tree, with which all parties were familiar, was located thirty feet inside their western boundary line. Appellant contended that an old fence line and four stumps, which were essentially in line with the big oak tree, marked the boundary. The difference between these two contentions was a thirty-feet-wide strip of land. The most recent survey prepared indicated that the appellees' position was correct.

There were scores of witnesses at the hearing on this case. Appellee Mike Adams and many of the people who had farmed the land for appellees testified that everyone recognized an old fence line that had long been gone and a pecan tree in Ms. Henson's yard as being on the boundary line. The land had been farmed for many, many years following this line, according to their testimony. The same type of testimony was elicited from appellant and his witnesses who claimed that Mr. Adams had encroached upon their land, and that the established boundary was in line with the big oak tree, that being at the edge of Mr. Adams's field. This essentially came down to a question of credibility and comparison of surveys. Weighing the evidence and giving the witnesses whatever credibility determinations they deserved, we cannot say that the chancellor erred in dismissing appellant's complaint.

Adverse Possession

To establish title by adverse possession, the one claiming title bears the burden to prove that he had been in possession of the property continuously for more than seven years and that his possession was visible, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner. *Moses v. Dautartas*, 53 Ark. App. 242, 922 S.W.2d 345 (1996). The proof required as to the extent of possession and dominion may vary according to the location and character of the land. *Id.* Whether possession is adverse to the true owner is a question of fact. *Id.* We need not discuss this point with any length because it is abundantly clear that there was no asserted adverse use for the required seven years.

Acquiescence

The case-law principles that govern whether a boundary line has been established by acquiescence are well settled. Whenever adjoining landowners tacitly accept a fence line and thus apparently consent to that as their property line, it becomes the boundary by acquiescence. *Walker v. Walker*, 8 Ark. App. 297, 651 S.W.2d 116 (1983). A boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. *Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 927 (1978); *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). The period of acquiescence need not last for a specific length of time, but it must be for "many years" or "a long period of time" sufficient to sustain the inference that there has been an agreement concerning the location of the boundary line. *See Seidenstricker v. Holtzendorff*, 214 Ark. 644, 217 S.W.2d 836 (1949). This period varies with the facts of each case, just as all circumstantial evidence does, unlike the seven years required to take land by adverse possession, which is a statute of limitations for commencement of an action to recover land adversely possessed. *See* Ark. Code Ann. § 18-61-101(a) (1987). Moreover, establishment of a boundary line by acquiescence does not require adverse possession of the land by one party. *See Morton v. Hall*, 239 Ark. 1094, 396 S.W.2d 830 (1965). When the adjoining landowners occupy their respec-

tive premises up to the line they acquiesce in as the boundary for a long period of time, they and their grantees are precluded from claiming that the boundary thus acquiesced in is not the true boundary, although it may not be. *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972). A boundary line may be established by acquiescence whether or not preceded by a dispute or uncertainty as to the boundary line. *Id.* Where a boundary line by acquiescence can be inferred from other facts presented in a particular case, a fence line, whatever its condition or location, is merely the visible means by which the acquiesced boundary line is located. *See Camp v. Liberatore*, 1 Ark. App. 300, 615 S.W.2d 401 (1981). While appellant makes a better case for acquiescence than adverse possession, we cannot say that the chancellor erred in finding that Mr. Ward failed in carrying his burden of proof to show that there was a boundary by acquiescence.

Mr. Adams and his witnesses testified that the post that marked the true line had been moved over thirty feet to the big oak tree in 1995. He contended that the true line was thirty feet west of the big oak tree and in line with a pecan tree in the yard of Ms. Henson. One farmer in particular testified that in 1967, when he plowed the field for appellee's predecessor in title, he had to plow around the oak tree, and he remembered that the oak tree was between the seventh and tenth row in from the edge of the field. Witness after witness on behalf of appellee testified in the same manner.

It is appellant's position that the eastern boundary of his property and Ms. Henson's is a straight line, because they appear straight in the aerial photographs. Therefore, he argues that it is inconsistent that Ms. Henson prevailed on her adverse possession claim to a thirty-foot strip and that he did not prevail. However, appellant ignores that Ms. Henson, since her purchase of her land in 1988, mowed the strip of land that was contrary to the survey, and she had a building and plants and a flag pole on that strip of land. There was evidence that appellees came on to her land, digging up the soil in 1996, contrary to her established ownership since 1988. This was open, notorious, and clearly adverse to any claim by appellees. This is why she prevailed.

In addition, the tract of land between appellant's and Ms. Henson's, owned by the Staggs, was judicially determined to be in line with what the chancellor determined in this case. This boundary line runs south from a pecan tree growing in Ms. Henson's yard — a landmark that multiple witnesses testified was used as a marker when plowing or tilling the land.

Appellant also mischaracterizes the clarity of the aerial photographs. The photographs were taken from such a distance that the plats of land appear in a quilt-like pattern. In our de novo review, we could not discern where any of the landmarks in question lay. The chancellor agreed that the boundary lines appeared to be in a "relatively straight line north and south between the properties," but went on to state that "it would be difficult, if not impossible, for the court or anyone else to ascertain with any surety the angle from which the photos were taken, or the altitude, and or to calculate any distance shown from the middle of the big tree to the crops growing, east or west. An aerial photograph taken from an angle of even a few degrees to the east or west could create a totally different appearance of the crop lines and their location, as evidenced by the photos." We do not find his conclusion regarding the photographs to be clearly erroneous.

While appellant makes much of the fact that some of appellees' witnesses testified that there were wooden posts in line with the big oak tree, he neglects to point out that those references were to periods of time after which appellees allege that appellant had moved those posts over thirty feet to the east, contrary to the true boundary line. Consequently, this is of no help to appellant since it only goes to prove that appellant attempted to change the boundary line just before litigation began.

We cannot say that the chancellor clearly erred in this case, and therefore we affirm.

HART and JENNINGS, JJ., agree.

Angela BROWN *v.* STATE of Arkansas

CA CR 98-763 991 S.W.2d 137

Court of Appeals of Arkansas
Division III
Opinion delivered May 5, 1999

Bart Ziegenhorn, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant, Angela Brown, was charged by amended information with first-degree murder in connection with the death of her child. After a jury trial, she was found guilty of second-degree murder and was sentenced to fifteen years' imprisonment and fined $5,000. On appeal, she contends that the trial court erred in admitting expert opinion that the death was the result of homicide. We affirm.

Appellant's two-year-old son died between 8:00 p.m. and 9:30 p.m. on September 9, 1997. It was undisputed that the cause of death was thermal burning, with the child having suffered third-degree burns to over twenty-five percent of his body. It was the State's theory of the case that appellant had intentionally dipped the child into extremely hot water and waited some six to twelve hours before seeking any medical attention. The State presented evidence that the child was burned no later than early afternoon, that appellant called her adult daughter to come home, and that the baby lay on the bed until that evening. Appellant's boyfriend testified that he went to appellant's apartment after work and found no one home. He went to a friend's home a block and a half away. At least thirty minutes later, appellant arrived pushing the baby in a stroller. She stated that the baby was not breathing and asked that someone call an ambulance. Others who were present attempted to resuscitate the child and called 911.

Paramedics arrived within five minutes and continued to work on the child, who was immediately transported to the hospital. Within minutes of arriving at the hospital, it was determined that the child had been dead for perhaps an hour or more. The emergency-room physician, Dr. David Cauley, testified that, while the burns had probably occurred within twelve hours, they "had not just happen[ed]. . . . [T]here had been plenty of time for the body to react to the burning." The doctor stated on cross-examination that, based on the location and pattern of the burns, it looked "like the child had been dipped. . . . The burns I saw are

typical dunking in hot water type burns." Before he told appellant that her son was dead, the doctor asked her when the burning had occurred. Appellant said, "I don't know. I wasn't there." Dr. Cauley described appellant's demeanor as "unconcerned."

West Memphis Detective Ken Mitchell testified that he interviewed appellant later that evening. He stated that she maintained that, while she was in the kitchen, the child climbed from the toilet to the bathroom sink, turned on the hot water, and burned himself. She went to get him when she heard his cries. She changed her story several times as it related to the length of time that passed between the injury and when she sought medical help, with the period ranging from just minutes to about eight hours. Detective Mitchell stated that appellant was very calm and relaxed throughout this initial interview. However, after he set up a video camera to record appellant's statement, she became emotional. The detective stated that she appeared to cry and moan, but he never saw any tears.

The State also presented the testimony of Assistant State Medical Examiner Daniel Konzelmann, who performed the autopsy. Dr. Konzelmann testified that the child had suffered third-degree burns to twenty-seven percent of his body. The child was burned on his feet, legs, buttocks, groin, lower back, and right hand. Conspicuously not burned were the areas behind the child's knees. Dr. Konzelmann also noted a sharp line of demarcation between the burned skin and unburned skin. He stated that he had researched several respected medical journals on the subject of thermal burning and described the various factors that have been determined relevant in deciding whether burns were accidentally inflicted. He stated that, based on his comparison of the leading research to his physical findings and the police reports, it was his opinion that the victim's injuries were inconsistent with the child having accidentally burned himself. Dr. Konzelmann pointed specifically to such factors as the pattern of the burns, with the distinct line of demarcation being suggestive of dipping and inconsistent with appellant's explanation; the location of the burns, with the unburned areas behind the knees being consistent with the child having reflexively drawn his legs up when dipped; the length of time between the injury and when medical attention

was sought; and the apparent lack of concern shown by appellant. Over appellant's objection pursuant to Ark. R. Evid. 704, the doctor was then allowed to state his opinion that the manner of the child's death was "homicide."

On appeal, appellant contends that the trial court erred in allowing Dr. Konzelmann to state his opinion that the manner of death was homicide. She concedes that the doctor could list and explain the factors that experts in the field look toward to determine the manner of death. However, she argues, the doctor's opinion that the death resulted from a homicide did more than merely embrace the ultimate issue under Rule 704; it told the jury what to do and thereby impermissibly mandated a legal conclusion. We find no reversible error.

The admission of relevant evidence, whether opinion testimony or otherwise, is a matter within the sound discretion of the trial court, whose decision will not be reversed absent an abuse of discretion. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). Rule 704 of the Arkansas Rules of Evidence provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Our supreme court has drawn a distinction between "an admissible opinion that 'touches upon the ultimate issue' and an opinion, not admissible, that 'tells the jury what to do.'" *Marts v. State*, 332 Ark. at 642, 968 S.W.2d at 48 (citing *Salley v. State*, 303 Ark. 278, 283, 796 S.W.2d 335, 338 (1990)). The clear trend of authority is not to exclude opinion testimony because it amounts to an opinion on the ultimate issue. *Marts v. State, supra; Davlin v. State*, 320 Ark. 624, 899 S.W.2d 451 (1995); *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984). Such opinion testimony is permissible provided that it does not mandate a legal conclusion. *Marts v. State, supra; Davlin v. State, supra.* Consistent with these rules, our supreme court has refused to reverse convictions where opinion testimony as to one element of an offense has been admitted. *See Salley v. State, supra* (in an attempted capital murder prosecution, police officer allowed to testify that defendant appeared to be shooting to kill; opinion testimony dealt with single element, leaving jury to decide ultimate issue of whether all necessary elements were proven beyond a

reasonable doubt); *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987) (in a rape case, an expert can offer an opinion that a child has been sexually abused); *Jennings v. State*, 289 Ark. 39, 709 S.W.2d 69 (1986) (in a child-rape case where the adult defendant's defense was that another juvenile in the home had committed the offense, a physician was allowed to opine that the victim had been penetrated by an adult penis; "[t]he opinion given was not the ultimate issue to be decided, that being whether [appellant] was guilty"); *Long v. State, supra* (in a prosecution for driving while intoxicated, police officer allowed to opine that defendant was intoxicated).

From our review of this record, we cannot conclude that the trial court abused its discretion in allowing Dr. Konzelmann to state his opinion that the manner of death was homicide. By so testifying, the doctor did no more than offer an opinion that the child's life was ended by the act of another person. "Homicide" is defined in *Black's Law Dictionary* 734 (6th ed. 1990) in pertinent part as follows:

> The killing of one human being by the act, procurement, or omission of another.
>
> Homicide is not necessarily a crime. It is a necessary ingredient of the crimes of murder and manslaughter, but there are cases in which homicide may be committed without criminal intent and without criminal consequences. . . . The term "homicide" is neutral; while it describes the act, it pronounces no judgment on its moral or legal quality.

Thus, the opinion testimony to which appellant objected was different from a conclusory statement that appellant was "guilty of murder." *See Salley v. State, supra*; *Jennings v. State, supra.* As the State argues, in determining appellant's guilt in this case, the jury was still left to decide whether appellant caused the child's death and, if so, her culpable mental state, if any.

In any event, we could find no prejudice as a result of the opinion in question in this case. Appellant's only objection was to Dr. Konzelmann's opinion that the manner of death was homicide. She did not object to Dr. Cauley's testimony that it appeared to him as though the child had been dipped in hot water

or to Dr. Konzelmann's conclusion that "the mother intentionally dipped her child" in hot water. Indeed, both statements were elicited by appellant's counsel on cross-examination. Neither doctor went anywhere near so far in his testimony on direct examination. Evidence that is merely cumulative of other evidence admitted without objection is not prejudicial. *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995).

Affirmed.

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

David CASTEEL and Judith Casteel *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

CA 98-1117 989 S.W.2d 547

Court of Appeals of Arkansas
Division I
Opinion delivered May 5, 1999

Henry, Halsey & Thyer, for appellants.

Snellgrove, Laser, Langley , Lovett, & Culpepper, by: *Todd Williams*, for appellee.

JOHN E. JENNINGS, Judge. This litigation arose from a car accident involving Robin Peppers and appellant David Casteel. Appellant recovered the maximum limit of Ms. Peppers's automobile insurance policy in the amount of $50,000.00, and this case concerns appellant's underinsurance claim against his own insurer, appellee State Farm. Appellee defended the suit on alternative grounds, arguing that appellant's own negligence con-

tributed to the cause of the accident or that appellant's damages did not exceed $50,000.00. A Craighead County jury returned a general verdict for the defense.

Two issues are raised in this appeal. Appellant contends that the trial court erred in allowing testimony and evidence concerning his prior medical conditions and treatment that were unrelated to the injuries sustained in the collision and that the court erred in giving the jury instruction AMI 601. We affirm.

Appellant raises several evidentiary matters in his first point on appeal. By way of background, appellant filed a written motion in limine before trial seeking to exclude certain references to prior medical conditions, as contained in the office notes and deposition of his primary physician, Dr. Darrell Ragland. The trial court denied the motion in part, allowing mention of conditions that were deemed related to appellant's complaints since the accident, but the court also granted the motion in part, specifically precluding testimony concerning pain in the appellant's right-hand index finger related to arthralgia, and mild tension headaches. At trial, Dr. Ragland's deposition was read to the jury by the parties' two attorneys.

■ ■ Appellant's first contention is that error occurred because appellee violated the court's ruling in limine because those two conditions were mentioned when Dr. Ragland's deposition was read. Appellant, however, failed to voice any objection to the violation of the court's order prohibiting reference to those subjects. In his brief, appellant concedes that he did not object, but he argues that no objection was necessary, citing the rule that pertains when a trial court overrules a specific motion in limine. *See Ward v. State*, 272 Ark. 99, 612 S.W.2d 118 (1981); *Taylor v. State*, 9 Ark. App. 286, 658 S.W.2d 432 (1983). We are not persuaded that this rule applies in this instance. Here, the error complained of does not concern the trial court's ruling, which was favorable to appellant, but rather it is the violation of the trial court's ruling. It is one thing for it to be unnecessary to complain further about an adverse ruling, but quite another to say that an objection is not necessary when there is a violation of a favorable ruling. Few tenets are more firmly established than the rule

requiring a contemporaneous objection in order to preserve a point for review. *Nazarenko v. CTI Trucking Co., Inc.*, 313 Ark. 570, 856 S.W.2d 869 (1993). The reason is that the trial judge must be given an opportunity to correct the mistake. *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992). Furthermore, there is no affirmative duty on a trial court to subsequently make evidentiary rulings on its own motion. *Mills v. State*, 321 Ark. 621, 906 S.W.2d 674 (1995). Because appellant failed to object, we conclude that this issue has not been preserved for appeal.

Also under this point, appellant argues that the trial court erred in allowing testimony given during Dr. Ragland's deposition that appellant had previously complained of left flank pain. Appellant sought the exclusion of this testimony in both the written motion in limine and one made orally at the outset of trial. In response to appellant's oral motion in limine, appellee's counsel agreed not to refer to this matter. Nevertheless, it was mentioned during the reading of the deposition. Again, however, appellant failed to make any objection, which results in a waiver of this issue.

Appellant further contends that the trial court erred in permitting testimony that he had high blood pressure, as well as evidence related to his family history of colon cancer and appellant's refusal of diagnostic testing for that condition for financial reasons. Appellant raised these and a number of other matters in his oral motion in limine. Our review of the record, however, reveals that appellant failed to obtain a ruling. In addressing appellant's motion, the trial court ruled only that it would allow evidence of appellant's preexisting condition of fibromyalgia and related symptoms, since appellant's current complaints were similar to that condition. The court's ruling did not specifically address any of the other points raised in the motion. It is well established that the burden of obtaining a ruling is on the movant, and any objections and questions left unresolved are waived and may not be relied upon on appeal. *Fisher v. Valco Farms*, 328 Ark. 741, 945 S.W.2d 369 (1997). Also, when a trial court declines to rule on a motion in limine to exclude specific evidence, it is necessary for counsel to make a specific objection during the trial in order to preserve the issue on appeal. *Slocum v. State*, 325 Ark. 38,

924 S.W.2d 237 (1996). Because appellant failed to obtain a ruling and did not object when the evidence was introduced, these issues were not preserved. Even so we do not regard the admission of the evidence complained of as being prejudicial. Unless the appellant demonstrates prejudice, we do not reverse. *Lucas v. Grant*, 61 Ark. App. 29, 962 S.W.2d 388 (1998).

The accident in this case occurred on a four-lane street as Ms. Peppers, in a west-bound left lane, was making a left-hand turn into a parking lot, while appellant was heading east after entering the street from an adjacent parking lot. Ms. Peppers's vehicle struck appellant's vehicle broad-side, near the driver's door. As his second argument, appellant contends that the trial court erred in instructing the jury that a driver about to enter a highway must give the right of way to approaching vehicles. We find no error.

The parking lot that appellant had left and the lot that Ms. Peppers was turning into are only a foot or so apart. Ms. Peppers testified that the road was clear when she initiated her turn. Although appellant did testify that he had traveled some distance before the accident occurred, he also testified that "I pulled onto the road, and all of a sudden she was there. It was that quick." We believe that there was evidence from which the jury could find that Ms. Peppers made her turn first and was thus approaching when appellant pulled out of the parking lot. 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 it. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

Affirmed.

ROGERS and GRIFFEN, JJ., agree.

Steven Ron FORTSON *v.* STATE of Arkansas

CA CR 98-247 989 S.W.2d 553

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 5, 1999
[Substituted opinion on grant of rehearing.]

William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Appellant brings this appeal from the Pulaski County Circuit Court contending that the court

erred in ordering him to make restitution for property that he was not charged with having stolen and which he was not proven to have possessed. We reverse and remand. We originally decided this case on November 19, 1998, and affirmed the trial court. Appellant filed a timely petition for a rehearing, which we granted, and we issue this substituted opinion.

The appellant, Steven Ron Fortson, was charged with violating Ark. Code Ann. § 5-36-106 (Repl. 1995), theft by receiving, after the State alleged that the appellant either received, retained or disposed of property that was valued at more than $200 and belonged to Judy Harness. Property, including antique furniture, was stolen from Harness's home in a series of burglaries occurring May 15, 1996, August 12, 1996, and August 17, 1996. The items had a value of approximately $9,685. On September 9, 1996, Harness contacted the police and informed them that she had found several of the stolen items at different antique stores in North Little Rock. An investigator met with the owner of one of the stores, Sherry Ballard, who informed the investigator that she had purchased the items from the appellant and his co-defendant, Rebecca Rolling, who is not a party in this appeal. Ballard stated that she paid $60 to appellant and his co-defendant for items that Harness had identified as being stolen from her home. Donna Kinder, a manager of the store, stated that she paid appellant and his co-defendant $1,170 for some of the items.

A hearing was held on August 11, 1997, at which time the appellant entered a no-contest plea to theft by receiving, and the court accepted the plea. The following exchange took place at the hearing on appellant's plea:

> THE COURT: Would the State state the facts?
>
> MR. PETTY [FOR THE STATE]: In the case of CR-97-620, the State's proof at trial would show that on or about May 11 through May 15, 1996, and on or about August 17, 1996, Ms. Judy Harness had reported some burglaries that occurred at her residence at 4206 Burlingham Road. . . . In those burglaries there were several antiques that were stolen for a total value of

> $9685.00. On September 9, 1996, Ms. Harness contacted Investigator Winchester and told him that she had found several of those items at three different antique stores in the North Little Rock area. She then went and met with the owners of those antique stores and identified fifteen items among those three stores which were hers, which she had reported stolen. Those fifteen items had been purchased by the antique shops from Mr. Steven Fortson and Ms. Becky Rolling. Ms. Harness recovered approximately half of her property. There was over $5000.00 worth of property which was outstanding. There were also checks written by the antique stores to Ms. Rolling in the amounts of $2100.00 total for the antiques which were purchased.
>
> MR. FORTSON, DEFENDANT: I have heard the Prosecutor's statement about the facts in these cases. Those are the facts which I do not contest. I do not know of any reason, legal or otherwise, why you should not accept my no contest pleas. I am pleading no contest voluntarily.
>
> THE COURT: In 97-0620, theft by receiving how do you plead?
>
> MR. FORTSON, DEFENDANT: No contest.

Under the terms of the plea agreement, the trial court sentenced appellant to seventy-two months in the Arkansas Department of Correction and ordered him to pay restitution to the victims.

Because the appellant contested the amount of restitution, a hearing was held on October 6 and 13, 1997. The court determined that appellant was obligated to make restitution in the amount of $6,705, which included $1,170 to Kinder and $60 to Ballard, and $5,475 to Harness for property that was not recovered. Appellant did not dispute that he owed restitution in the amount of $1,230 to the antique vendors, Kinder and Ballard. However, he objected to the requirement that he should have to pay Harness because he argued that he had neither been charged with nor pleaded no contest to burglary of Harness's home. He argued that the State had produced no evidence that he ever possessed any of the non-recovered property. Therefore, he argued that the court should not order him to make restitution for a crime with which he had never been charged.

The State admitted the charge against appellant for theft by receiving was based upon the items sold to the antique stores and that the appellant was never charged with or pleaded no contest to committing the burglaries. Even so, the trial court found that appellant had pleaded to the facts as stated by the prosecutor, including the burglaries. Consequently, the trial court ordered appellant to make full restitution, including making payment to Harness in the amount of $5,475, the value of the property taken in the burglaries that had never been recovered.

On appeal and on petition for rehearing, the appellant's sole argument is that he should not have to make restitution for the remaining property because he had not been charged with the burglaries and had not pleaded no contest to committing them. He argues that the State did not produce any evidence that appellant was ever in possession of any of the other non-recovered property. He also contends that the State produced no proof that he stole the property or burglarized Harness's home. He does not challenge the restitution that he was ordered to pay to Kinder and Ballard. The State concedes appellant's argument on appeal, emphasizing that appellant was not charged with burglary and did not plead to burglary; and the State joins in appellant's request that the trial court's judgment be reversed and the case remanded.

Arkansas Code Annotated section 5-4-205(a)(1)-(3) (Repl. 1997) states:

> (a)(1) A defendant who is found guilty or who enters a plea of guilty or nolo contendere may be ordered to pay restitution.
>
> (2) The sentencing authority, whether the trial court or a jury, shall make a determination of actual economic loss caused to a victim *by the crime*. (Emphasis added.)
>
> (3)(A) The determination of the amount of loss is a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of a trial.

In the case at bar, the appellant was charged with and pleaded no contest to theft by receiving. He was neither charged with nor did he plead no contest to burglary. These two crimes have dif-

ferent elements. Theft by receiving, as codified at Ark. Code Ann. § 5-36-106(a) (Repl. 1997), is defined as follows:

> A person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen.

Burglary, as codified at Ark. Code Ann. § 5-39-201(a)(1) (Repl. 1997), is defined as follows:

> A person commits residential burglary if he enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.

A person may be found guilty of theft by receiving if he is knowingly in possession of stolen property, even without proof that he took the property himself or acquired it from the actual thief. *King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977). A person need not have committed burglary, or even received all of the property taken in a burglary, to be guilty of theft by receiving. *Id.* Defendants cannot be convicted of crimes with which they were never charged. *Whitehead v. State*, 316 Ark. 563, 873 S.W.2d 800 (1994); *Hagen v. State*, 315 Ark. 20, 864 S.W.2d 856 (1993); *Brewer v. State*, 286 Ark. 1, 688 S.W.2d 736 (1985). Consequently, defendants cannot plead guilty to crimes with which they have never been charged. *Switzer v. Golden*, 224 Ark. 543, 274 S.W.2d 769 (1955).

Even if the trial court found that the statement of the charge was broad enough to include facts sufficient to find the appellant guilty of burglary as well as theft by receiving, the court erred by ordering restitution for an economic loss that was caused by a crime with which the appellant was never charged, *Whitehead v. State*, *supra*, and for which the appellant never entered a plea, *Switzer v. Golden*, *supra*. Therefore, appellant should have been ordered to make restitution for the economic loss that was caused by the crime for which he was charged and for which he pleaded no contest, which was theft by receiving and not burglary. Ark. Code Ann. § 5-4-205.

The dissenting opinion contends that a person should pay restitution for a crime with which he was never charged. We agree that when restitution is due, the determination of the amount of loss is a factual question to be decided by the preponderance of the evidence. *See* Ark. Code Ann. § 5-4-205. However, in this instance, restitution is simply not due for an economic loss that was the result of a crime with which the appellant was not charged.

Accordingly, we reverse and remand this case for entry of judgment in the amount of $1,230. We also note that this opinion addresses only the issue of restitution; the appellant did not appeal his sentence of seventy-two months, and we do not address that issue.

Reversed and remanded.

PITTMAN, JENNINGS, and GRIFFEN, JJ., agree.

NEAL and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. The majority has misapplied the standard of review for restitution cases in reversing the trial court's award of restitution. Arkansas Code Annotated § 5-4-205 (Repl. 1997) provides in pertinent part:

> (a)(1) A defendant who is found guilty or who enters a plea of guilty or nolo contendere may be ordered to pay restitution.
>
> (2) The sentencing authority, whether the trial court or a jury, shall make a determination of actual economic loss caused to a victim by the crime.
>
> (3)(A) *The determination of the amount of loss is a factual question to be decided by the preponderance of the evidence* presented to the sentencing authority during the sentencing phase of a trial. [Emphasis added.]

On appeal, this court should not reverse unless the trial court's award was clearly against the preponderance of the evidence. *Reddin v. State*, 15 Ark. App. 399, 695 S.W.2d 394 (1985).

The record reflects that the information charging Fortson with theft by receiving read as follows:

> Larry Jegley, Prosecuting Attorney of the Sixth Judicial District of Arkansas, in the name, by the authority, and on behalf of the State of Arkansas charges STEVEN RON FORTSON with the crime of violating Ark. Code Ann. § 5-36-106 THEFT BY RECEIVING committed as follows, to-wit: The said defendant(s), in Pulaski County, over a period of time, from on or about May 8, 1996, through on or about November 30, 1996, unlawfully, feloniously, did receive, retain, or dispose of stolen property, said property being valued in excess of $200.00, such being the property of Judy Harness, knowing or having good reason to believe said property was stolen, against the peace and dignity of the State of Arkansas.

Fortson pled no contest to this charge, Judy Harness was listed as the sole victim of his crime, and the charge encompassed the dates of all three burglaries of her property and the subsequent sales by Fortson to the various antique dealers. Furthermore, Fortson did not contest the facts as recited by the prosecutor at his plea hearing regarding the three burglaries and the items stolen from Ms. Harness, including the dates he allegedly received the property, the fact that property valued at over $9600 was taken from Ms. Harness, approximately one half of the items had been recovered, and over $5000 of her property had not been recovered. Unlike his co-defendant, neither Fortson nor his counsel expressed any disagreement with the total value of the subject property as recited by the prosecutor, a fact stressed by the trial court in making the restitution award.

The majority suggests that in dissenting, we are contending that Fortson should pay restitution for a crime with which he was never charged, that of burglary; nothing could be further from the truth. Fortson was directly linked by the evidence to fifteen of the items taken in two of the three burglaries, or about half of the stolen property, including such large and not easily movable items as wardrobes, dressers, chairs, and tables, that had been sold by him to three different antique shops. Under the facts of this case, the trial court could reasonably have found that Fortson's possession of half the stolen items from two of the three burglaries, items not transportable without a truck or other large vehicle, and which he disposed of for less than twenty percent of their retail value, made it *more likely than not* that he had also *received* the bal-

ance of the stolen property, and without concluding that he committed the burglaries. That is all that is required to meet the preponderance of the evidence standard for an award of restitution for full economic loss suffered by the victims of the crime with which Fortson was actually charged: theft by receiving Ms. Harness's property valued at over $200.

I would affirm.

NEAL, J., joins in this dissent.

Kal ISHMAEL *v.* Sally Rose ISMAIL

CA 98-896 989 S.W.2d 923

Court of Appeals of Arkansas
Division IV
Opinion delivered May 5, 1999

[redacted]

Mike Everett, for appellant.

Saxton and Ayres, by: *Clint Saxton*; and *Donald A. Forrest*, for appellee.

ANDREE LAYTON ROAF, Judge. Kal Ishmael appeals the provisions in a Crittenden County Chancery Court divorce decree that awarded his ex-wife Sally Rose Ismail a portion of her attorney fees and suit money and require that his visitation with his minor child be supervised. On appeal, Kal argues that the chancellor erred in 1) ordering him to pay Sally's attorney fees and in setting the amount so ordered; and 2) requiring supervised visitation. We affirm.

When Kal met Sally they were students at Memphis State University. Sally's studies there led to her becoming a Certified Public Accountant; Kal opted instead to attend various pilot training programs in pursuit of an apparently as yet unrealized career in aviation. Kal and Sally married on June 6, 1985, after Sally became pregnant with the parties' only child, Benjamin, who was born on January 20, 1986.

The parties separated in 1990, and Sally filed, then dismissed, a divorce action in Tennessee. Around this time, Kal, a native of Egypt, made to Sally the first of what was apparently repeated threats to take Benjamin out of the country and never let her see him again. Kal left Arkansas and moved to Port Huron, Michigan, where he lived and occasionally worked as a "financial advisor" for his brother-in-law, Dr. Khattab M. Joseph, a successful vascular surgeon.

The parties entered into marriage counseling with psychologist Dr. Walter R. Houston, a self-styled Christian family therapist. According to Dr. Houston, Kal initially denied, but later admitted, that he had threatened Sally with taking Benjamin out of the country and never letting her see him again.

Kal apparently continued to resist the dissolution of his marriage, and he initially acquiesced to the terms of a reconciliation agreement, dictated by Sally, that required of Kal that he not take Benjamin out of the country without prior authorization of the court; that he formally renounce his Egyptian citizenship; that he surrender his passport to Sally's attorney; and that he secure the agreement by a $50,000 cash bond deposited in the credit union managed by Sally's father and a pledge of the equity in the home owned by Dr. Joseph, which Sally believed to be approximately $50,000 to $60,000. Kal, however, never followed through on the reconciliation agreement, and the parties never again cohabitated.

According to Sally, on the advice of her attorney, who told her that she would get a "better deal" in Arkansas, she petitioned for divorce in Crittenden County, on May 26, 1992. In her complaint, she alleged that Kal threatened to take Benjamin out of the country and never allow her to see the child again. In addition to seeking full custody, the petition prayed that Kal's visitation be restricted and that a mutual restraining order be granted that would enjoin the parties from "bothering or harassing the other and/or removing the parties' children [*sic*] from the jurisdiction." On May 27, 1992, Sally caused to have entered an *ex parte* order restricting Kal's visitation so as to allow it to be exercised only in her presence. The order also granted her temporary use and possession of the marital residence. On October 6, 1992, a mutual restraining order was entered that enjoined the parties from "disposing of any assets owned by the parties without prior Court approval and more particularly to the withdrawal of any funds from any bank account that either party may have . . . in amounts over $1,000 without prior Court approval."

Sally then undertook a determined effort to find and lay claim to some or all of the money that Kal handled for Dr. Joseph. To this end, she hired as many as five private investigators in Michigan and Florida, who located several bank accounts into which Kal had deposited hundreds of thousands of dollars of Dr. Joseph's money. In preparation for the divorce proceedings, Sally had her legal team depose several bank employees in Michigan

who had knowledge of Kal's transactions. These accounts were held in names other than Kal Ishmael and under social security numbers that were different from his. Kal admitted that he worked these deceptions to keep Sally from getting her hands on the money.

After a two-day hearing in September of 1996, in which the out-of-state witnesses testified by deposition, the chancellor took the matter under advisement. On February 11, 1998, a decree was finally filed for record. It dissolved the marriage on the grounds of general indignities; granted Sally full custody of Benjamin; awarded Sally use and possession of the marital home until Benjamin reaches the age of eighteen or graduates from high school; awarded the parties the automobiles and personal property then in their possession; made an equitable distribution of the parties' bank account; continued the supervised visitation established in the 1992 *ex parte* temporary visitation order based on a finding that unsupervised visitation with Kal posed an abduction risk; established child support at $75 per month based on a finding that Kal was unemployed; and awarded Sally $15,000 in attorney fees, $2,500 in suit money, and $58.75 in costs. The award of attorney fees represented approximately half of what Sally claimed to have expended in her case. The suit money reflected the amount of an expert witness fee charged by Philip Schwartz, an attorney who specializes in international matrimonial law. Schwartz had testified by deposition that if Kal abducted Benjamin and fled to Egypt, it would be difficult and costly, if not impossible, for Sally to get him back. The chancellor also made a specific finding that Kal did not own any of the funds contained in the Michigan bank accounts that he had opened and declined to find him in contempt for removing these funds from the accounts that he had opened.

Kal first argues that the chancellor erred in ordering him to pay Sally's attorney's fees and suit money, and in fixing the amount thereof. Citing *Paulson v. Paulson*, 8 Ark. App. 306, 652 S.W.2d 46 (1983), and *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998), for the proposition that a chancellor must consider the financial means of the parties in his decision to award

attorney fees, he asserts that the $17,558.75 in attorney fees and costs that he was ordered to pay is more than his net worth and more than twice his annual income. Further, he recites that during the pendency of the divorce, the most money that he ever made in a year was in 1992, when he made $16,088, while in comparison, Sally's salary at the time of the hearing was $36,586. Kal also notes that the property settlement from the marriage left him with a 1985 Toyota; half-interest in the equity in the $85,000 marital residence, which he could not realize until after Benjamin turns eighteen; a judgment for $3,500; and $136,000 in debts. Furthermore, Kal contends that "an enormous majority" of Sally's legal fees were incurred in a futile effort to discover marital property, an issue that she lost on. Kal acknowledges that the standard of review for the award of fees is daunting, but contends that the award of fees in this case should be reversed because it was clearly erroneous. We disagree.

A chancellor has considerable discretion to award attorney's fees in a divorce case. *Gavin v. Gavin*, 319 Ark. 270, 890 S.W.2d 592 (1995). In determining whether to award attorney's fees, the chancellor must consider the relative financial abilities of the parties. *Anderson v. Anderson, supra; Paulson v. Paulson, supra; see also Lee v. Lee*, 12 Ark. App. 226, 674 S.W.2d 505 (1984). In setting the amount of fees awarded, it is well settled that the chancellor is in a better position to evaluate counsel's services than an appellate court, and, in the absence of clear abuse, the chancellor's award of an attorney's fee will not be disturbed on appeal. *Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987).

Here we find no abuse of discretion. Although Kal apparently had no present employment, he testified that he had secured his commercial pilot's license at a cost of more than $100,000. Furthermore, Kal's purported lack of funds was no deterrent to his flying to Europe and the Middle East with a regularity that made him unable to recall with specificity an overnight stay in London only few months before. Moreover, although the amount of the attorney's fees awarded in this case is considerable, we note that it was less than the total fees incurred by Sally. Furthermore, while Sally's attempt to lay claim to the several thou-

sand dollars that Kal controlled ultimately proved unsuccessful, the circumstances created by her much-traveled estranged husband nonetheless could reasonably have been considered by the chancellor in making his fee award. *See Grant v. Grant*, 254 Ark. 1060, 497 S.W.2d 255 (1973)(upholding a large attorney fee award where the appellee had expended a significant sum of money to hire private investigators to help prove the appellant had committed adultery on his many business trips).

For his second point, Kal argues that the chancellor "became incensed" at what he perceived to be Kal's dishonesty as evidenced by the fact that the chancellor "unreasonably chastised" him about his testimony. He contends that in so doing, the chancellor lost sight of the best interest of the child, the "polestar" for making judicial determinations concerning custody and visitation matters. He argues that while he was purported to have first threatened to abduct Benjamin in 1987, he has had the child alone many times since then and never acted upon these alleged threats. He also denies ever having made such a threat. He urges this court to find him credible, where the chancellor did not, and believe him when he testified "reasonably" that he would not remove Benjamin from America because it would ruin his and his son's life and that supervised visitations were detrimental to his relationship with his son. Finally, Kal asserts that the chancellor ignored Sally's lack of credibility as established by the fact that she testified that he controlled all the family money yet he proved that she signed ninety-four percent of some 1,480 checks. This argument fails to persuade.

The governing principle for making judicial determinations concerning custody and visitation is the best interest of the child. *Marler v. Binkley*, 29 Ark. App. 73, 776 S.W.2d 839 (1989). While chancery cases are tried *de novo* on appeal, the chancellor's decision will not be reversed unless it is shown that his decision is clearly against the preponderance of the evidence. *Id.* Because there are no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties and their witnesses carry as great a weight as one involving the

custody of children, this court defers to the chancellor's determination as to the credibility of the witnesses. *Id.*

This court cannot revisit a finding concerning a witness's credibility on appeal, so even if the order of supervised visitation turned solely on the fact that the chancellor believed Sally when she said that Kal threatened to take Benjamin out of the country and did not believe him when he denied it, we would have to affirm the chancellor. There is, however, more in the record to uphold the chancellor's ruling on this issue. Specifically, Dr. Houston testified that, in the course of his providing counseling to Kal and Sally, Kal admitted threatening Sally with Benjamin's abduction.

Here, preventing Kal from abducting Benjamin was obviously an important consideration for the trial court in establishing and maintaining supervised visitation; indeed, Kal himself testified that removing Benjamin from America would ruin the child's life. Accordingly, we find that it is simply disingenuous to assert that the chancellor failed to consider the best interest of the child in ordering supervised visitation. We are not unmindful of the fact that Kal failed to act on his threat despite ample opportunity to do so, over a period of several years. However, during this time he was actively seeking reconciliation with Sally, an eventuality that is obviously foreclosed to him now. Deferring as we must to the superior position of the chancellor to determine the credibility of the witnesses, we are unable to conclude that the chancellor erred when he ordered that Kal's visitation with Benjamin continue to be supervised. *See Lowell v. Lowell*, 55 Ark. App. 211, 934 S.W.2d 540 (1996).

Affirmed.

PITTMAN and HART, JJ., agree.

BOATMEN'S ARKANSAS, INC. *v.* Jim G. FARMER

CA 98-850 989 S.W.2d 557

Court of Appeals of Arkansas
Division II
Opinion delivered May 12, 1999

[redacted]

Wright, Lindsey & Jennings, by: *John G. Lile* and *Claire Shows Hancock*, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *James M. McHaney, Jr.*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellee accepted a position as president and chief operating officer of Worthen Banking Corporation in February 1994. The terms of his employment were established by a written agreement executed in July 1994. One of the terms of the agreement provided that, upon acceptance of appellee's application for membership at the Little Rock Country Club, the employer would reimburse him for the initiation fee. After commuting for a short time from St. Louis, Missouri, to Little Rock, Arkansas, appellee moved his family to Little Rock in August 1994, and promptly applied for membership with the Little Rock Country Club. Worthen was acquired by appellant Boatmen's Arkansas, Inc., in February 1995, pursuant to an agreement whereby Boatmen's would become responsible for Worthen's obligations, including Worthen's employment agreement with appellee. Appellee was terminated after the acquisition. In January 1997, nearly two years after appellee's termination, appellee's application for membership at the Little Rock Country Club was accepted. Appellee requested that appellant reimburse him for the initiation fee; appellant refused to do so, and appellee filed the present lawsuit, alleging that Boatmen's was obligated to pay the initiation fee under the terms of his employment agreement with Worthen. The circuit judge entered an order granting appellee's motion for summary judgment, concluding that the obligation to reimburse appellee for the initiation fee became fixed at the time of his application to Little Rock Country Club. From that decision, comes this appeal.

For reversal, appellant contends that the trial judge erred in concluding that the obligation to reimburse appellee for the initia-

tion fee accrued upon appellee's application for membership to the Little Rock Country Club. We agree, and we reverse and remand.

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Cottrell v. Cottrell*, 332 Ark. 352, 965 S.W.2d 129 (1998). The issue in the present case turns on the interpretation of a written agreement. A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. *Singh v. Riley's, Inc.*, 46 Ark. App. 223, 878 S.W.2d 422 (1994). Our examination of that agreement leads us to conclude that it is unambiguous; therefore, its construction is a question of law for the court. *Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998). When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. *Hampton Road, Inc. v. Miller*, 18 Ark. App. 9, 708 S.W.2d 98 (1986). Different clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible. *Pate v. U.S. Fidelity and Guaranty Co.*, 14 Ark. App. 133, 685 S.W.2d 530 (1985). The intention of the parties is to be gathered not from particular words and phrases but from the whole context of the agreement. *Id.*

The employment agreement at issue in the present case provides, in pertinent part, that:

> The terms and conditions of your at will employment are reflected below:
>
> *COMPENSATION*
>
> - Base Salary: $20,000 monthly (annual equivalent: $240,000)
> - Car Allowance: $800.00 monthly plus mileage reimbursement for business-related trips outside a 25 mile radius

- Country Club Membership:

  Reimbursement via payroll of membership dues at Chenal Country Club; reimbursement of appropriate, business-related expenses via Accounts Payable. Upon acceptance of your application for membership at the Little Rock Country Club, WBC will reimburse you for the Initiation Fee; membership dues; and appropriate business-related expenses. In addition, concurrent with commencement of your Little Rock Country Club membership, you will reimburse WBC for the transfer fee related to the Chenal membership and will discontinue such membership.

. . . .

CHANGE-OF-CONTROL: SEVERANCE BENEFITS

In the event of a change-of-control which results in your termination within one (1) year of your effective date of employment, you will be entitled to receipt of the minimum executive severance benefit of twenty-four weeks of compensation. Such severance benefits, as well as the determination of "change-of-control" and resulting termination, shall be subject to and defined by the Worthen Banking Corporation Employee Protection Plan (EPP). Should a change-of-control and resulting termination occur subsequent to one (1) year of Worthen Banking Corporation service, you will receive severance benefits per the EPP or other established Severance Plan for WBC Executives in effect at the time of termination.

RELOCATION

. . . .

- *Expenses for locating new residence:*

. . . .

- *Temporary living expenses:*

. . . .

- *New residence purchase assistance:*

. . . .

- *Sale of former residence:*

. . . .

- *Physical Move:*

. . . .

■ ■ A review of the entire agreement shows that there were three pertinent sections dealing with payments to be made to appellee, and that these sections bear a logical relation to the time when the employer's duty to make these payments would arise. The benefits enumerated under the "relocation" section of the agreement were clearly designed to secure appellee's presence in Little Rock and thereby permit him to perform the duties of his employment; consequently, it follows that the employer's duty to make payments under this section would accrue immediately upon appellee's acceptance of employment. The benefits listed under the "severance" section of the agreement were, by their terms, to be payable only following appellee's termination. It is equally clear that the benefits comprising the "compensation" section of the agreement were those benefits that the employer would be obligated to pay so long as appellee remained employed by the corporation. Reimbursement of appellee's country club expenses was provided for in this section of the agreement, as were appellee's salary and other items to be disbursed through the employer's payroll. The parties agree that appellee was an employee at will. The right of an employee at will to compensation generally rests upon the performance of services and, upon termination of the employment, the employer has no duty to pay future wages. *See Tumblin v. Gratech Corp.*, 448 So.2d 179 (La. Ct. App. 1984). Were we to adopt a contrary view, it would follow that the employer would be obligated not only to reimburse appellee for the initiation fee (an expense incurred nearly two years after the termination of his employment), but would also be obligated in perpetuity to reimburse appellee for his annual membership dues. We hold that, under the terms of the agreement, appellant's obligation to reimburse appellee for the initiation fee would accrue only if appellee remained employed at the time appellee's application was accepted. Consequently, we reverse and remand for further consistent proceedings.

Reversed and remanded.

BIRD and ROGERS, JJ., agree.

Patricia KIMBRELL *v.* ARKANSAS DEPARTMENT of HEALTH

CA 98-1298 989 S.W.2d 570

Court of Appeals of Arkansas
Division I
Opinion delivered May 12, 1999

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

Richard S. Smith, for appellees.

SAM BIRD, Judge. Patricia Kimbrell appeals a decision of the Workers' Compensation Commission denying her benefits. An agreed upon record with an attached joint medical exhibit was submitted to the administrative law judge, without a hearing, on the sole issue of whether a compensable injury had been established by medical evidence supported by objective findings. The administrative law judge held that it had not. The Commission affirmed and adopted the decision of the law judge.

It was stipulated that appellant was an employee of the Arkansas Department of Health on July 17, 1997. Appellant contended that she had sustained a compensable injury to her back while sweeping and mopping under a bed in a patient's home, as she was performing her duties as an "in-home service aid." The employer, represented by its insurance carrier, the Arkansas Insurance Department, Public Employment Claims Division, claimed that appellant's injury was not demonstrated by objective medical evidence.

The medical records indicate that appellant presented to her family physician, Dr. Victor S. Chu, at the Eagle Heights Clinic in Harrison, on July 17, 1997, complaining that she had hurt her back "while bending over doing something underneath a bed at Boone County Home Health." An x-ray revealed "no evidence of any obvious deformity." Appellant was diagnosed with "musculoskeletal back pain," prescribed medication, and told to come back if necessary.

On July 24, appellant reported that her back was improving, and she began a course of physical therapy. An MRI performed on August 13, 1997, indicated "minimal changes of degenerative disc disease at L4-5 and L5-S1 limited to disc desiccation. There is no evidence of significant disc bulge or focal herniation." An August 14 entry in the appellant's progress record at Eagle Heights Clinic states that the patient was notified of her normal MRI and told to resume physical therapy three times a week for two weeks.

A September 15, 1997, letter from Dr. Carl M. Kendrick, an orthopedist in Fayetteville, concluded that appellant was having muscular back pain, that she had sustained a "lumbosacral strain," and he prescribed continued physical therapy and walking.

Reports of Dr. William L. Money, of the Center for Pain Management at Washington Regional Medical Center in Fayetteville, indicate that appellant had mild lumbar degenerative disease, and lumbar facet syndrome. He treated her with medication and injections.

The administrative law judge's opinion reviewed the medical evidence, then stated:

> [T]he medical evidence, supported by objective findings, fails to show that these degenerative problems, or any physical harm, were caused by the incident at work. The record shows that the claimant's medical care is related to her subjective complaints and the existence of pre-existing pathology, but fails to demonstrate the existence of a compensable injury causing physical harm, as required by the Act.

As previously stated, the Commission affirmed and adopted the opinion of the law judge.

Arkansas Code Annotated section 11-9-102 (Repl. 1996) provides in pertinent part:

> (5)(A) "Compensable injury" means:
>
> (i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;
>
> . . . .
>
> (D) A compensable injury must be established by medical evidence, supported by "objective findings" as defined in § 11-9-102(16).
>
> . . . .
>
> (16)(A)(i) "Objective findings" are those findings which cannot come under the voluntary control of the patient.
>
> (ii) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative

> law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain; for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings.

Appellant cites Dr. Chu's original observations that "palpation of back reveals palpable musculoskeletal tenderness, negative straight leg raise bilaterally," and argues that palpable muscle spasms are an "objective finding." Indeed, this court has held that muscle *spasms* constitute an objective finding, *see Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998); *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998), and in *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997), we approved the following definition of a muscle spasm:

> 1. An involuntary muscular contraction. . . . 2. Increased muscular tension and shortness which cannot be released voluntarily and which prevent lengthening of the muscles involved; [spasm] is due to pain stimuli to the lower motor neuron.

STEDMAN'S MEDICAL DICTIONARY 1304 (23d ed. 1976). *Webster's New Complete Medical Dictionary* (1995) defines the word "spasm" as "1: an involuntary and abnormal contraction of muscle or muscle fibers or of a hollow organ (as the esophagus) that consists largely of involuntary muscle fibers 2: the state or condition of a muscle or organ affected with spasms."

In the case at bar, however, Dr. Chu's note does not state that he found muscle spasms. The language he used is muscle *tenderness*. The twenty-third edition of Stedman's Medical Dictionary defines "tender" as "[s]ensitive, painful on pressure or contact," and "tenderness" as "[t]he condition of being tender; painfulness to pressure or contact." The word "tender" is defined in *Webster's New Complete Medical Dictionary* (1995) as "sensitive to touch or palpation — tenderness."

From these definitions it is obvious that a muscle spasm is not under the control of the patient, because involuntary muscle contractions are just that, involuntary. On the other hand, tender

or tenderness is measured by the patient's subjective reaction to stimuli, and can be controlled by the patient.

We affirm the Commission's finding that appellant failed to demonstrate a compensable injury by objective medical evidence.

Affirmed.

NEAL and CRABTREE, JJ., agree.

Pierre L. WEAVER *v.* STATE of Arkansas

CA CR 98-186 990 S.W.2d 572

Court of Appeals of Arkansas
Division III
Opinion delivered May 12, 1999

Hough, Hough, & Hughes, P.A., by: *R. Paul Hughes III*, for appellant.

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

SAM BIRD, Judge. Pierre Weaver was charged with three counts of exposing another person to HIV in violation of Ark. Code Ann. § 5-14-123 (Repl. 1993). He was found guilty of one count and was sentenced to thirty years in the Arkansas Department of Correction. That case was affirmed by this court. *See Weaver v. State*, 56 Ark. App. 104, 939 S.W.2d 316 (1997). Before a trial was held on the remaining two counts, appellant filed a motion to suppress his medical records that he alleged were obtained in violation of the Arkansas Rules of Criminal Procedure 16.2, Rule 503 of the Arkansas Rules of Evidence, and the state and federal constitutions. The court denied the motion, and, pursuant to Ark. R. Crim. P. 24.3, the appellant entered a conditional plea of guilty. He was sentenced to thirty years on each count to be served concurrently and also concurrent to the previous thirty-year sentence on the other conviction. He brings this

appeal arguing that the court erred in denying his motion to suppress the introduction of his medical records.

After two people tested positive for HIV and reported that they believed they had contracted it from appellant, he became a suspect, and the Sebastian County Prosecuting Attorney drafted a prosecutor's subpoena to obtain appellant's medical records from the Sebastian County Health Department.[1]

A hearing was held on his motion to suppress, and Archie Goins, an officer with the Fort Smith Police Department, testified that the prosecuting attorney had asked him to pick up the medical records of the appellant by serving the subpoena on the Sebastian County Department of Health. He stated that the department accepted a subpoena and later called him to pick up a packet containing the records, and that he delivered the sealed packet to the prosecuting attorney's office. He said that the prosecutor was the one who issued the subpoena and who directed him to obtain the records.

Appellant argues that the medical records were illegally obtained in violation of his Fourth Amendment rights because the State did not procure the records with a valid search warrant. Appellant also argues that the prosecutor abused her subpoena power. We disagree and hold that the court's ruling denying the motion to suppress was not clearly against the preponderance of the evidence because a search warrant was not needed in this case. The prosecutor obtained the information through the proper use of the prosecutor's subpoena power. The General Assembly has stated that this particular kind of information can be obtained by a prosecutor by using a subpoena. Ark. Code Ann. § 20-15-904 (Repl. 1991).

When reviewing a denial of a motion to suppress, this court must make an independent determination based upon the totality of the circumstances. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998); *Thompson v. State*, 333 Ark. 92, 966 S.W.2d

[1] The appellant did not object to the introduction of his medical records when they were entered into evidence at the trial in which he was found guilty of one count. *See Weaver v. State, supra.*

901 (1998); *Muhammad v. State*, 64 Ark. App. 352, 984 S.W.2d 822 (1998). We reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Green v. State, Thompson v. State, Muhammad v. State, supra.* In making this determination, we view the evidence in the light most favorable to the State. *Green v. State, Thompson v. State, Muhammad v. State, supra.*

Arkansas Code Annotated section 16-43-212(a) (1987) states:

> (a) The prosecuting attorneys and their deputies may issue subpoenas in all criminal matters they are investigating and may administer oaths for the purpose of taking the testimony of witnesses subpoenaed before them. Such oath when administered by the prosecuting attorney or his deputy shall have the same effect as if administered by the foreman of the grand jury.

The subpoena power of the prosecuting attorney was statutorily created by the General Assembly to implement the power of prosecutors to bring criminal charges by information. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). It was designed to take the place of a grand jury. *Id.* The emergency clause of the statute states that it was enacted to enable prosecutors to properly prepare criminal cases. *Id.* Prosecuting attorneys have an affirmative duty to investigate crime. *Streett v. Stell*, 254 Ark. 656, 495 S.W.2d 846 (1973). The prosecutor's power to subpoena must be used only for a prosecutor's investigation. *State v. Hamzy,* 288 Ark. 561, 709 S.W.2d 397 (1986). The police do not have the authority to issue subpoenas. *Id.* The prosecutor's power to subpoena must only be used as an investigatory tool and not as a tool for a police investigation. *Id.* In *Echols v. State, supra*, the prosecutor subpoenaed school records of one of the appellants. The court found that he did so in order to investigate and prepare for trial. Therefore, he did not abuse his subpoena power.

In the case at bar, Goins testified that the records were not subpoenaed for police purposes, but that he merely acted as a courier by delivering the subpoena to the health department and by delivering the records to the prosecutor's officer. The prosecutor stated that she had subpoenaed the records in order to investigate reports that the appellant had exposed others to the HIV virus in violation of Ark. Code Ann. § 5-14-123. Because the prosecu-

tor used the subpoena as a tool for her investigation, and not for police purposes, we cannot say that the court erred in denying appellant's motion to suppress.

A search warrant in this case was not needed since a prosecutor is at liberty to procure such information through the use of a subpoena. Arkansas Code Annotated § 20-15-904 states:

> (a) A person with Acquired Immunodeficiency Syndrome (AIDS) or who tests positive for the presence of Human Immunodeficiency Virus (HIV) antigen or antibodies is infectious to others through the exchange of body fluids during sexual intercourse and through the parenteral transfer of blood or blood products and under these circumstances is a danger to the public.
>
> (b) A physician whose patient is determined to have Acquired Immunodeficiency Syndrome (AIDS) or who tests positive for the presence of Human Immunodeficiency Virus (HIV) antigen or antibodies shall immediately make a report to the Arkansas Department of Health in such manner and form as the department shall direct.
>
> (c) All information and reports in connection with persons suffering from or suspected to be suffering from the diseases specified in this section shall be regarded as confidential by any and every person, body, or committee whose duty it is or may be to obtain, make, transmit, and receive such information and reports. *However, any prosecuting attorney of this state may subpoena such information as may be necessary to enforce the provisions of this section and 5-14-123 and 16-82-101, provided that any information acquired pursuant to such subpoena shall not be disclosed except to the courts to enforce the provisions of this section.* (Emphasis added.)

Because the prosecutor was investigating a crime, and because the General Assembly has stated that prosecuting attorneys are privy to the information in the medical records when investigating cases involving HIV exposure in violation of Ark. Code Ann. § 5-14-123, we hold that a search warrant was not needed; therefore, the court did not err in denying the appellant's motion to suppress.

Affirmed.

NEAL AND CRABTREE, JJ., agree.

Bruce Edward LEAKS *v.* STATE of Arkansas

CA CR 98-663 990 S.W.2d 564

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 12, 1999

Jim Pedigo, Public Defender Office, for appellant.

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

JUDITH ROGERS, Judge. Bruce Edward Leaks was convicted in a jury trial of first-degree murder and was sentenced to forty years in the Arkansas Department of Correction. On appeal, he argues that the trial court abused its discretion in limiting his cross-examination of a State's witness, and that the trial court erred in allowing the prosecutor to argue to the jury that he could have been charged with capital murder. We find no reversible error, and affirm.

Appellant does not challenge the sufficiency of the evidence; however, a recitation of the facts is necessary for an understanding of our decision and the arguments on appeal. Appellant was convicted of the shooting death of William Littlejohn. Appellant admitted to shooting the victim but contended that he did so because he feared for his life. The victim, appellant's former roommate, was living with appellant's brother at the time of the incident. On the night of January 7, 1997, appellant went to his brother's home to confront the victim about money that the victim owed him and about the victim allowing several women to wash their clothes at the house while his brother was away. Appellant testified that he had been drinking on the day of the incident. He further testified that he had taken a gun with him because the victim had previously assaulted him and cut him with a razor blade. Appellant claimed that he only intended to talk to the victim, and that he shot him because he thought the victim was reaching into his pocket for a weapon. Appellant testified that he did not mean to kill the victim.

Appellant left the house immediately after the shooting. Appellant's nephew, who had been in a back bedroom, testified that the victim came into his bedroom and told him that appellant

had shot him. Although appellant initially denied any knowledge of the shooting to the police, he later admitted that he had shot the victim after the police recovered the gun involved in the shooting from a car owned by appellant's girlfriend. The coroner determined that a single gunshot wound to the chest caused the victim's death. The jury was given instructions on the elements of first and second-degree murder.

Appellant first argues that the trial court erred in limiting his cross-examination of a State's witness, Bennie Smith, about her relationship with another State's witness, George Cheatham. Smith testified that she had been given permission by the victim to do laundry at the house on the night of the shooting, but had left prior to appellant's arrival. She also testified that at one time she had heard appellant say that his girlfriend had cut him. Smith had also testified on direct examination that she had dated Cheatham.

On cross-examination, Smith stated that "I guess I have a problem with George Cheatham." When appellant's counsel asked her what the problem was, the State objected based on relevancy. Appellant's counsel argued that the question went to Smith's credibility; the trial court sustained the State's objection.

Appellant contends that the trial court abused its discretion in not allowing a complete cross-examination of Smith, thereby denying the jurors potentially vital information regarding her credibility and potential bias. However, we are precluded from addressing the merits of this issue because appellant failed to proffer the excluded testimony.

■ ■ Evidentiary matters regarding the admissibility of evidence are left to the sound discretion of the trial court, and rulings in this regard will not be reversed absent an abuse of discretion. *Harris v. State*, 322 Ark. 167, 907 S.W.2d 729 (1995). In order to challenge a ruling excluding evidence, an appellant must proffer the excluded evidence so that we can review the decision, unless the substance of the evidence is apparent from the context. Ark. R. Evid. 103(a)(2); *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996); *Davis v. State*, 319 Ark. 460, 892 S.W.2d 472 (1995). The failure to proffer evidence so this court can determine if prejudice results from its exclusion precludes review of the evidence

on appeal. *Jackson v. State*, 284 Ark. 478, 683 S.W.2d 606 (1985); *Willett v. State,* 18 Ark. App. 125, 712 S.W.2d 925 (1986).

In the instant case, the trial court precluded appellant's cross-examination of Smith about her relationship with George Cheatham based on the prosecutor's objection to the line of questioning as irrelevant. Although appellant contends that the trial court's exclusion of the testimony was erroneous, he did not proffer the excluded testimony, nor is its substance apparent from the context of the question posed to Smith. Absent a proffer of the expected testimony, this court cannot find an abuse of discretion by the trial court. *Willett v. State, supra.* Consequently, we cannot determine if prejudice results from its exclusion. *Jackson v. State, supra.*

Appellant next argues that the trial court erred in overruling his objection to remarks made by the prosecutor during closing arguments. Appellant contends that it was improper for the prosecutor to include anything in his closing arguments except the evidence in the case and deducible conclusions that may be made from the law applicable to a case. During the prosecutor's closing, the following argument and objection occurred:

> STATE: . . . Mr. Leaks, he's a lucky man. He's already been given a break when he wasn't charged with the premeditated killing of Mr. Littlejohn. If you kill somebody with a premeditated and deliberated purpose of doing so, if you think about it and plan on it and deliberate on it, that's one of the differences between murder in the first degree and capital murder. But, the decision was made right or wrong not to charge him with capital murder and not to seek the death penalty. We charged him with murder in the first degree. So, he has already been given a break in that regard.
>
> DEFENSE COUNSEL: I'm going to have object to that line of argument. He's arguing that this is a capital murder case and through the good graces of the Prosecuting Attorney's Office, they have not charged him with that, that's highly improper.
>
> STATE: Judge, he was arguing and representing in his opening comments that the defendant ought to be charged with, that he ought to be convicted of murder in the second degree. He's asking the jury or representing to the jury that they ought to give

him a break. I'm telling the jury now that after the evidence has been presented which the evidence justifies not giving him any more breaks.

COURT: Objection overruled.

After the jury retired, appellant made a motion for mistrial based on the prosecutor's remarks. The prosecutor responded that the motion was untimely, and the trial court denied the motion without further comment.

A trial court is given broad discretion in controlling counsel in closing arguments, and we do not disturb the trial court's decision absent a manifest abuse of discretion. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998). Indeed, remarks that are so prejudicial as to mandate a reversal are rare and require an appeal to the jurors' passions. *Id.* The jury is presumed to follow the court's instructions. *Logan v. State*, 300 Ark. 35, 776 S.W.2d 341 (1989); *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155 (1987); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982).

We affirm the trial court's ruling based on procedural errors as discussed below. Moreover, we conclude that the evidence of guilt is so overwhelming that any error, although not sanctioned by this court, is harmless in the context of this case.

Here, appellant failed to request any further relief when his objection was overruled, and he failed to move for a mistrial until after the jury had retired. It has repeatedly been held that motions for mistrial must be made at the first opportunity. *Smith v. State*, 330 Ark. 50, 953 S.W.2d 870 (1997); *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996); *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996); *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996); *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992).

These holdings are squarely based on settled law that for the trial court to have committed reversible error, timely and accurate objections must have been made so that the trial court could be provided with the opportunity to correct such error. *See e.g., Wallace v. State*, 53 Ark. App. 199, 920 S.W.2d 864 (1996). Errors arising from improper argument are frequently curable by

admonition to the jury, and the trial court should have recourse to this option because his presence in the courtroom puts him in a superior position to evaluate the degree of prejudice that might arise from the improper argument, and because of the enormous waste of judicial resources which must inevitably result from declaring a mistrial when a case is all but concluded.

In *Smith v. State*, 302 Ark. 459, 790 S.W.2d 435 (1990), the supreme court refused to find reversible error when the prosecutor during closing argument made reference to witnesses who did not testify at the trial. The court held:

> The appellant objected to the statement on the basis that the defendant does not have to prove his innocence. The objection was overruled, and the appellant made no further motion or request for relief in the nature of a request for a mistrial, a striking of the statement, or a limiting instruction. In the absence of a proper request for, and a denial of, specific relief sought by appellant, we decline to hold that the ruling of the trial court to the appellant's general objection was reversible error. The appellant now also argues for the first time that the remark of the prosecuting attorney amounts to a comment on the failure of the defendant to testify in his own behalf. That objection was not raised at trial and will not be considered for the first time on appeal.

302 Ark. at 461, 790 S.W.2d at 436-37.

In the present case, the trial court was not afforded the opportunity to correct the error and, under the clear holdings of the Arkansas Supreme Court, the present argument was thereby waived. *See, Smith v. State*, 302 Ark. 459, 790 S.W.2d 435 (1990); *Butler Mfg. Co. v. Hughes*, 292 Ark. 198, 792 S.W.2d 142 (1987).

The dissent believes that the statement by the prosecutor was so prejudicial that a new trial is mandated, and concludes that it was not necessary for appellant to request further relief once his objection was overruled; the simple answer is that this is not the law. In *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995), the court stated the following:

> It does not appear that any such appeal for an emotional or passionate response was made in this case. Further, it is difficult to fathom how the prosecutor's remarks in any way prejudiced

> Mills's case. *And, lastly, defense counsel made no request for relief following his objection.* There was no error by the trial court in overruling the objection.

322 Ark. at 663, 910 S.W.2d at 691 (emphasis added). The court in *Mills* did not state that the holding was based on the premise that Mills did not have to request any further relief once his objection was overruled.

Although it is perhaps laudable and progressive for the dissent to have recourse to law journal articles as it attempts to change and improve the law, the changes it would make in this case involve the regulation of trial practice by attorneys and are contrary to the clear holdings of the Arkansas Supreme Court. *See Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996); *Mills v. State, supra; Littlepage v. State*, 314 S.W.2d 361, 863 S.W.2d 276 (1993); *Smith v. State*, 302 Ark. 459, 790 S.W.2d 435 (1990). The ramifications of following the dissent's rationale in terms of wasted judicial resources are significant, and we cannot overrule precedent handed down by the supreme court. *Conway v. State*, 62 Ark. App. 125, 969 Ark. 669 (1998). Certainly, the supreme court should be the arbiter of these fine distinctions that affect the uniform administration of the courts and the practice of law.

Furthermore, appellant was convicted of first-degree murder and sentenced as an *habitual offender* for that offense pursuant to Arkansas Code Annotated § 5-4-501(a) (Repl. 1997). He was, therefore, not sentenced to the maximum time he could have received for the crime of which he was convicted, and consequently cannot show that he was prejudiced by the prosecutor's remarks in that regard.

Finally, appellant admitted to seeking out and confronting the victim while he was armed with a loaded weapon. Appellant admitted to shooting the victim with the .38 caliber handgun, and the victim died from the single gunshot wound to the chest. Also, the trial court's instructions made clear the elements of the charged offense and that counsel's arguments were not evidence. Thus, while we do not condone the remarks of the prosecutor, ultimately appellant's conviction must be affirmed because under the facts in the case at bar any error was harmless

due to the overwhelming evidence of guilt. *See, e.g., Efrud v. State*, 334 Ark. 596, 976 S.W.2d 928 (1998); *Esmeyer v. State,supra*; *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995).

PITTMAN, J., agrees.

CRABTREE, J., concurs.

ROAF, HART, and NEAL, JJ., dissent.

TERRY CRABTREE, Judge, concurring. I would affirm this case but on different grounds than would the majority. In my opinion, the evidence was so overwhelming as to make the improper remark by the prosecutor harmless error.

I agree that the prosecutor's remarks in this case were improper. First, the prosecutor argued matters outside the record, and second, he suggested that the appellant was guilty of a greater offense than he was charged. However, I do not agree with the majority that the appellant was required to request an admonition after the court overruled his objection. In my opinion, further objection or a request for a curative instruction would have resulted in nothing more than to irritate the jurors or the court and would have served no other purpose.

The victim in this case, William O. Littlejohn, lived with the appellant's brother. The appellant went to his brother's home on the night of January 7, 1997, armed, with the intent to confront Littlejohn about money Littlejohn owed him and a rumor he heard that Littlejohn was letting several women wash their clothes at his brother's house. The appellant claimed he was afraid of the victim and only wanted to talk to him when he went to his brother's house and that appellant shot the victim when he thought the victim was reaching in his pocket for a weapon.

It is unfortunate that the prosecutor chose to make the reference to matters outside the record and, in another case, I may be persuaded to reverse. However, in this case, the trial court instructed the jury that comments by the attorneys were not evidence. Further, the evidence of guilt was so compelling, I am of the opinion that the comment was harmless error. We may affirm the trial court if the error was harmless when considered in the

context of the other evidence. *Baker v. State*, 334 Ark. 330, 974 S.W.2d 474 (1998)

I would affirm.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse and remand this case. The two prevailing judges take issue with my reliance, in part, on a *UALR Law Journal* article in reaching the conclusion that the closing-argument issue is preserved for our review. However, unlike the two prevailing judges, I cannot so lightly dismiss solid scholarship in favor of a dubious and shaky holding from a single case, especially when the law review article makes good sense and the case does not. This issue is preserved, the prosecutor's remarks to Leaks's jury were both improper *and highly prejudicial,* and even at the risk of "wasting" a few judicial resources, I cast my vote to reverse and remand so that Leaks can get the fair trial to which he is entitled.

It is well settled that closing arguments must be confined to questions in issue, the evidence introduced, and all reasonable inferences and deductions that can be drawn therefrom. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996); *Williams v. State*, 259 Ark. 667, 535 S.W.2d 842 (1976). There can be no dispute that whether Leaks was guilty of capital murder was not a question in issue in this case.

Other jurisdictions have held that arguments similar to the one made by Leaks's prosecutor, whether made by the State or the accused, are highly improper, and so should we. In *Vines v. State*, 231 S.W.2d 332 (Tenn. 1950), the appellant's conviction for assault with intent to commit murder was reversed and remanded for new trial because the prosecutor suggested that appellant intended to rape the victim, when the case was prosecuted on the theory that his purpose was to commit a robbery. The trial court allowed the argument over the appellant's objection. In reversing, the Tennessee Supreme Court stated:

> We think the foregoing argument by the State's counsel justifies a reversal of this case. The defendant was not on trial for attempted rape. On the contrary, the State had put him to trial upon an indictment charging an assault to commit murder, the theory being that his purpose was robbery. The State's counsel

> clearly asked the jury to give consideration to the theory of attempted rape, and not robbery, referring to the defendant as "this human fiend . . . ." The court should have admonished counsel that he had no way to argue a theory that was wholly foreign to the indictment in order to secure a conviction, and that the language used was highly improper. While it is the duty of the State's counsel to prosecute all offenders with the utmost vigor, he is never driven to the necessity of indulging in such intemperate language to influence a jury's decision." (Citation omitted.)

In *State v. Dickson*, 691 S.W.2d 334 (Mo. App. 1985), the Missouri Court Appeals, in affirming a conviction for capital murder, held that the trial court properly sustained the State's objection to appellant's closing arguments. After the State suggested in its closing that the appellant had a "sexual purpose" in the attack on the victim, appellant's counsel attempted to argue that the killing was a felony murder rather than capital murder. However, the jury was instructed only on capital murder, murder in the second degree and manslaughter. The court stated:

> It is thus evident that if appellant's lawyer, at the time of the prosecutor's objection was intending to argue to the jury that a killing during an attempted rape would constitute "felony-murder," such an argument would have been outside of the instruction. While counsel may argue to facts as they pertain to the law declared in the instructions of the court, it is improper for counsel to argue questions of law not within the issues or inconsistent with the instructions of the court, or to present false issues. Whether appellant, on the evidence before the jury, was guilty of "felony-murder" was not an issue for the jury to decide. (Citation omitted.)

Finally, in *United States v. Quinn*, 467 F.2d 624 (1972), *cert. denied*, 410 U.S. 935 (1973), the Eighth Circuit Court of Appeals affirmed the appellant's conviction, rejecting his argument that it was error for the trial court to prohibit defense counsel from arguing that he should have been charged with another crime rather than the crime with which he was charged, stating:

> The scope and extent of oral argument are within the sound discretion of the trial court and a new trial should not be granted

> unless it is clear that the court abused its discretion. It is well settled that the arguments of counsel must be confined to the issues of the case, the applicable law, pertinent evidence, and such legitimate inferences as may properly be drawn. (Citation omitted.)

It is clear that the prosecutor's argument to Leaks's jury was outside the charges and evidence in this case, and thus improper. Moreover, for the prosecutor to argue that Leaks could have been charged with capital murder and been given the death penalty was highly prejudicial. Two of the prevailing judges somehow conclude that Leaks was not prejudiced because he was an habitual offender, and did not receive the maximum sentence that he could have been given for first-degree murder. However, Leaks was sentenced as an habitual offender pursuant to Ark. Code Ann. § 5-4-501(a) (Repl. 1997), which provides for a sentence of ten to sixty years, or life, for first-degree murder, a Class Y felony, and five to thirty years for conviction of second-degree murder, a Class B felony. Thus, Leaks's sentence of forty years exceeded by ten years the maximum sentence he could have received for second-degree murder, *as an habitual offender.*

The majority also conclude that Leaks suffered no prejudice because there was overwhelming evidence of his guilt; they miss the point. Of course there was overwhelming evidence of his guilt, but of which crime? The trial court concluded that the evidence supported the lesser-included instruction on second-degree murder, because he gave the instruction. Leaks was entitled to a fair deliberation by the jury on the two offenses. What he got instead were deliberations skewed in favor of first-degree murder when the prosecutor, with the trial court's approval, unfairly and improperly planted the suggestion of a third and even more serious charge in the minds of the jurors.

Finally, Leaks's failure to request a mistrial until after the jury had retired is nothing more than a red herring, and should not preclude our review of this issue, because Leaks need not have requested the mistrial at all after the trial court overruled his objection. In this regard, the majority accepts the State's argument that *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995), provides authority to affirm Leaks's conviction without reaching

the merits of this issue. Although the trial court also overruled the defendant's objection to the prosecutor's closing argument in *Mills*, and afterwards, Mills failed to request any further relief, the supreme court, in affirming the conviction, stated:

> We have held that the trial court is given broad discretion to control counsel in closing arguments and this court does not interfere with that discretion absent a manifest abuse of it. Indeed, remarks made during closing arguments that require reversal are rare and require an appeal to the jurors' passions. *It does not appear that any such appeal for an emotional or passionate response was made in this case. Further, it is difficult to fathom how the prosecutor's remarks in any way prejudiced Mills' case. And, lastly, defense counsel made no request for relief following his objection. There was no error by the trial court in overruling the objection.* (Citation omitted and emphasis added.)

Mills v. State, 322 Ark. at 659. Thus, the holding in *Mills* does not hinge on the failure to request further relief after Mills's objection was overruled, because the supreme court determined that the trial court did not err in overruling the objection in the first instance.

The majority's further reliance on *Smith v. State*, 302 Ark. 459, 790 S.W.2d 435 (1990), to avoid reaching the merits of this issue also rests upon shaky ground. Indeed, the majority has very effectively demonstrated the problems that can later arise from less-than-careful use of precedent, as occurred in the *Smith* decision. In quoting from *Smith*, they may be aware of this because they have omitted the crucial citation to the single case the *Smith* court relied on; the pertinent language, with the citation intact, bears repeating:

> *The objection was overruled*, and the appellant made no further motion or request for relief in the nature of a request for a mistrial, a striking of the statement, or a limiting instruction. In the absence of a proper request for, and a denial of, specific relief sought by appellant, we decline to hold that the ruling of the trial court to the appellant's general objection was reversible error. See *Jurney v. State*, 298 Ark. 91, 766 S.W.2d 61 (1989). (Emphasis added.)

However, even a cursory reading of *Jurney* indicates that this case could not be more inapplicable to the facts presented in *Smith*, and to the instant case:

> Finally, the appellant argues that the victim should not have been allowed to testify about his prior violent acts. When asked if this was the first time the appellant had been violent to her and her husband, the victim said no, he had pulled a knife on her before and hurt his father several times. *An objection was sustained.*
>
> When asked why she left town shortly after the incident, the victim replied that she feared her son would get out of jail and hurt her and her husband. *Again, the objection was sustained.*
>
> *The appellant got the relief requested. Since he did not ask for either an admonition or a mistrial, we find no error. Daniels v. State*, 293 Ark. 422, 739 S.W.2d 135 (1987). (Emphasis added.)

The crucial distinction, fatal to the holding of *Smith*, is that in *Jurney*, the objection was sustained, while in *Smith* it was overruled.

Moreover, I am convinced that a most important authority, even for appellate judges — common sense — dictates that a defendant need not move for mistrial after an objection to the State's closing argument has been clearly overruled. In Sullivan, *Prosecutorial Misconduct in Closing Arguments in Arkansas Criminal Trials*, 20 UALR L.J. 213, 254 (1997), one legal scholar has stated that *Boyd v. State*, 318 Ark. 799, 889 S.W.2d 20 (1994), implicitly recognizes a two or three-step process in preserving error based on prosecutorial misconduct in closing arguments and, with regard to the requirement for a timely motion for mistrial in order to preserve the issue, concludes:

> Although, the supreme court does not appear to require an initial objection addressed to the trial court prior to the motion for mistrial, in most cases counsel will need to object to set in motion the full process of preservation. *If the trial court overrules the objection no further steps should be required of the defense counsel in terms of either the motion for mistrial or request for specific admonition to disregard precisely because the trial court has ruled that no misconduct has occurred. Consequently, curative action could hardly be rationally contemplated by a court that has rejected the defense challenge.* (Emphasis added.)

Here, the trial court clearly overruled Leaks's objection and no further steps should be required of Leaks after that ruling. The issue is preserved, and we should reverse and remand this case for new trial.

HART and NEAL, JJ., join.

Verlon McKAY *v.* Debra McKAY

CA 98-888 989 S.W.2d 560

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered May 12, 1999

Meredith Wineland, for appellant/cross-appellee.

Virginia (Ginger) Atkinson, for appellee/cross-appellant.

JOHN F. STROUD, JR., Judge. Appellant, Verlon McKay, and appellee, Debra McKay, were divorced by the Saline County Chancery Court on March 12, 1998. Appellant contends on appeal that the chancellor erred in finding that appellee has an equal interest in a houseboat purchased during the marriage. Appellee argues in her cross-appeal that the chancellor erred in finding that all of the money in the parties' joint checking account and that most of the property purchased with the funds from this account are the separate property of appellant. Appellee also argues that the chancellor erred in modifying the divorce decree by setting aside her award of rehabilitative alimony and in failing to award her attorney's fees.

When the parties married in 1991, appellee had custody of two sons from a previous marriage and was employed as a courier by Federal Express. Appellant receives veterans' and social security disability income. When the parties married, his monthly income was increased over $100 because he had a wife and minor stepchildren. Appellant receives approximately $76,000 of tax-free income each year. Appellant deposited all of his disability income into a joint checking account to which appellee made no contribution. Appellant paid for the utilities and groceries out of this account. At trial, appellant testified that he wrote 90% of the checks on this account; he said that appellee wrote approximately 10% of the checks and that she only did so after first discussing it with him. At the time of the parties' marriage, appellant owned a house in Little Rock and land in Saline County. After their marriage, the parties built a house on the land in Saline County. In order to finance the construction, appellant used over $60,000 of his nonmarital savings and borrowed $30,000; the parties mortgaged the house in Little Rock as security for the loan. During the marriage, this debt was repaid in full from funds in the joint checking account. When the parties separated, appellant closed out the joint checking account and kept the balance of $12,800.

During the parties' marriage, appellant inherited approximately $35,800 from his mother. He deposited the proceeds of his inheritance into the joint checking account and used this money in the purchase of a $39,500 houseboat. Although the seller prepared the bill of sale in both parties' names, appellant registered the boat with the State of Arkansas only in his name. He testified that he had not intended to give appellee an interest in the houseboat and that he had not objected to appellee's name appearing on the bill of sale because she was his wife.

Appellee testified that, at appellant's request, she changed jobs with Federal Express. For awhile, she worked part-time and later went back to full-time employment as a customer-service representative. At the time of trial, she was making $27,200 per year. Appellee stated that she assisted appellant with two multilevel marketing businesses during the marriage. Appellee testified that she did write checks on the joint account for such things as groceries and gas credit cards and that she did so without first dis-

cussing it with appellant. She also said that, during the marriage, she kept her own checking account, on which appellant did not write checks, and that she paid for a new refrigerator, stove, dishwasher, washer, and dryer. Appellant, however, testified that he paid for the washer and dryer. At trial, he produced the checks written for these items.

In the divorce decree, the chancellor found that all of the money that was in the joint checking account was the separate property of appellant because it was derived from his disability benefits and was under his control. The chancellor also found that, with the exception of the houseboat, everything purchased with the proceeds of the joint checking account was appellant's separate property because it was purchased with his disability income. The chancellor found that, although appellant's inheritance was used to purchase the houseboat, it was marital property because the bill of sale placed title in both parties' names and that appellant made a gift of an interest in the boat to appellee. The chancellor found that appellee had purchased the stove, refrigerator, and dishwasher and found them to be her separate property. He also directed appellant to pay appellee $100 a week in rehabilitative alimony through the end of 1998. Upon motion by appellant, however, the chancellor set aside the award of alimony; he found that, because appellee's pleadings did not request alimony, he was without authority to make this award.

On appeal, appellant argues that the chancellor erred in finding that appellee has an interest in the houseboat because he used the proceeds of his inheritance to purchase it and because he did not intend to make a gift of an interest in it to appellee.

■ ■ Under Arkansas law, property acquired by inheritance or in exchange for such property is not marital property subject to equal division upon divorce. Ark. Code Ann. § 9-12-315(b)(1) and (2) (Repl. 1998). However, a party can destroy the nonmarital status of such property by placing it in an account held jointly with a spouse. *See Jackson v. Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989). Once property, whether real or personal, is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a presumption

that they own the property as tenants by the entirety, and clear and convincing evidence is required to overcome that presumption. *Cole v. Cole*, 53 Ark. App. 140, 920 S.W.2d 32 (1996).

A presumption also arises that the spouse placing the money in a joint account intended to make a gift of an interest in this money to the other spouse. *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). To support a finding that such property is separate property for purposes of property distribution upon divorce, the party seeking to rebut either presumption must present clear and convincing evidence that the property was separately owned. *Id.* In either event, the requirement of clear and convincing evidence means that the proponent seeking to rebut the presumption must do so by proof so clear, direct, weighty, and convincing that the fact-finder is able to come to a clear conviction, without hesitation, of the matter asserted. *Id.* Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction respecting the allegation sought to be established. *Id.*; *see also Cole v. Cole*, *supra*. This court's test on review is not whether it is convinced that there was clear and convincing evidence to support the trial judge's finding but whether it can say that the finding is clearly erroneous. *Bishop v. Bishop*, 60 Ark. App. 164, 961 S.W.2d 770 (1998). A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). A requirement that the evidence be clear and convincing does not mean that the evidence must be uncontradicted. *O'Flarity v. O'Flarity*, 42 Ark. App. 5, 852 S.W.2d. 150 (1993). Even when the burden of proof is by clear and convincing evidence, this court defers to the superior position of the chancellor to evaluate the evidence. *Id.*

Appellant testified that, after he had talked with the seller of the houseboat, the seller had prepared the bill of sale in both parties' names. He said he did not object because "she was my wife." Applying the proper standard of review, therefore, we cannot say that the chancellor's finding that appellant gave appellee an interest in the houseboat is clearly erroneous.

For her cross-appeal, appellee argues first that the chancellor erred in failing to award her an interest in all of the property that was purchased with money from the joint checking account, even though appellant's disability income funded this account. Appellee does not dispute that appellant's disability income itself is excepted from the definition of marital property. *See* Ark. Code Ann. § 9-12-315(b)(6) (Repl. 1998). She also does not argue that his disability income lost its status as nonmarital property simply because it was used to acquire property. Instead, she contends that appellant's disability income lost its status as nonmarital property when he deposited it in the joint checking account and that she therefore has a one-half interest in everything purchased with the funds in that account. Appellee also argues that, contrary to the chancellor's finding, the joint checking account was not solely under appellant's control. She also stresses that appellant's monthly disability income was increased by approximately $100 a month because of his marriage to appellee and that he also drew a monthly allotment for her boys while they were under the age of eighteen. Appellant argues that, therefore, she did make an actual monetary contribution to the joint checking account.

Appellee also contends that, because she participated in giving a mortgage on appellant's house in Little Rock to secure the debt on the new house in Saline County, she should be awarded an interest in the new house. She states: "When nonmarital property is converted into security for a marital debt, as here, the protected status of that property which the owner might have had under the division of property statute is relinquished. *Hale v. Hale*, 307 Ark. 546, 822 S.W.2d 836 (1992)." In *Hale,* the supreme court held that it was permissible for nonmarital property to be subjected to payment of the parties' marital debts only because that property was specifically mortgaged to secure those debts. The supreme court limited the application of its holding therein to situations wherein the mortgaged nonmarital property is used to satisfy the debt to which it is actually pledged. The supreme court emphasized that the chancellor could not utilize this property to satisfy any other marital debts. In any event, in the case before us, the parties did not give a mortgage on the new house, but did so only on appellant's nonmarital house in Little Rock, on

which appellee has made no claim. The *Hale* case is therefore not applicable to this situation.

Appellant testified that appellee only wrote checks on the joint checking account after first discussing it with him, that the parties understood the separate nature of their checking accounts, and that he had not intended to give appellee an interest in the funds in the joint checking account. The chancellor believed appellant's testimony and was satisfied that he had met his burden of rebutting the presumptions by clear and convincing evidence. We cannot say that his findings in this regard are clearly erroneous.

Appellee also argues that the chancellor erred in holding that he did not have authority to award alimony because appellee had failed to raise this issue in her pleadings. At the temporary hearing, appellee was awarded temporary monthly support in the amount of $100. At trial, she testified that her financial circumstances were basically the same as during the temporary hearing and stated that she needed continued assistance until her truck was paid for (approximately two years). She specifically requested that the chancellor award her alimony. In fact, counsel for appellant acknowledged at trial that appellee had requested alimony.

Rule 15(b) of the Arkansas Rules of Civil Procedure allows for the amendment of the pleadings to conform to the evidence introduced at trial:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

The rule is liberal in its allowance of amendments to conform pleadings to proof and even contemplates an amendment after

judgment. *Hope v. Hope,* 333 Ark. 324, 969 S.W.2d 633 (1998). Even if no amendment is made, it does not affect the trial of issues not raised in the pleadings; permitting the introduction of proof on an issue not raised in the pleadings constitutes an implied consent to trial on that issue. *Id.*; *see also Interstate Oil & Supply Co. v. Troutman Oil Co.*, 334 Ark. 1, 972 S.W.2d 941 (1998).

Clearly, the issue of alimony was tried, and the chancellor did have authority to make this award. Accordingly, we hold that the chancellor erred in setting aside the award of alimony. On *de novo* review of a chancery record, when 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 be better served by a remand. *Reaves v. Reaves*, 63 Ark. App. 187, 975 S.W.2d 878 (1998). In our view, justice will be better served by a remand so that the chancellor can compute the amount of alimony due appellee and enter a judgment in her behalf for that amount.

Appellee also argues in her cross-appeal that the chancellor erred in failing to award her attorney's fees. However, appellee failed to obtain a ruling on her request for attorney's fees, and it is well settled that an issue must be raised and ruled on before this court will consider it on appeal. *Vanderpool v. Fidelity & Casualty Ins. Co.*, 327 Ark. 407, 939 S.W.2d (1997); *Britton v. Floyd*, 293 Ark. 397, 738 S.W.2d 408 (1987). We therefore need not address this issue.

Affirmed on direct appeal; affirmed in part, and reversed and remanded in part on the cross-appeal.

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

HART and ROGERS, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. Appellant Verlon McKay and appellee Debra McKay were married on June 8, 1991, and divorced on March 12, 1998. During their marriage, appellant placed appellee's name on his checking account, making it a "joint account." Appellant and appellee also maintained separate bank accounts. The funds deposited into the joint account were monthly checks paid to appellant from the Vet-

erans Administration and Social Security Administration. Appellant did not work and these funds were his contributions toward the support of the family. Appellant conceded that additional benefits, based on his marriage to appellee, were paid to him. These additional monthly benefits were placed in the joint account.

During the marriage, the parties used funds from the joint account to pay for groceries, utilities, furniture, boats, and motor vehicles; to create investment accounts; and to repay a $30,000 loan obtained by the parties to partially finance the construction of the home built by the parties during the marriage. Appellant verified that the joint account was the only account from which both parties could write checks, and both parties wrote checks on the account. The appellee wrote approximately 10% of the checks written on the joint account. The appellant removed the balance of $12,800 from the joint account when the parties separated. The chancellor awarded the joint account to appellant.

The parties constructed a home on land acquired by the appellant prior to his marriage to the appellee. Appellant admitted they planned and built the house together and had intended to live there the rest of their lives. A portion of the construction cost of the home, approximately $62,000, was paid from appellant's separate savings account. The parties financed the remainder of the construction costs by obtaining a $30,000 loan that was secured by a mortgage on a rent house owned by the appellant. Both parties signed the loan agreement, and both were responsible for repaying the debt. The loaned funds were placed in the joint account and then used to pay construction costs. The loan was repaid in full during the marriage with funds from the joint account. The chancellor awarded the appellant the home as his sole property.

Also, the appellant invested in CIFRA stock with funds from the joint account and admitted that the total worth of the investment account was approximately $18,000. Appellant did not establish the value of the account before marriage nor did he establish the amount of money invested in the stock during the marriage. This account was also awarded to the appellant.

In making these decisions, the court failed to recognize that the account was a joint account by virtue of the appellee's name being on the account. The appellant placed funds he received *during the marriage* in the account after he had made the account a joint account. The court also disregarded the fact that appellant received extra benefits based solely on his marriage to the appellee and those funds were commingled in the joint account. After making these rulings, the chancellor, in an inconsistent ruling, divided equally between the parties a houseboat that was purchased during the marriage, even though the houseboat was purchased with money that appellant received through inheritance. In making this award, the chancellor disregarded appellant's contention that he did not intend to give the appellee a one-half interest in the houseboat, even though appellant established that the title to the boat was in his sole name. The chancellor found that the bill of sale was made in their joint names and, therefore, appellee was entitled to a joint interest in the houseboat.

The law presumes that when property is placed in the names of both husband and wife, the property is held by them as tenants by the entirety. *Creson v. Creson,* 53 Ark. App. 41, 917 S.W.2d 553 (1996). The law also presumes that a spouse who deposits money in a joint account intends to impart to his spouse a gift of an interest in this money. *Id.* A party seeking to claim such property as separate property must rebut this presumption by clear and convincing evidence. *Id.* Clear and convincing evidence to rebut the presumption must be so clear, direct, weighty, and convincing that the fact finder is able to come to a clear conviction, without hesitation, of the matter asserted. *Id.*

In *Lofton v. Lofton,* 23 Ark. App. 203, 745 S.W.2d 635 (1988), this court held that once property is placed in the names of husband and wife, without specifying the manner in which they take, there is a strong presumption they own the property as tenants by the entirety, and it takes clear and convincing evidence to overcome that presumption. In *Lofton,* both marital funds and separate funds were used to purchase certificates of deposit in the names of both husband and wife. The husband's refusal to concede that the certificates were to be marital property was held insufficient to overcome the presumption. *Id.*

In *McLain v. McLain*, 36 Ark. App. 197, 820 S.W.2d 295 (1991), the wife sold property from nonmarital sources for $158,000. She placed this money in a joint account with her husband, where it remained for approximately nine months to a year. They withdrew $125,000 from their joint account to purchase securities. This court held that the wife failed to meet the quantum of proof necessary to rebut the presumption of a gift, as the only evidence she presented was that she always thought of the securities as her property. The court found the length of time the money remained in the joint account to be significant.

In *Mathis v. Mathis,* 52 Ark. App. 155, 916 S.W.2d 131 (1996), the parties had been married for eight years when Mr. Mathis retired from his job of twenty-eight years. In order to obtain his retirement benefits in a lump sum, Mrs. Mathis was required to sign a release. She agreed to sign the release only after Mr. Mathis agreed to place the money in their joint account. He did so for less than sixty days, but then withdrew the funds and placed them in IRAs under his sole name. He testified he never intended Mrs. Mathis to have one-half of his total benefits, but only one-half of the benefits that accrued during their eight-year marriage. This court found it significant that both parties had access to the funds during the several weeks time period. Chief Judge Robbins, writing for this court, affirmed the chancellor's decision finding the retirement funds to be a tenancy by the entirety even though the funds had been transferred to the sole name of Mr. Mathis after they had remained in the joint account for that short time.

In *Creson, supra,* the husband inherited approximately $27,000 and placed it in a joint account with his wife. The wife made neither deposits nor withdrawals from the joint account. Subsequently, he used $22,000 from the joint account to obtain refinancing on their marital residence. Even though his wife agreed this money would be repaid to him when the residence was sold, this court upheld the chancellor's finding that the inherited money became joint property when Mr. Creson deliberately placed it in the joint account. In *Creson*, as in the present case, money from the joint account was used to purchase other items, such as stereo equipment. This court also held in *Creson* that the

funds placed in the joint account and the purchases made from the joint account were marital property.

This court has consistently upheld the strong presumption that property placed in the names of both spouses is jointly owned. There have been only two cases where the court has held that the presumption was overcome. In *Jackson v. Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989), the court held the presumption was rebutted where the wife deposited funds from her separate stock account into a joint account with her husband and then immediately wrote a check to her sister for the amount deposited to purchase the sister's interest in real estate. The court noted that the wife had rejected the husband's suggestion that they buy the property together and that the wife had immediately withdrawn the money from the joint account to purchase the real estate in her name alone. The court found it significant that the funds used to purchase the real estate interest were directly traceable to the wife's nonmarital stock. Also in *Cole v. Cole*, 53 Ark. App. 140, 920 S.W.2d 32 (1996), this court held that funds held in a joint account were the sole property of the wife. The evidence showed only money acquired from the wife's separate property was deposited in the account. Further, the husband had written only four or five checks on that account and he did so only after receiving his wife's permission. The parties had another joint account where they deposited their wages and used those funds to pay their bills.

If the placing of both names on the bill of sale to the houseboat purchased by inheritance money created a joint interest in the boat, as found by the chancellor, surely placing both names on a joint bank account created a joint interest in the account. Several facts weigh in favor of this conclusion, such as, the joint account was maintained for several years and both parties exercised the right to withdraw funds from the account. The joint account was used to repay the $30,000 construction loan used to complete construction of the house where the parties resided, and was used to pay utilities, groceries, furniture, appliances, and various items for the house. This was the only joint account held by the parties.

The evidence presented by the appellant to refute the presumption of a gift was that the appellee had her own checking account and she wanted to be an independent woman. Appellant testified that appellee told him when she wrote checks on the joint account because "it was understood that that account was mine and hers was hers." This explanation does not address appellant's reason for setting up the joint account, nor does it address his maintaining a separate account in his sole name. This was the only account the parties had where both parties could write checks. He gave no other explanation of why he continued to deposit funds in the joint account, but admitted she had access to the account and had written 10% of the checks on the account. This was the sole testimony relied upon by the court to be so clear, direct and convincing as to overcome the presumption that a gift was created.

In determining whether the presumption of a gift was rebutted, the majority ignored standards set out in the above-cited cases. The joint account and property purchased by funds from the joint account are marital property and should be divided equally.

I therefore dissent from the prevailing opinion.

JUDITH ROGERS, Judge, dissenting. I write in dissent to the majority's holding that appellant owns all of the funds in the parties' joint checking account.

It would appear that the judges deciding this case agree on the rule of law applicable to this issue: Once property is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety, and clear and convincing evidence is required to overcome that presumption. *See Cole v. Cole*, 53 Ark. 140, 920 S.W.2d 32 (1996); *Mathis v. Mathis*, 52 Ark. App. 155, 916 S.W.2d 131 (1996). However, for all intents and purposes, the majority opinion has modified that law. The majority opinion holds that the chancellor's finding that appellant rebutted this presumption by clear and convincing evidence is not clearly erroneous and relies on the following facts to

which appellant testified: (1) that appellee wrote checks on this account only after first discussing it with him; (2) that the parties understood the separate nature of their checking accounts; and (3) that appellant had not intended to give appellee an interest in the funds in the joint account.

These justifications simply do not hold up under scrutiny. At trial, appellee testified that the joint account was not solely under appellant's control. In fact, appellant admitted that appellee had written ten percent of the checks on this account. Can there be any reasonable doubt that the number of checks that appellee wrote on this account over the duration of their seven-year marriage was substantial? As for the parties' "understanding" about the separate nature of their checking accounts, one cannot ignore the fact that household expenses, benefitting both parties, were paid out of the joint checking account.

Thus, we are left with appellant's statement that, when he deposited his funds into the joint checking account, he *intended* that the money would remain his separate property. Surely it is not the law that, when depositing money into a joint checking account, someone's *intent* controls whether it is separately or jointly held. If intent is the controlling factor, divorce litigants will, regardless of their actions, always be able to avoid the effect of this presumption by later testifying that they *intended* to keep this money separate. I submit that more is required to overcome the presumption that such accounts are held as tenants by the entirety.

This case illustrates a disturbing trend to devalue the efforts of one spouse in a marriage and to emphasize the financial contribution of the other spouse by disregarding the efforts of the spouse who often provides care and supervision within the family unit.

Jimmy Lee ROGERS *v.* STATE of Arkansas

CA CR 98-540 989 S.W.2d 568

Court of Appeals of Arkansas
Division III
Opinion delivered May 12, 1999

Darrel Blount, for appellant.

Mark Pryor, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. Appellant, Jimmy Rogers, was arrested on April 19, 1996, and charged with residential burglary, theft of property, and possession of a scheduled IV controlled substance. He was tried by a jury on September 23, 1997, found guilty of counts I and II, and sentenced to fifteen years at the Arkansas Department of Correction on count I and one year at the Montgomery County Jail on count II, to be served concurrently. At trial, appellant moved to dismiss all charges against him

for the State's failure to comply with his right to a speedy trial. The trial court heard arguments from both parties and denied the motion. Appellant appeals the denial of his motion to this court. We affirm.

Appellant brings this appeal under the authority of Ark. R. Crim. P. 28.1, which provides that an accused will be provided the right to a speedy trial. Rule 28 also requires that an accused must be brought to trial within twelve months from the date of his arrest if the accused has been continuously held in custody or on bail since the time of his arrest for the offense charged. *See* Ark. R. Crim. P. 28.1(c) and 28.2(a). Once it has been determined that the trial took place outside the speedy-trial period, the State bears the burden of proving that the delay was legally justified. *Kelch v. Erwin*, 333 Ark. 567, 970 S.W.2d 255 (1998).

In this case, appellant has presented a *prime facie* case for a speedy-trial violation in that he was arrested on April 19, 1996, and was tried 521 days later on September 23, 1997. During trial, he moved for a dismissal of all charges due to the State's failure to bring him to trial within one year of the date of his arrest. The State responded by arguing that the speedy-trial rule should be excused because the trial was delayed from continuances made on behalf of appellant's co-defendant, Robert Klinch, whose case was consolidated with appellant's case before Klinch was brought to trial. Thus, according to the State, the delays caused by Klinch were excusable in regard to the applicable periods of the speedy-trial rule and were imputed to appellant as co-defendant.

On appeal, appellant argues that the only time he failed to appear for trial was during his incarceration in the Garland County jail. However, in criminal cases, issues raised must be presented to the trial court to preserve them for appeal. *Strickland v. State*, 331 Ark. 402, 962 S.W.2d 769 (1998). This issue was not presented before the trial court in deciding appellant's motion to dismiss and, therefore, does not warrant our discussion.

Appellant also argues that the trial court erred in denying his motion to dismiss for lack of a speedy trial by relying on the

State's assertion that the speedy-trial rule was not relevant due to the consolidation of his case with that of his accomplice in State v. Robert Klinch, No. 96-32, and that, pursuant to Rule 28.3, an excluded time for purposes of computing time for speedy trial was caused by motions for continuances filed by Klinch and a delay chargeable to him.

Here, however, the record shows that appellant was untimely in preserving his argument. The record establishes that on the day of trial, appellant, through his counsel, announced to the trial court that he was ready to proceed with trial. It further reflects that before appellant moved for a dismissal of the charges against him, he participated in the selection of the jury during *voir dire*. In *Taylor v. State*, 284 Ark. 103, 679 S.W.2d 797 (1984), the Court stated that *voir dire* is an essential step in a trial. In *Wilkerson v. State*, 53 Ark. App. 52, 920 S.W.2d 15 (1996) (quoting *Summers v. State*, 292 Ark. 237, 729 S.W.2d 147 (1987)), we stated that "the State has a right to be notified prior to the hearing that a defendant will raise a speedy-hearing objection, and appellant waived his objection by failing to move for dismissal prior to the hearing." Further, in *Summers*, *supra*, the Arkansas Supreme Court applied to a revocation proceeding Ark. R. Crim. P. 28.1(f), which states that a defendant's failure to move for dismissal of a charge for lack of a speedy trial prior to trial results in a waiver. Therefore, we hold that appellant waived his right to a speedy trial when he failed to move for a dismissal prior to trial. *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991).

Affirmed.

BIRD and CRABTREE, JJ., agree.

Sarah ELLISON *v.* THERMA-TRU

CA 98-1064 989 S.W.2d 987

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 12, 1999

Walker, Shock, Harp & Hill, P.L.L.C., by: *Eddie H. Walker, Jr.*, for appellant.

Ledbetter, Cogbill Arnold & Harrison, L.L.P., by: *E. Diane Graham*, for appellee.

Judy W. Rudd, for appellee.

WENDELL L. GRIFFEN, Judge. Sarah Ellison has appealed the decision by the Workers' Compensation Commission concerning her claim for permanent disability benefits associated with a compensable back injury governed by the Workers' Compensation Law that pre-dated Act 796 of 1993. Ellison contends that the Commission erred in its determination that she is entitled to permanent benefits on account of her anatomical impairment equal to a rating of 1% to the body as a whole, that she was entitled to wage-loss disability benefits of 3% to the body as a whole, and that the Second Injury Fund (SIF) was not liable pursuant to Ark. Code Ann. § 11-9-525 (Repl. 1996). We agree that the Commission erred; therefore, we reverse and remand so that the Commission can determine Ellison's entitlement to benefits according to the correct legal standards.

Ellison sustained a work-related back injury on May 8, 1991, while employed by Therma-Tru, arising from her work pulling a load of door styles. Therma-Tru accepted the injury as compensable and paid indemnity and medical benefits related to it. Ellison continued working for Therma-Tru until July 1, 1993, and has not returned to work elsewhere since that time. She filed a claim for additional compensation benefits in which she contended that she was permanently and totally disabled due to the combined effects of the May 8, 1991 injury and recurrences sustained in December 1992 and June 1993, as well as her pre-existing degenerative back condition and a pre-existing condition of chronic obstructive pulmonary disease. The SIF was joined as a party and denied any liability for benefits, while Therma-Tru denied Elli-

son's claim of being permanently and totally disabled. The Commission denied Ellison's claim for permanent and total disability benefits arising from her May 1991 compensable back injury and compensable recurrences in December 1992 and June 1993. Instead, the Commission found appellant entitled to 1% anatomical impairment, found that she was entitled to wage-loss disability benefits of 3% to the body as a whole, and held that the Second Injury Fund was not liable pursuant to A.C.A. § 11-9-525 and *Midstate Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

It is settled law that on appellate review of workers' compensation cases, we view the evidence and all reasonable inferences from it in the light most favorable to the Commission's findings. *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). A decision of the Commission is reversed only if we are convinced fair-minded persons using the same facts could not reach the conclusion reached by the Commission. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). In our review, we defer to the Commission in determining the weight of the evidence and the credibility of the witnesses. *Id.* The issue is not whether we may have reached a different conclusion or whether the evidence might have supported a contrary finding. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

Ellison argues that the Commission erroneously focused on deposition testimony by Dr. Stephen Heim, an orthopaedic surgeon, who acknowledged that Ellison had pre-existing back problems before the May 8, 1991 injury, concluded that she sustained some permanent impairment due to the job-related injury, and assessed her permanent anatomical impairment at 6% to the body as a whole due to her overall condition without dividing the impairment between the job-related and the pre-existing condition. When pressed during his deposition to apportion what part of the impairment rating was attributable to the traumatic work injury, Dr. Heim testified:

> With the trauma that has been relayed to me and knowing the condition of her back, if she has injured her back on the date that you mention, several times, in 1991 and 1992 and was taken off

> work in 1993, I think that it is likely that if she is incurring ongoing trauma that it has contributed at least 1% to her back.

The Commission evaluated Dr. Heim's testimony and his written opinions regarding a 6% impairment rating in the following words:

> Based on Dr. Heim's written opinion and deposition testimony, we find that the greater weight of the evidence establishes that only 1% of the claimant's anatomical impairment rating to the body as a whole is attributable to her work-related injuries and recurrences in 1991, 1992 and 1993. . . Dr. Heim is of the opinion that the claimant's work-related injuries in 1991 with recurrences in 1992 and 1993 have aggravated claimant's preexisting abnormality at L5-S1, to the extent that the claimant has experienced an additional 1% impairment (on top of the 5% impairment attributable to the preexisting disc abnormality) attributable to her work-related injury.

Regarding the Commission's determination that Ellison is entitled to only 1% anatomical impairment based on Dr. Heim's statement that if she has "ongoing trauma that it has contributed to at least 1% to her back," this case is governed by workers' compensation law as of 1991, the date of the compensable injury for which appellant seeks permanent disability benefits. Thus, Ark. Code Ann. § 11-9-522 (1987) applies. That statute and case law pertinent to it such as *Bates v. Frost Loggins Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1992), and *Lockeby v. Massey Pulpwood, Inc.*, 35 Ark. App. 108, 812 S.W.2d 700 (1991), show that although a workers' compensation claimant must prove a causal connection between the work-related accident and the later disabling injury, it is not essential that the causal relationship between the accident and the disability be established by medical evidence, nor is it necessary that employment activities be the sole cause of a worker's injury in order to receive compensation benefits. By focusing on Dr. Heim's statement regarding the extent that "ongoing trauma" from the 1991 employment injury and its recurrences contributed to appellant's back condition, the Commission resorted to Act 796 of 1993 analysis based on Ark. Code Ann. § 11-9-102(F) (1987) which states, in pertinent part, as follows:

> (ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
>
> (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

The Commission did not refer to § 11-9-102(F)(ii)(a) and (b) in its opinion; however, its decision regarding Ellison's permanent physical impairment demonstrates that Act 796 reasoning was employed in deciding her impairment. Under the law in 1991 when Ellison was injured, it was not necessary that employment activities be the "major cause" for permanent disability.

We must also reverse the Commission's determination that Ellison is only entitled to wage-loss disability benefits of 3% to the body as a whole. The Commission only factored the work-related injury into its analysis and made no reference to Ellison's pre-existing degenerative back condition and her chronic obstructive pulmonary disease. Both conditions were clearly established by the record. Concerning Ellison's pre-existing degenerative back condition, the Commission's opinion acknowledged Dr. Heim's opinion and deposition testimony that Ellison had some degree of permanent impairment. Ellison's testimony regarding her chronic obstructive pulmonary disease was uncontradicted and corroborated by medical records from her doctors.

Under the law in effect when Ellison's claim arose, where the claim is for permanent disability based on incapacity to earn, the Commission is supposed to consider all competent evidence relating to the incapacity, including the age, education, medical evidence, work experience, and other matters reasonably expected to affect the claimant's earning power. *Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978); *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985). Although the Commission cited the seminal case of *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), and its progeny, which recognize that these factors are properly considered in determining wage loss

disability, it did not consider the effect of Ellison's pre-existing degenerative condition and her respiratory problem in concluding that Ellison's wage-loss disability is 3% to the body as a whole.

The Commission also erred when it failed to address the wage loss disability issue and Ellison's claim that she is permanently and totally disabled from the perspective of the "odd lot" doctrine. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992), *supp. op.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993), and similar cases provide that an employee who is injured to the extent that she can perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist may be classified as totally disabled. This employee is said to fall within the odd-lot category of disabled workers. Act 796 of 1993 abolished the odd-lot doctrine for permanent disability claims based on injuries that occurred *after* July 1, 1993 (*see* A.C.A. § 11-9-522(e) (Repl. 1996)); however, the doctrine was alive and applicable to Ellison's disability claim stemming from her 1991 compensable injury and its recurrences.

Finally, the Commission erred when it held that the Second Injury Fund is not liable pursuant to Ark. Code Ann. § 11-9-525 and *Midstate Const. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), and concluded that Ellison failed to prove the third factor required by the *Midstate Construction* opinion (that her prior disability or impairment combined with the additional permanent disability or impairment caused by the 1991 compensable injury to result in the current disability status). Even if Ellison's anatomical impairment from the 1991 injury and its recurrences was only 1%, the combined effect of that impairment and her pre-existing degenerative disease and pre-existing respiratory condition resulted in her current disability status by all the medical evidence. While the Commission's opinion concludes at page 9 that "the greater weight of the evidence establishes the claimant's respiratory problems in no way 'combined' with the claimant's most recent back problems to cause her present wage loss disability," the employer's physician even opined after the December 1992 episode, "I really think that this lady is going to need to find another line of work." The October 11, 1993 medical report from Dr. Sills includes a statement that Ellison "is

unable to work due to her severe chronic obstructive pulmonary disease and back pain." Dr. Harford, the company physician, concluded in a July 21, 1993 report that appellant was "[n]ot able to do factory work. She needs to change occupations." Likewise, Dr. Heim, the orthopaedic surgeon deposed by the parties, testified that "Mrs. Ellison is probably not a good candidate for vigorous activity that requires a lot of bending, stooping and lifting. She should have a sedentary job." This and other proof in the record shows that fair-minded people could not agree with the Commission that the combined effect of Ellison's work related 1991 injury and her pre-existing respiratory condition and pre-existing degenerative back condition did not combine to produce her current disability.

Reversed and remanded.

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

MEAD, J., dissents.

MARGARET MEADS, Judge, dissenting. I cannot agree with the majority to reverse this case. I believe the correct law was properly considered and applied to the facts of the case and the decision should be affirmed.

The record reflects that the Administrative Law Judge (ALJ) made the determination in her March 22, 1996, opinion, and reiterated in her April 18, 1996, amended opinion, that "[t]his injury occurred prior to July 1, 1993, therefore Act 796 does not apply." Therma Tru and Liberty Mutual Ins. Co. appealed these decisions and specified in their Notice of Appeal: "The ALJ's finding that the injury is not governed by Act 796 is contrary to the facts and the law and is error." The Commission issued an opinion on October 22, 1996, finding that claimant sustained a recurrence of her 1991 injury in December 1992 and again in June 1993. This opinion includes the following:

> In reaching our decision, we note that the respondents assert that any claim related to the claimant's 1993 back problems is governed by the provisions of Act 796 of 1993. However, we note that the amendments of Act 796 do not apply to a recurrence of an injury sustained before the effective date of the Act.

Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996).

Clearly, the issue of whether Act 796 of 1993 or the law preceding Act 796 applies to these facts has been litigated and properly decided, and I do not believe the Commission failed to consider and apply the appropriate law when it reached its June 11, 1998, decision now on appeal to this court. For the majority to conclude that the Commission gave lip-service only to pre-Act 796 law but actually applied Act 796 is an insult to the Commission and wholly speculative.

I dissent.

THOMSEN FAMILY TRUST, 1990, Erik Thomsen, Trustee *v.* PETERSON FAMILY ENTERPRISES, INC., Elly Von Mueller Peterson, and Elly L. Droshin

CA 98-962 989 S.W.2d 934

Court of Appeals of Arkansas
Division II
Opinion delivered May 19, 1999

Gene O'Daniel, for appellant.

Rose Law Firm, A Professional Association, by: *Richard T. Donovan*, for appellees.

JOHN B. ROBBINS, Chief Judge. Thomsen Family Trust, 1990, through its trustee, Erik Thomsen, has appealed from an order of the Lonoke County Chancery Court that removed its lis pendens against property owned by appellee Peterson Family Enterprises, Inc., and dismissed its third-party complaint against appellee Elly Drosihn. Appellant has also appealed from an earlier order that dismissed its counterclaim against Peterson Family Enterprises, Inc. ("PFE"), and its third-party complaint against appellee Elly Von Mueller Peterson. We affirm.

In 1994, appellant obtained a bankruptcy court judgment in California on a nondischargeable debt against Ms. Drosihn and her husband. In April 1995, after Mr. Thomsen learned that Ms. Drosihn had moved in with her mother, Mrs. Peterson, in Little Rock, he sent a letter to Mrs. Peterson in which he expressed interest in attaching Ms. Drosihn's stock in appellee PFE as a means of satisfying the judgment. PFE is a family farming corporation which was incorporated by Mrs. Peterson and her husband, now deceased, in 1968. Mrs. Peterson received the majority of the stock, and her children received minority interests. Appellant registered its bankruptcy judgment in Pulaski County, Arkansas, on May 16, 1995. On May 30, 1995, EDCEL, LP, was filed for record, with Ms. Drosihn owning a 98% interest and her two sons each owning 1%. The next day, Ms. Drosihn conveyed all of her stock in PFE to EDCEL. On June 28, 1995, appellant filed a lis pendens in the recorder's office of Lonoke County against real estate owned by PFE.

PFE filed this action in the Lonoke County Chancery Court to set aside the lis pendens on the ground that the corporation, and not its shareholders, owns the property in Lonoke County. In response, appellant argued that the corporation was merely a shell for tax purposes and that its property was actually owned by its shareholders. Appellant also filed a counterclaim against PFE and a third-party complaint against Mrs. Peterson and Ms. Drosihn in which it alleged that the transfer of Ms. Drosihn's stock in PFE to EDCEL was intentionally fraudulent and done to avoid satisfac-

tion of appellant's judgment. Appellant sought damages of $461,915.71 and punitive damages in the amount of $1.5 million. PFE and Mrs. Peterson then filed motions to dismiss on the basis of Arkansas Rule of Civil Procedure 12(b)(6). On March 11, 1996, a hearing was held on the motions to dismiss, after which the chancellor dismissed the counterclaim against PFE and the third-party complaint against Mrs. Peterson because they were not parties to the conveyance of Ms. Drosihn's stock. The third-party complaint against Ms. Drosihn remained for trial. Appellant, however, never added EDCEL or Ms. Drosihn's sons as parties to this action.

At the subsequent trial, Mr. Thomsen testified about the fraudulent acts by which Ms. Drosihn obtained the original loan from appellant that gave rise to the judgment. He stated that Mrs. Peterson never responded to his April 1995 letter, although she did verify that she had received it. He admitted that appellant does not have a judgment against PFE.

Ms. Drosihn testified that among the reasons she formed EDCEL was her desire to include her sons in their Arkansas heritage and family business. She stated that she had sought counsel in establishing the limited partnership and that she had not given larger interests in it to her sons because she wanted to avoid the appearance of a fraudulent transfer. She admitted that PFE's attorney also prepared the limited-partnership documents. She testified that she is the agent for service of process for EDCEL and that it had not been added as a party to this lawsuit.

Tom Shurgar, executive vice-president of PFE and manager of its farming operation, testified that the corporation has been in good standing with the Arkansas Secretary of State's Office since 1968. He was adamant that PFE was not involved in the transfer of Ms. Drosihn's stock to the limited partnership. He stressed that PFE did not, in any way, assist Ms. Drosihn or advise her to take this action and said that the only thing it did was to acknowledge the transfer of the shares. He stated that no officer, director, or shareholder was involved in this transaction except in signing the necessary documents.

In an order filed April 15, 1998, the chancellor ordered that the lis pendens filed by appellant be removed and that the third-party complaint against Ms. Drosihn be dismissed for failure to join a necessary party.

In its first argument on appeal, appellant contends that the chancellor erred in dismissing the counterclaim against PFE and the third-party complaint against Mrs. Peterson. The Arkansas Fraudulent Transfer Act, Ark. Code Ann. §§ 4-59-201 through 4-59-213 (Repl. 1996 and Supp. 1997), does not provide for the liability of an individual or entity who was not a transferor or a transferee of the property in question. Arkansas Code Annotated section 4-59-204 (Repl. 1996) states:

> *4-59-204. Transfers fraudulent as to present and future creditors.*
>
> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
>
> (b) In determining actual intent under subdivision (a)(1) of this section, consideration may be given, among other factors, as to whether:
>
> (1) The transfer or obligation was to an insider;
>
> (2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Arkansas Code Annotated section 4-59-207 (Supp. 1997) and section 4-59-208 (Repl. 1996) provide creditors with certain remedies against the transferors and transferees of such property. These statutes, however, make no provision for the recovery of a judgment against third parties in the positions of PFE and Mrs. Peterson. Furthermore, appellant did not plead that Mrs. Peterson or PFE acted as Ms. Drosihn's agent with regard to the transfer of Ms. Drosihn's stock to EDCEL. Consequently, even treating the allegations of fact made by appellant in his counterclaim against PFE, and his third-party complaint against Mrs. Peterson, as true, these pleadings fail to state facts upon which relief against them can be granted under Ark. R. Civ. P. 12(b)(6). The chancellor did not err in granting the motions to dismiss appellant's actions against PFE and Mrs. Peterson.

In its second point on appeal, appellant contends that the chancellor erred in removing the lis pendens from the circuit court records in Lonoke County. Appellant argues that, because appellees were involved in the fraudulent transfer of the stock to avoid the judgment, the trial court should have ignored the cor-

porate form and permitted appellant to attach the assets of the corporation to prevent a wrongdoing. As appellees point out, appellant is seeking a "reverse piercing of the corporate veil."

It is a nearly universal rule that a corporation and its stockholders are separate and distinct entities, even though a stockholder may own the majority of the stock. *First Commercial Bank v. Walker*, 333 Ark. 100, 969 S.W.2d 146 (1998), *cert. denied*, 119 S.Ct. 410 (1998). In special circumstances, the court will disregard the corporate facade when the corporate form has been illegally abused to the injury of a third party. *Enviroclean, Inc. v. Arkansas Pollution Control and Ecology Comm'n*, 314 Ark. 98, 858 S.W.2d 116 (1993); *Don G. Parker, Inc. v. Point Ferry, Inc.*, 249 Ark. 764, 461 S.W.2d 587 (1971). The conditions under which the corporate entity may be disregarded or looked upon as the alter ego of the principal stockholder vary according to the circumstances of each case. *Winchel v. Craig*, 55 Ark. App. 373, 934 S.W.2d 946 (1996). The doctrine of piercing the corporate veil is founded in equity and is applied when the facts warrant its application to prevent an injustice. *Humphries v. Bray*, 271 Ark. 962, 611 S.W.2d 791 (Ark. App. 1981). Piercing the fiction of a corporate entity should be applied with great caution. *Banks v. Jones*, 239 Ark. 396, 390 S.W.2d 108 (1965).

Further, a stockholder does not acquire any estate in the property of a corporation by virtue of his stock ownership; the full legal and equitable title thereto is in the corporation. *Arkansas Iron and Metal Co. v. First Nat'l Bank of Rogers*, 16 Ark. App. 245, 701 S.W.2d 380 (1985). *Accord In re Cummins*, 166 B.R. 338 (Bankr. W.D. Ark. 1994). In our view, appellant presented absolutely no evidence that PFE's corporate facade has been illegally abused or that Mrs. Peterson or any of the other officers or shareholders of PFE (except Ms. Drosihn) were involved in the transfer of the stock to EDCEL. In short, we find no evidence to warrant disregarding the corporate form.

In its third point on appeal, appellant contends that appellees waived the defense of failure to join a necessary party

because they raised it too late.[1] However, this issue is not preserved for our review because appellant failed to raise it to the chancellor or obtain a ruling on it. *Evans v. Harry Robinson Pontiac-Buick, Inc.*, 336 Ark. 155, 983 S.W.2d 946 (1999); *Moon v. Moon Enters., Inc.*, 65 Ark. App. 246, 986 S.W.2d 134 (1999).

Accordingly, we affirm the chancellor's orders in all respects.

Affirmed.

STROUD and MEADS, JJ., agree.

Louise MAXEY *v.* TYSON FOODS, INC., and Second Injury Fund

CA 98-1330 991 S.W.2d 624

Court of Appeals of Arkansas
Division III
Opinion delivered May 19, 1999

[1] Appellees claim that this issue is moot because appellant has filed a fraudulent conveyance action in Pulaski County Circuit Court styled *Thomsen Family Trust, 1990, Erik Thomsen, Trustee v. EDCEL, L.P.*, No. CV-98-5606. Any issue that is outside the record, however, will not be considered on appeal. *Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999).

Stephen M. Sharum, for appellant.

Bassett Law Firm, by: *Earl Buddy Chadick*, for appellee Tyson Foods, Inc.

David L. Pake, for appellee Second Injury Fund.

SAM BIRD, Judge. Louise Maxey appeals a decision of the Workers' Compensation Commission holding that she was not permanently and totally disabled, but that she was entitled to benefits for a 35% wage-loss disability. The Second Injury Fund argues on cross-appeal that the Commission erred in awarding appellant wage-loss benefits on a scheduled injury. Appellee Tyson Foods takes the position that the Commission did not err in finding that appellant failed to prove permanent and total disability, but it does not address the Second Injury Fund's argument.

At the time of the hearing in 1997, appellant was sixty-eight years old, had a tenth-grade education, no vocational training, and her past work experience consisted of working on a farm, in a flower shop, as a sales clerk in a clothing store, and for appellee Tyson Foods. Appellant testified that she began working for Tyson in 1984 and performed various jobs. She had been on the "debone line pulling chicken tenders," a floor person cleaning up, assisting on the production line, and keeping load records. On January 27, 1989, appellant sustained a compensable injury to her lumbar spine, underwent two surgeries, and was left with a 12% physical impairment to the body as a whole.

When appellant was released to return to work after her back injury she was restricted from bending and lifting, and she was placed on the "shell line." She said a maintenance man made a stool especially for her so she could sit or stand as she needed. She also wore a back brace and took pain medication as needed. She said, in general, she did quite well that way.

In 1995, appellant developed bilateral carpal tunnel syndrome, and she has had two surgeries on each wrist. After the surgery on her right wrist, appellant developed an infection that has never completely healed. When appellant was released to return to work on May 14, 1997, with a 15% impairment to her hands, appellant was told by the plant manager that there was no job available within her restrictions, and she was terminated as of May 30, 1997.

Appellant testified that she then attempted to work as a Wal-Mart "greeter," but being on her feet all day and having to pull baskets for customers caused her severe pain and she had to quit.

She said she can no longer squeeze anything, open a jar, peel a potato, push a vacuum, lift any cookware, or clean her house. Her hands stay sore and hurt constantly. The administrative law judge found that appellant was permanently and totally disabled.

The Commission reversed, and reduced appellant's disability from total to 35%. It found that appellant had skills transferable to the "service sector" of employment where she had experience, and that there were numerous jobs where appellant's restrictions of sitting or standing as needed could be accommodated. The Commission dismissed appellant's unsuccessful attempt to work at Wal-Mart as insufficient to prove a total inability to earn meaningful wages.

On appeal, appellant argues that the Commission's analysis was flawed and that reasonable minds could not reach the decision that the Commission reached. She contends that the Commission failed to acknowledge that she attempted to return to her job at Tyson Foods but was told that her restrictions barred her from performing "even the most sedentary work available" at Tyson. The appellant challenges the Commission's implication that she was not motivated to return to work. She points out that she testified that she needed to continue working to meet her daily expenses; that she suggested to Tyson's manager a couple of jobs she thought she could perform but was rebuffed; that she attempted to work at Wal-Mart but was physically unable to do so; and that after her back surgery she returned to her work at Tyson and worked until she became unable to function because of bilateral carpal tunnel syndrome.

Appellant also submits that the medical evidence supports a finding that she is permanently and totally disabled. In support of this argument, she points to the records of Dr. E.F. Still. Dr. Still's report of April 4, 1997, stated that appellant "has as much swelling as I have ever seen in a carpal tunnel area. . . . The swelling is so much this morning that I have taken pictures to document this[.]" When appellant had reached maximum healing and Dr. Still released her to return to work, he wrote:

> Obviously, she is not going to be able to do anything as far as repetitive work is concerned and I doubt seriously if she is going

> to be able to do anything that has anything of substance such as heavy lifting, etc.

Appellant urges us to reverse the Commission's conclusion. Appellant contends that expecting a sixty-eight-year-old woman with a tenth-grade education and serious medical problems to find a job in the service sector in a small town like Waldron, Arkansas, is unrealistic.

On appeal in workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and will affirm if those findings are supported by substantial evidence. *Morelock v. Kearney Co.*, 48 Ark. App. 227, 894 S.W.2d 603 (1995). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). The issue on appeal 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). Where a claim is denied because the claimant has failed to show entitlement to compensation by a preponderance of the evidence, the substantial evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for the denial of the relief sought. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998); *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987).

Permanent and total disability is awarded when an employee is unable, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1) (Repl. 1996). Appellant has experience as a clerk in a clothing store and working for a florist making and delivering flower arrangements. Considering appellant's medical restrictions for her back and hand injuries (no repetitive bending, stooping, lifting, and no lifting greater than thirty pounds) it seems that both her previous jobs would fit into these restrictions. Appellant described her typical day:

> I get up of a morning and I go down at my cousin's cafe and I eat breakfast and I am usually down there until the mail runs, and I go to the post office, and I come back home, and by that time, well, "Matlock" is on; I watch him. And then I watch "The Price is Right," and then [I] . . . get in the car and I go drive around town and sometimes I go to Wal-Mart, go in there and look around, and by that time it's lunchtime, and I eat lunch, and I go back down and do the same thing over in town, and then I come home and if there's a good program on, I watch it, and then I have to get up and have to go back down town.

If appellant can tolerate driving various places in town, she could deliver flowers. Working in a dress shop would also appear to be within appellant's restrictions. Furthermore, appellant testified that when told that Tyson had no job for her within her restrictions, she mentioned at least one job she thought she could do, but it was already filled. Thus, there is a substantial basis in the record to support the Commission's finding that appellant was not permanently and totally disabled. We affirm on direct appeal.

The Second Injury Fund argues on cross-appeal that the Commission erred as a matter of law when it awarded appellant permanent partial disability benefits on a scheduled injury. Although on first reading, the Commission's reasoning sounds quite logical, after analysis under the well-settled guidelines of statutory construction, we find we cannot agree. The Commission said:

> We certainly agree that Section 521(g) [Ark. Code Ann. § 11-9-521 (Supp. 1997)] and the *Risper* [*Fed. Compress & Warehouse Co. v. Risper*, 55 Ark. App. 300, 935 S.W.2d 279 (1996)] decision stand for the proposition that a respondent-employer and a respondent-carrier (Respondent No. 1 in this case) cannot be liable for an award of wage loss for a scheduled injury absent a finding of permanent and total disability. However, *Risper* was *not* a Second Injury Fund case, and we interpret Second Injury Fund liability to be controlled by Ark. Code Ann. § 11-9-525, and *not* by Ark. Code Ann. § 11-9-521.
>
> . . .
>
> Likewise, we see no rationale for limiting Second Injury Fund liability, in cases involving scheduled injuries, only to those cases resulting in permanent and total disability. In this regard,

> the underlying rationale for a schedule of benefits, such as Ark. Code Ann. § 11-9-521, is to compensate the injured worker for the permanent degree of loss or disuse provided for by statute. Included in that schedule of benefits is a conclusively presumed award of wage loss statutorily assigned to that particular scheduled injury. However, Second Injury Fund cases under Ark. Code Ann. § 11-9-525(b)(3), *by definition*, involve two or more injuries which *combine* to cause a *greater degree* of disability than the degree of disability attributable to each particular injury considered separately. Therefore, we believe that the General Assembly intended for the Second Injury Fund to have potential liability under Section 525(b)(3) in cases involving scheduled injuries causing less than permanent and total disability, even though an employer's liability for permanent disability benefits for scheduled injuries is limited under Section 521(g) to the schedule in Section 521, unless the injury causes permanent and total disability. In our opinion, Section 521 and Section 525 were enacted to address distinctly different situations, and we do not agree with the Second Injury Fund's assertion that Section 521(g) is a bar to Second Injury Fund liability in this case.

(Emphasis in the original; some citations omitted.)

Arkansas Code Annotated section 11-9-521 (Supp. 1997) provides in pertinent sections:

> (a) An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule:
>
> . . . .
>
> (g) Any employee suffering a scheduled injury shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment set forth above except as otherwise provided in § 11-9-519(b).

Arkansas Code Annotated section 11-9-519(b) states, "In the absence of clear and convincing proof to the contrary, the loss of both hands, both arms, both legs, both eyes, or of any two (2) thereof shall constitute permanent total disability."

In *Lawhon Farm Serv. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998), the Arkansas Supreme Court explained:

> We construe a statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Vanderpool v. Fidelity & Casualty Ins. Co.*, 327 Ark. 407, 415, 939 S.W.2d 280 (1997); *Bill Fitts Auto Sales, Inc. v. Daniels*, 325 Ark. 51, 55, 922 S.W.2d 718, 720 (1996). . . . In construing any statute, we place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *Hercules, Inc. v. Pledger*, 319 Ark. 702, 706, 894 S.W.2d 576, 578 (1995).
>
> Strict construction means narrow construction. *Arkansas Conf. Seventh Day Adventists v. Benton Cty. Bd. of Equalization*, 304 Ark. 95, 800 S.W.2d 426 (1990). In *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993), we wrote that strict construction requires that nothing be taken as intended that is not clearly expressed. The doctrine of strict construction is to use the plain meaning of the language employed. *Holaday v. Fraker*, 323 Ark. 522, 915 S.W.2d 280 (1996). Even when statutes are to be strictly construed, however, they must be construed in their entirety, harmonizing each subsection where possible. *Min-Ark Pallet Co. v. Lindsey*, 58 Ark. App. 309, 950 S.W.2d 468 (1997).

335 Ark. at 278-79, 984 S.W.2d at 4. Statutes relating to the same subject should be read in a harmonious manner, if possible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999); *Mecco Seed Co. v. London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994).

Arkansas Code Annotated section 11-9-521 is not ambiguous. The title of section 521 is "Compensation for disability — Scheduled permanent injuries," and subsections (a) and (g) state: "An *employee* who sustains a permanent compensable injury. . ." and, "Any *employee* suffering a scheduled injury *shall not be entitled to* permanent partial disability benefits in excess of the percentage of permanent physical impairment set forth above except as otherwise provided in § 11-9-519(b)." Nowhere in the section is there any reference to the party who is to be responsible for *paying* the disability compensation to the claimant. The entire section is directed toward *claimants* and the amount of compensation to which a *claimant* is entitled.

Further, while section 525 does mandate when Second Injury Fund liability may arise, it is not the only portion of the Workers' Compensation Law that applies to the Second Injury Fund. The purpose of the Second Injury Fund is to pay a portion of the obligation of the employer in accordance with the Workers' Compensation Act, and benefits both the employer and its insurance carrier. *Ward v. Fayetteville City Hospital*, 28 Ark. App. 73, 770 S.W.2d 668 (1989). *See also Second Injury Fund v. Mid-State Const. Co.*, 16 Ark. App. 169, 698 S.W.2d 804 (1985). Since Ark. Code Ann. § 521(g) exempts the employer from paying any wage-loss disability for a scheduled injury in the absence of permanent total disability, as the Commission admits, it also exempts the Second Injury Fund. A claimant who is not entitled to wage-loss disability benefits from his employer or its insurance carrier cannot be entitled to benefits from the Second Injury Fund.

When we consider the workers' compensation statute as a whole, and read Ark. Code Ann. §§ 11-9-521 and 525 harmoniously with each other and with the entire workers' compensation law, it is clear that the Legislature meant for the claimant's recovery to be restricted to the appropriate scheduled amount, regardless of whether the respondent is an employer, insurance carrier, or the Second Injury Fund.

Case law addressing scheduled injuries supports our finding that a claimant who has sustained a scheduled injury but is less than permanently, totally disabled is not entitled to wage-loss disability benefits. *Fed. Compress & Wholesale v. Risper*, 55 Ark. App. 300, 935 S.W.2d 279 (1996), involved an eye injury. It was not clear from the Commission's opinion that it had not considered the claimant's eye injury when determining the amount of wage-loss benefits to which he was entitled. We pointed out that an eye injury was a scheduled injury, which should not have been considered when determining claimant's wage-loss benefits. We reversed and remanded for the Commission to determine the extent of the claimant's wage-loss benefits without giving any consideration whatsoever to his scheduled eye injury or his non-compensable lumbar injury, which may also have been considered to some extent by the Commission.

In *Ward, supra*, we held that a claimant who has settled his claim with the employer cannot then proceed against the Second Injury Fund. In other words, we held that the statute controlled the *claimant's entitlement* to compensation, rather than the *source* of the compensation.

For these reasons we reverse the Commission's order that the Second Injury Fund is liable for wage-loss benefits to the claimant and hold that the claimant is not entitled to wage-loss benefits in addition to the compensation she received for her scheduled injury.

Affirmed on direct appeal; reversed on cross-appeal.

NEAL and CRABTREE, JJ., agree.

Brady Andrew LANGLEY *v.* STATE of Arkansas

CA CR 98-914 990 S.W.2d 575

Court of Appeals of Arkansas
Division I
Opinion delivered May 19, 1999

Hampton, Larkowski & Coleman, by: *Mark F. Hampton* and *Patrick J. Benca*, Law Student Admitted to Practice Pursuant to Rule XV(E)(1)(6) of the Rules Governing Admission to the Bar of the Arkansas Supreme Court for appellant.

Winston Bryant, Att'y Gen., by: *Kelly S. Terry*, Ass't Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Appellant entered a conditional plea of guilty pursuant to Arkansas Rule of Criminal Procedure 24.3(b) to conspiracy to manufacture methamphetamine and possession of methamphetamine with intent to deliver. On

appeal, he argues that the trial court erred in denying his motion to suppress. We agree, and reverse and remand.

Appellant was charged in connection with evidence discovered after a search of a mobile home owned by Patrick Fouse. In a companion case, *Fouse v. State,* 337 Ark. 13, 989 S.W.2d 146 (1999), Fouse also entered a conditional plea of guilty to several charges. In *Fouse,* the Arkansas Supreme Court held that the affidavit for the search warrant, which is the same affidavit and warrant involved in the instant case, did not contain sufficient facts to justify a nighttime search.

Detective David Oser, of the 17th East Judicial District Drug Task Force, presented the affidavit to the municipal judge. In the affidavit, he stated that he had reason to believe that methamphetamine and items used to manufacture methamphetamine were currently being concealed at Fouse's residence. He stated that on November 29, 1997, McRae police officers detected a chemical odor coming from the residence. He stated that he went to the residence at 9:00 p.m. on December 22, 1997, and also detected a very strong odor of ether coming from the residence. Officer Oser also attached to the affidavit a recipe for making methamphetamine, which indicated that ether is used during the active stages of the manufacturing process. He stated that the manufacturing process takes approximately four hours and that the chemicals used in the process are volatile. Officer Oser further stated that Fouse had a prior conviction for delivery of a controlled substance, and had previously associated with other persons who had been sentenced in federal court for conspiracy to manufacture and distribute methamphetamine. Officer Oser averred that there was an imminent danger that the items used to manufacture the methamphetamine and the controlled substance would be removed or destroyed.

The municipal judge issued the warrant, which allowed for execution to take place at any time based on the finding that reasonable cause existed to believe that the objects to be seized were in danger of imminent removal. At 12:20 a.m. on December 23, 1997, officers conducted the search and found evidence of an

active methamphetamine lab, drug paraphernalia, and communication equipment.

Appellant was present in the mobile home at the time of the search; he was sleeping on the couch in the living room of the residence. Arkansas State Trooper Roger Ahlf testified that he conducted a pat-down search of appellant, and subsequently retrieved a clear plastic bag containing what he believed to be methamphetamine.

The trial court found that appellant had standing to challenge the search as an invitee in the home, and denied his motion to suppress. Appellant argues that the trial court erred in its ruling because the affidavit in support of the search warrant failed to justify a nighttime search and because the *Leon* good-faith exception did not apply.

It is well settled that an affidavit must set forth a factual basis as a prerequisite to the issuance of a nighttime warrant and that mere conclusions are insufficient to justify a nighttime search. *Langford v. State,* 332 Ark. 54, 962 S.W.2d 358 (1998). Arkansas Rule of Criminal Procedure 13.2(c) provides that before a warrant authorizing a nighttime search is issued, the issuing judicial officer must have reasonable cause to believe that:

> (i) the place to be searched is difficult of speedy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy.

In reviewing whether the requirements of the rule were met, we make an independent determination based upon the totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Id.*

In *Fouse,* the supreme court in finding that the instant affidavit failed to justify the nighttime search stated:

> We view these comments by Detective Oser as conclusory and as falling more readily within the *Richardson/Garner* line of cases

> where we held that factual support for a nighttime search had not been forthcoming. Nor can we agree with the trial court that a strong odor of ether detected at the Fouse residence at 9:00 p.m., on December 22, 1997, was a reasonable basis for concluding that methamphetamine was to be removed or sold or both within the next four hours and that a nighttime search was justified. We hold that not only was the search warrant deficient under Ark. R. Crim. P. 13.2(c) but that probable cause was lacking to justify a nighttime search.

337 Ark. at 20-21, 989 S.W.2d at 149. *See also Richardson v. State,* 314 Ark. 512, 863 S.W.2d 572 (1993); *Garner v. State,* 307 Ark. 353, 820 S.W.2d 446 (1991).

In *United States v. Leon,* 468 U.S. 897 (1993), the Supreme Court held that objective good-faith reliance by a police officer on a facially valid search warrant will avoid the application of the exclusionary rule in the event the magistrate's assessment of probable cause is found to be in error. *See State v. Hart,* 329 Ark. 582, 952 S.W.2d 138 (1997). In determining that the officers in the instant case lacked good faith in executing the search warrant, the court in *Fouse* stated:

> The test under *Leon* is not whether the police officers executing the warrant subjectively believed they were complying with the law. Rather, the test to be applied under *Leon* is an objective standard of what reasonably well-trained police officers would believe is probable cause for a nighttime search.
>
> . . . .
>
> What is required for establishing probable cause for a nighttime search is clear from Ark. R. Crim. P. 13.2(c) and the multiple decisions of this court requiring more than merely conclusory statements. We have held that an objective standard of good faith is not met when a police officer only presents suspicions regarding removal and the municipal judge only repeats the boilerplate language from Rule 13.2(c). Using an objective standard, we conclude that a reasonably well-trained police officer would not have believed that probable cause existed to conduct a nighttime search based on the smell of ether.

337 Ark. at 21-22, 989 S.W.2d at 149-50 (citations omitted).

Pursuant to the supreme court's holding in *Fouse,* we must hold that the affidavit and resulting search warrant in the instant case did not contain sufficient facts to justify the nighttime search pursuant to Rule 13.2(c), that the smell of ether did not constitute sufficient probable cause to justify the nighttime search, and that the officers failed to meet the objective standard of good faith under *Leon.* We reverse and remand for entry of an order consistent with this opinion.

Reversed and remanded.

GRIFFEN and JENNINGS, JJ., agree.

Lynette Marie PRESLEY *v.* Charles Edwin PRESLEY

CA 98-954 989 S.W.2d 938

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered May 19, 1999

Sexton & Fields, P.L.L.C., by: *Sam Sexton, Jr.*, for appellant.

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

JUDITH ROGERS, Judge. This is an appeal from an order denying appellant's request for a change of custody of the parties' minor children from appellee. On appeal, appellant argues that the chancellor erred in failing to find a significant change of circumstances warranting a change in custody of the parties' minor children. We disagree and affirm.

The record reveals that the parties were married on November 29, 1986. Three children were born during the marriage. On August 22, 1996, the parties divorced. Appellant was awarded

custody of the children. On April 2, 1997, appellee filed a petition for change of custody asserting a significant change in circumstances because appellant had overnight visits with a person of the opposite sex. After a hearing, which is not abstracted, appellee was awarded custody of the children. There was no appeal from that May 7, 1997, decision. Approximately two months later, appellee filed a motion to increase child support and a motion for contempt because appellant had failed to pay support. Appellant counterclaimed for a change of custody. On April 9, 1998, the chancellor denied appellant's request for a change of custody, and granted the request for an increase in support. Appellant has appealed the chancellor's ruling denying the change of custody, but does not challenge the increase in child support.

On appeal, appellant argues that the chancellor erred in finding no material change of circumstance since the last hearing. Appellant contends that in the previous order of May 7, 1997, the chancellor found that overnight unmarried guests of the opposite sex in the presence of the children was a basis for a change of custody. Thus, appellant argues that law of the case should apply as a basis for a change of custody because appellee admitted to overnight visits with a woman in the presence of the children.

It does not appear from the abstract that appellant raised the defense of law of the case below before the chancellor. It has been held that the law-of-the-case defense cannot be raised for the first time on appeal. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997). Because the chancellor was not presented with an argument on this point concerning the law of the case, and made no ruling on it, the issue is barred. *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997). We also decline, due to lack of citation to authority or convincing argument, to address appellant's argument. *See Scollard v. Scollard*, 329 Ark. 83, 947 S.W.2d 345 (1997).[1]

Appellant also argues that the chancellor erred in not awarding her custody of the children because the facts in this case satisfy

[1] We do have serious reservations whether law of the case even applies in chancery cases involving custody determinations because the polestar consideration is the best interest of the child, and circumstances are continually changing.

the best-interest test required for a change of custody. We disagree.

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. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998); *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.* 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 chancellor found:

> Based upon the testimony I've heard today, there have been some changes of circumstances. Mr. Presley is now married. During the period of time since the last hearing until today, he did some things that his parents didn't approve of and that I don't approve it; that is, staying the night with his intended without benefit of clergy. That's been rectified.
>
> Mrs. Presley has made, some very encouraging changes in her lifestyle. There's no proof that she is hanging around some of the people and engaged in some of the activities that the Court found so objectionable the last time you all were here before me. The most important thing in care of children is stability, and the children will not become yo-yo's, ping-pong balls pounding back and forth. I have not heard anything that has convinced me that there has been a sufficient change of circumstances on the part of either party to warrant any type of change of custody so the previous order of the court will remain in full force and effect.
>
> . . .
>
> And I'm going to say to Mrs. Presley that what I am doing today is in no way critical of what you have accomplished over the last

> — since the last time that we were here. Because I think it has been commendable, and there was room — a vast room for improvement, and you have improved. But this isn't a situation where it's a D.H.S. case where children are removed and you do A, B, C, and D, and the children come back. I looked at the total picture to the total stability of the family and made a judgment based upon that. And it would be more detrimental, I believe, to make a change and change the children's residence once again, within a little over a year, after all of the upheaval they have been through going through a divorce to start with, which is the fault of each of you. So that is what I have done, and that is the reason I have done it.

The record indicates that it had been only two months since appellee was awarded custody of the children when appellant filed for a change of custody. The record also reveals that the children had changed homes twice in less than a two-year period. The chancellor found that the most important factor, in considering the best interest of the children, was stability so that the children would not become yo-yos between the parents. The chancellor also recognized that there had been some changed circumstances on both sides, but he did not find them sufficient to warrant a change in custody. After reviewing this record and giving great deference to the superior position of the chancellor, we cannot say that the chancellor's decision was clearly against the preponderance of the evidence. There is no case where we defer as much to the chancellor's superior ability to view the witnesses and weigh the evidence.

Affirmed.

ROBBINS, C.J., PITTMAN, STROUD, and CRABTREE, JJ., agree.

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. The parties' divorce decree awarded the appellant custody of their three small children, but restricted her from having a roommate, male or female. The appellee subsequently petitioned for a change of custody on the basis that appellant had an overnight male guest when

the children were present. The court changed custody to the appellee.

Shortly thereafter, the appellant requested that custody be returned to her. She alleged several facts supporting her contention that there had been a change of circumstances, one of which was the appellee had a female overnight guest in the presence of the children. The chancellor declined to change custody of the children, finding that the appellee had rectified his immoral behavior by marrying his female sexual partner and that it would not be in the best interest of the children to again be moved.

A chancellor is in the best position to view the parties and judge the credibility of witnesses, and his findings will not be disturbed absent an abuse of discretion. *Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998). A party who seeks a change in custody must show a significant change of circumstances since the most recent decree. *Id.* If a significant change of circumstances is found, then the chancellor must award custody based on the best interest of the child. *Id.*

Based upon the evidence presented, the chancellor abused his discretion when he ruled the appellant failed to prove a substantial change of circumstances and that it would be in the best interests of the children to remain in the custody of their father.

There were significant changes in the circumstances of the children after custody was changed to the appellee. He changed the school they attend and either decreased or stopped the extracurricular activities in which they previously participated. Appellant left guns accessible to his small children, although he could afford to buy a gun cabinet. After a home-study investigator suggested that he place the guns in a gun cabinet, he then went out and purchased one. The youngest child, at age four, began constantly talking about guns and a Bowie knife, and threatened to blow his grandfather's head off. The boys also began cursing and lying. The father did not deny this behavior, but explained that children will hear curse words on the playground and proclaimed that his oldest son is doing tremendously better because he now tells the truth more often than he lies.

Further, there was a significant change in the appellant's circumstances. She testified she no longer had overnight guests of the opposite sex, no longer drank alcohol, and attended church with the children. The chancellor even complimented the appellant for her change to a positive lifestyle. The appellant did everything the court asked her to do, except pay child support. While I would not excuse the appellant's child-support obligation, it should be noted that the appellee was in arrears on his child support when the chancellor gave him custody.

On the other hand, the appellee admitted he had spent the night with a woman on several occasions when the children were present. He tried to justify his immoral behavior by asserting that he did this with only one woman and subsequently married her a mere twelve days before the custody hearing. The chancellor found that the appellee had rectified his immoral behavior by the subsequent marriage. The act of engaging in a premarital sexual relationship is immoral from its commission. A subsequent marriage does not transform immoral conduct into moral conduct.

It is obvious that the chancellor imposed a different standard of conduct on the parties. The record shows that the chancellor consistently entered orders forbidding the appellant from having overnight visitors of the opposite sex in the presence of the children. This same prohibition was never placed on the appellee. The court found a change of circumstances and changed custody to the appellee the first time evidence was presented that the appellant engaged in the prohibited behavior. But when the evidence showed that the appellee engaged in the same immoral behavior, the chancellor swiftly forgave the appellee because of his twelve-day marriage. Common sense dictates that if engaging in premarital sexual relations is immoral conduct by a female, then the same is true for a male, unless a double standard is being applied. Although there was ample proof of changed circumstances, the chancellor chose to ignore it and employed a double standard. This is certainly an abuse of discretion.

Furthermore, the chancellor abused his discretion in holding the best interests of the children were served by leaving custody with the appellee. The appellee's attitude toward the appellant

was shown to be so hostile that it was affecting the children's lives. Although he did not have anyone to care for the two school-aged children, he refused to allow the mother to keep the children after school. Instead, he took the children to work with him until he could place them in an aftercare program provided by the school. Thus, the children are required to remain at school after it dismisses for the day, instead of going home to the care of a parent. The appellee announced he would give the appellant only the visitation required by the court order and nothing more. He kept his answering machine on and the phone was not answered when the appellant called to speak to her children. Messages that she left on the machine went unanswered. Although the appellant is a pediatric nurse, the appellee kept the children from visiting her when they were sick contending he did not want them to get worse. He scheduled his wedding during the appellant's visitation time, and expected appellant to allow the children to attend, which she did. The appellee refused to share information about their children. He maintained appellant should get information from the school. He failed to tell her when their oldest child was injured because no bones were broken. The appellee's hostile attitude toward the appellant was so apparent, the chancellor admonished him to work on his attitude because it would be detrimental to the children.

Since the children were removed from their mother's care, they have changed schools, are required to stay after school every day, have had extracurricular activities taken away, have had access to guns, and are now cursing and lying. They have not been allowed to visit with their mother, a nurse, when they are sick nor answer her phone calls. They have lived with a father who has exhibited a very hostile attitude toward their mother.

The chancellor's finding that it is in the best interests of the children to remain with their father is incredible based on the evidence presented. It is my opinion the chancellor abused his discretion in making this finding.

Cephas BREWER *v.* STATE of Arkansas

CA CR 98-935 992 S.W.2d 140

Court of Appeals of Arkansas
En Banc
Opinion delivered May 19, 1999

[redacted]

Theresa Nazario, for appellant.

No response.

JOHN F. STROUD, JR., Judge. Appellant was tried by a jury and convicted of two counts of rape involving victims younger than fourteen years of age. On December 12, 1997, the trial court sentenced appellant to twenty years' imprisonment on each count and ordered that the sentences be served concurrently. Theresa Nazario, appellant's court-appointed attorney, filed notice of appeal and ordered the transcript of the trial proceedings. A two-volume transcript, consisting of almost a thousand pages and costing $2,748.60, was provided at the State's expense because appellant was indigent. On September 28, 1998, Ms. Nazario tendered her motion to withdraw as counsel of record, stating that appellant "*has hired private counsel to pursue his appeal.* Attorney Karen Pope Greenaway has obtained transcripts as evidenced by the attached receipt in order to perfect the appeal." (Emphasis added.) The motion was filed on October 16, 1998, on which date the clerk's office confirmed that it had been served on appellant. On October 13, 1998, Ms. Greenaway had filed her entry of appearance in this case.

When the motions to withdraw and to enter an appearance were originally filed, respectively, by the appellant's public defender and his retained counsel, this court issued a *per curiam* opinion. In it, we remanded the case to the trial court with instructions that it conduct proceedings and render findings of fact regarding the source of funds used to hire appellant's retained counsel, the date that the funds were obtained and counsel was retained, and whether a demand was made on behalf of the State for reimbursement of the cost of the trial record. *See Brewer v. State,* 64 Ark. App. 372, 984 S.W.2d 65 (1998).

On remand, the trial court found that the appellant was still indigent. The trial court explained that it could not consider the real property owned by the appellant and his wife because appellant had conveyed the real property to his wife when he was unable to make the payments on the property; that appellant had no income and no money in savings; that he was incarcerated in the state penitentiary; that the cost of the transcript was substantial, as was the cost to retain counsel; and that his wife (by then his ex-wife) and siblings had paid the cost of retaining private counsel for him.

■ ■ In response to the *per curiam* opinion that remanded this matter to the trial court, Judges Pittman, Neal, Roaf, and I concurred with Judge John Jennings's dissent to that *per curiam.* While we all agreed that any abuses in the process of obtaining transcripts by indigent defendants should be cured, the basis for the dissent was that this matter was best left to the State, through the attorney general's office, to represent the people and to ask for relief if such abuse was occurring. We reiterate that position here, now as the majority position, because we believe that in most instances the attorney general's office will be better suited than this court to supervise, investigate, and cure any abuses by indigent defendants in obtaining transcripts. In stating this preference, however, we do not in any way relinquish our authority to remand such matters to the trial court in appropriate circumstances. If all cases were to be remanded to the trial court to determine whether an appellant is still indigent after being repre-

sented by appointed counsel at trial and receiving a transcript at State expense, it should be only by rule that would apply to criminal cases in the supreme court and in the court of appeals. Rule-making authority lies with our supreme court, not the court of appeals. *See Jennings v. State,* 276 Ark. 217, 633 S.W.2d 373 (1982).

Moreover, in any future instances in which we might decide to remand such a matter to the trial court, we will expect the trial court to follow the standards enunciated in *Hill v. State,* 305 Ark. 193, 805 S.W.2d 651 (1991), and *Hill v. State,* 304 Ark. 348, 802 S.W.2d 144 (1991):

> As we said when we remanded this matter, the burden of establishing indigency is on the defendant claiming indigent status. In considering whether an appellant is indigent, which is a mixed question of fact and law, some of the factors to be considered are the following: (1) income from employment and governmental programs such as social security and unemployment benefits; (2) money on deposit; (3) ownership of real and personal property: (4) total indebtedness and expense; (5) the number of persons dependent on the appellant for support; (6) the cost of the transcript on appeal; and (7) the likely fee of retained counsel for the appeal. Hill, 304 Ark. 348, 802 S.W.2d 144. Able-bodiedness and the level of education of the appellant are also given some consideration as is whether the appellant himself paid the cost of the appeal bond or has control or complete discretionary use of funds raised by others for his defense.

305 Ark. 193, 194, 805 S.W.2d 651, 652-53.

> The ability of bystanders such as friends and family members to post bond or assist with expenses is not a factor in determining the appellant's indigency since indigency of the appellant does not depend on the financial position of his family and friends. Bystanders have no obligation to the state. An exception could be made, however, where the appellant has control or complete discretionary use of funds raised by others.

304 Ark. 348, 351, 802 S.W.2d 144, 145-46 (citations omitted).

Here, the trial court found that the appellant was still indigent and that the funds for private counsel were provided by the appellant's ex-wife and siblings. In accordance with *Hill,* 304 Ark. 348, 802 S.W.2d 144, the ex-wife and siblings had no obligation to the State to pay the cost of the transcript. Consequently, we accept the trial court's finding that appellant is still indigent, and we therefore find that Ms. Nazario's motion to withdraw as counsel should be granted.

Motion granted.

PITTMAN, JENNINGS, BIRD, NEAL, CRABTREE, MEADS, and ROAF, JJ., agree.

GRIFFEN, J., ROBBINS, C.J., HART and ROGERS, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. I dissent, not because I disagree with the law as set out in *Hill v. State,* 305 Ark. 193, 805 S.W.2d 651 (1991), but because we have encountered a problem in its application. It is apparent, however, to a few judges on this court that there appear to be defendants who claim indigency, thereby avoiding the costs of a transcript, and then immediately obtain private counsel to pursue the appeal. This appears to be a stratagem for avoiding the costs of a transcript and shifting such costs from the alleged perpetrators of the crimes to the rest of the taxpayers (*i.e.*, the State).

WENDELL L. GRIFFEN, Judge, dissenting.

Facts are stubborn things. . . . — JOHN ADAMS, *ARGUMENT IN DEFENSE OF THE SOLDIERS IN THE BOSTON MASSACRE TRIALS*

This is our chief bane, that we live not according to the light of reason, but after the fashion of others. — SENECA, *OCTAVIA*

I respectfully dissent from our decision to unconditionally grant the motion by Theresa S. Nazario, appellant's court appointed attorney, to withdraw as his attorney and to allow Karen Pope Greenaway, an attorney retained by his ex-wife and siblings, to be substituted as counsel in his appeal. After reviewing the record of the proceedings on remand, I believe more strongly

than ever that we should follow our decision in *Smith v. State*, 63 Ark. App. 31, 970 S.W.2d 336 (1998), and only grant the motion conditioned upon the State being reimbursed the cost of the trial transcript. Despite the clear requirement in Rule 16 of the Rules of Appellate Procedure—Criminal, neither the interest of justice nor other sufficient cause has been shown for allowing appellant to dump his taxpayer-paid lawyer after having obtained a free trial transcript worth almost three thousand dollars so that he can now pursue his appeal with a hired lawyer to whom his ex-wife and siblings have paid $10,000 (more than three times the cost of the trial transcript), yet not require that the transcript cost be reimbursed to the State. If anything, the factual history of this case confirms the very concern mentioned in our per curiam to remand, namely, that the notion of indigency and the reason for granting a free transcript to indigent appellants is being mocked.

Appellant was charged by information, tried to a jury, and convicted following a four-day trial on two counts of rape involving victims younger than fourteen years of age. On December 12, 1997, the trial court sentenced appellant to twenty years' imprisonment on each count and ordered that the prison sentences be served concurrently. Nazario, appellant's court appointed lawyer, filed notice of appeal and ordered the transcript of the trial proceedings. A two-volume transcript numbering almost a thousand pages and costing $2,748.60 was provided to Nazario on account of appellant's indigency.[1] Nazario tendered a motion to withdraw as counsel of record on September 28, 1998, but the motion was not filed until October 16, 1998, when the clerk's office confirmed that it had been served on appellant. The motion states

[1] Our court granted appellant's motion for rule on the clerk so as to permit a belated appeal on July 31, 1998. On September 10, 1998, the two-volume transcript was lodged in the clerk's office. On October 12, 1998, the clerk of our court apparently granted Nazario's motion to extend the due date for filing appellant's abstract and brief until October 27, 1998. That the motion was filed to accommodate Greenaway, the lawyer engaged to handle the appeal for $10,000, is self-evident because the transcript was delivered to Greenaway on September 17, 1998 — a week after it was lodged with the clerk of our court — and because Nazario's motion to withdraw was filed on September 28, 1998, well before she moved to extend the due date for filing appellant's abstract and brief.

that appellant "has *hired private counsel to pursue his appeal.* Attorney Karen Pope Greenaway has obtained transcripts as evidenced by the attached receipt in order to perfect the appeal." (Emphasis added.) The referenced receipt is dated September 17, 1998, eleven days before Nazario tendered the motion to withdraw and seven days after the transcript was filed with the clerk's office. We issued a per curiam decision and remanded the case to the trial court for an evidentiary hearing to establish the facts behind appellant's ability to hire counsel after obtaining a free trial transcript based on professed indigency. *See Brewer v. State*, 64 Ark. App. 372, 984 S.W.2d 65 (1998).

The record developed on remand shows that Greenaway was hired by appellant's family after he was imprisoned. During cross examination by counsel for the State, appellant testified as follows:

Q. Mr. Brewer, do you want Ms. Greenaway to represent you?

A. Ms. Greenaway will represent me, yes.

Q. Was she hired with your approval?

A. She was hired beyond my knowledge. I was incarcerated down there when I found out that they had hired her. They notified me after they had hired her.

Q. So you want her to be your attorney?

A. If she's been paid for it, sure.

Q. Okay. And she was paid or hired to represent you; is that true?

A. *As far as I understand they hired her to represent me. My family did, yes.*

Q. Do you know how much money they paid her —

A. Not right offhand, no.

Q. *So do you know if they could pay for the transcript since they paid for her?*

A. If my family *could* pay for the transcript? No, they *shouldn't.*

Q. You don't think they should?

A. *No, I don't think they should.*

Q. Why not?

A. *Because I hired — I hired the State to represent me, the State found me guilty, the State put me incarcerated. No funds, no money, so why should my family pay something that they just helping me to do now? They just love me, now, and represent to me to get a lawyer to represent my case.*

Alleen Brewer, appellant's ex-wife, testified at the hearing on remand that although appellant had been represented by two appointed lawyers at trial based on his professed indigency, she initially consulted Bill Putnam, Jr., about handling the appeal in January 1998. Putnam agreed to handle the appeal for $10,000, and Ms. Brewer testified that appellant's siblings paid the first $5,000 of that fee to Putnam. However, Putnam withdrew in May or June 1998 after learning that he had a conflict of interest arising from representing several Benton County officials. Putnam referred her to Karen Pope Greenaway, who also agreed to handle the appeal for $10,000. Putnam sent the first $5,000 payment to Greenaway on September 24, 1998, four days before Nazario, appellant's court-appointed counsel, moved to withdraw.

Meanwhile, appellant quitclaimed the couple's residence — valued at $50,000 with a $43,000 mortgage — to his wife in March 1998. Alleen Brewer then obtained a divorce on June 9, 1998. She wrote a check for the second $5,000 owed Greenaway on December 11, 1998, and testified that she obtained those funds by taking a second mortgage out on the house that appellant had transferred to her before their divorce. Ms. Brewer testified on cross-examination that Putnam or Greenaway "may have mentioned" the need for obtaining a transcript on appeal. Although the Court of Appeals has not granted the motion to withdraw or granted leave for Greenaway to enter an appearance as counsel for appellant (she merely filed an entry of appearance without leave), Greenaway has, by her own admission, "already done the work, the brief is nearly finished. . . ." (Remand transcript, 40.)

Following the hearing on remand, the trial judge entered the following findings:

> 1. The fee for the services of Ms. Greenway (*sic*) was paid by the Defendant's former wife, Alleen Brewer, and his brothers and sisters.
>
> 2. The Defendant is without any assets with which to pay the costs of the transcript.
>
> 3. The former wife and brothers and sisters of the Defendant are not legally obligated to pay the cost of the transcript.
>
> 4. The transcript of this hearing together with these findings are hereby referred to the Arkansas Court of Appeals for disposition.

Although the trial judge observed that appellant's ex-wife and siblings have no legal obligation to pay the cost of the appeal transcript, that conclusion does not control whether we should grant the pending motion by Nazario to withdraw without conditioning that the cost of the trial transcript be reimbursed to the State. Rule 16 of the Rules of Appellate Procedure—Criminal provides:

> Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court to withdraw *in the interest of justice or for other sufficient cause.* After the notice of appeal of a judgment of conviction has been filed, the Supreme Court shall have exclusive jurisdiction to relieve counsel and appoint new counsel. (Emphasis added.)

Appellant's family is certainly entitled to retain counsel to prepare a brief if they choose to pay for it. However, their freedom to do so does not mean that the interest of justice or other sufficient cause exists for permitting Nazario to withdraw and Greenaway, the retained lawyer, to pursue the appeal with a free transcript while all other criminal defendants whose appeals are advocated by retained counsel must pay for their transcripts. The interest of justice supports permitting Greenaway to be substituted as counsel on appeal and Theresa Nazario permitted to withdraw

only upon payment of the cost of the trial transcript, for the reasons stated in our previous per curiam. It is obvious that appellant accepted the services of appointed counsel at trial, transferred property from himself to his wife that could have been used to hire a lawyer after he was convicted, and knew that his wife and siblings were maneuvering to retain counsel based on the transcript that had been provided to him without cost because of his indigency.[2] If appellant desires to accept the services of retained counsel and desires that the Court of Appeals permit Greenaway to prosecute his appeal, his agents should accept the responsibility of paying the cost of the trial transcript the same as every other criminal defendant who is represented by retained counsel.

The Court of Appeals is under no obligation to permit Greenaway to represent appellant on the appeal at almost four times the cost of the trial record while the State goes unreimbursed for the transcript cost. Greenaway has no right to represent appellant as long as he is represented by Nazario and his constitutional right to counsel is fully satisfied by Nazario's representation. Nazario is obligated to continue the representation until relieved, and Greenaway cannot even file an *amicus* brief supporting the appeal without leave of the Court of Appeals [*See* Rule 4-6(a),

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[2] Appellant retained Mark McBeth when he was first charged below, and testified during the proceeding on remand from our previous per curiam that he paid McBeth "around $1,500." Remand Tr., p.19. McBeth was suspended from practicing law in Arkansas, according to the trial court's statement during the hearing on remand. Thereafter, appellant filed a petition to proceed in forma pauperis on June 2, 1997, and was determined by the trial judge to be indigent on the date that the petition was filed. Trial Tr., pp. 54-56. Apparently the trial court appointed Jack Shisler of the public defender's office and later Tim Morris (in private law practice) to assist Deputy Public Defender Theresa Nazario in rendering the defense at trial. Based on an Order of Compensation filed on December 31, 1997 that appears at page 134 of the trial transcript, the trial court ordered Morris paid an attorney's fee of $6,985 for his services assisting the defense. The record does not reflect that Morris was permitted to withdraw by the trial court or that he has sought to withdraw by motion to the Court of Appeals.

The notice of appeal was filed January 20, 1998 by Nazario, and recites that "[b]y copy of this Notice, the transcript has been ordered from Kathryn Pierson, the Court Reporter in this case, whose business address is Benton County Courthouse, Bentonville, Arkansas. Financial arrangements to pay for the transcript have been made with the Court Reporter pursuant to Ark. Code Ann. § 16-13-510(c)." Tr. 145.

Supreme Court Rules.] Unless the people who have already paid $10,000 to Greenaway for a brief that has not been filed and which cannot be filed without our decision to permit Nazario to withdraw and Greenaway to enter the appeal desire to lose the benefit of that investment, they will reimburse the State's cost for the two-volume trial transcript.

Therefore, I do not understand our unwillingness to grant the pending motion and permit Nazario to withdraw and Greenaway to be substituted as counsel for appellant subject to the condition that the State first be reimbursed for the cost of the trial transcript. Given Greenaway's statement during the February 3, 1999 hearing on remand that the brief was almost completed, the brief should be completed by now and ready for immediate filing. Given Alleen Brewer's testimony that Putman and Greenaway "may have mentioned" the need for obtaining the trial transcript to prepare the appeal, appellant's family already know that we can require that they reimburse the State for the transcript cost as a condition to Greenaway's substitution for Nazario.[3] And in view of our per curiam order in *Smith v. State*, *supra*, attorneys should know that we will grant such motions after the State has been reimbursed for the cost of the trial transcript.

In light of the plain language in Rule 16 that trial counsel are duty-bound to represent convicted defendants throughout the course of their defense unless the interests of justice or other sufficient cause warrant withdrawal, the clear evidence that appellant and his family have maneuvered to switch from appointed counsel

[3] It is clear from appellant's testimony on remand that his ex-wife and siblings are unwilling to reimburse the State's cost for the trial transcript unless compelled to do so. Appellant appears to believe that his family *should not* reimburse the transcript cost because "the State found me guilty, the State put me incarcerated. . . [S]o why should my family pay something that they just helping me to do now?" While appellant's displeasure with the State on account of his conviction is understandable, it does not justify allowing his court-appointed lawyer to withdraw and be substituted by retained counsel whose efforts have been procured by his agents. That displeasure also does not justify treating those agents any differently from any other non-parties to an appeal, nor does it justify suspending application of the Rules of Appellate Procedure—Criminal to their effort to replace appellant's appointed counsel.

to retained counsel after securing the trial transcript at State expense, the concerns expressed in our previous per curiam opinion in this case, and our action in *Smith v. State*, *supra*, I cannot fathom why the interest of justice is served by our decision to simply grant Nazario's motion to withdraw. I do not understand why we are willing to acquiesce in mocking "the notion of indigency and the reason for granting a free transcript to indigent appellants" in the face of plain proof that half of the $10,000 fee paid to Greenaway comes from an asset that appellant quitclaimed to his now ex-wife *before they divorced with full knowledge that she was trying to raise money to hire a new lawyer.* It is manifestly unjust for us to compel all other criminal defendants and their family members to pay for appeal transcripts along with sacrificing to hire their lawyers, yet refuse to even follow our own published per curiam in *Smith v. State* to require that the transcript cost be reimbursed as a condition to Nazario being permitted to withdraw so that Greenaway can pursue this appeal.

The result I advocate respects the trial court's findings that appellant is indigent and that he lacks funds with which to reimburse the State for the transcript cost. My position would not deprive appellant the effective representation guaranteed by the federal Constitution on account of his indigency. And my position would not prevent appellant's family from providing legal counsel that they (and he) apparently prefer, but which his family has no legal obligation to provide. It is beyond debate that while an indigent defendant has a right to an attorney on appeal, he does not have the right to an attorney of his choosing. *See Malone v. State*, 291 Ark. 315, 724 S.W.2d 180 (1987). We must simply be willing to vindicate the interest of justice in the face of a practice that reeks of disingenuity and mocks the reason for providing free transcripts to indigent defendants who appeal their convictions. The present decision signals our unwillingness to vindicate justice in the face of the plain and uncontroverted proof.

Seneca, the Stoic philosopher, once remarked that what used to be vices become fashions. As our previous per curiam in this case stated, the ruse employed in this case is a common practice.

This is but one of several appeals now pending with motions to permit the withdrawal of appointed counsel and the substitution of retained counsel after appellants have been provided free trial transcripts at State expense. More such motions are sure to follow. Regrettably, our court appears disposed to authorize a fashionable vice — but a vice nonetheless — despite the stubborn facts that we commanded the trial court to develop, and despite a clear supreme court rule obligating us to consider the interest of justice in deciding whether to permit counsel to withdraw. I refuse to go quietly into that night, nor will I pretend that it is just.[4]

I am authorized to state that ROBBINS, C.J., ROGERS and HART, JJ., join in this dissent.

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[4] Judge Stroud's majority opinion cites *Hill v. State*, 304 Ark. 348, 802 S.W.2d 144 (1991), regarding the standards applicable to determining whether a defendant is indigent. Our supreme court recognized in that case, as Judge Stroud has quoted, that bystanders have no obligation to the State. The supreme court added, "[a]n exception could be made, however, where the appellant has control or complete discretionary use of funds raised by others." *Id.* 304 Ark. 351. Here, appellant has complete discretion whether to accept Greenaway's services which were obtained from funds raised by others. If this situation does not fit the exception contemplated by the supreme court, I cannot think of many that are better.

I agree that the State should seek relief in these instances. However, the State appeared before the trial judge during the remanded hearing and argued for reimbursement. Moreover, when a defendant's motion to withdraw is involved, it is the duty of the courts and judges to decide and declare whether justice will be served by permitting withdrawal — and on what conditions — no matter how troublesome it may be to exercise that duty and however much the litigants and their advocates may want us to ignore it. Regarding the majority view that we need a specific rule to require reimbursement for transcripts where the indigent defendant obtains and seeks to substitute private counsel, the decision on this motion demonstrates we lack the resolve to enforce existing Rule 16. Another rule will not cure that affliction.

Jimmy WHITE *v.* GEORGIA-PACIFIC CORPORATION

CA 98-1066 989 S.W.2d 942

Court of Appeals of Arkansas
Division II
Opinion delivered May 19, 1999

Robert L. Depper, Jr., for appellant.

Mark Alan Peoples, PLC, for appellee.

JOHN F. STROUD, JR., Judge. Jimmy White, a forklift driver at Georgia-Pacific's Crossett plant, injured a foot and ankle when he slipped and fell on a step. The incident occurred when he stepped through a doorway to take a smoke break approximately two hours into his shift. After a hearing, the administrative law judge concluded that the injury did not occur in the course and scope of Mr. White's job duties for Georgia Pacific. The Commission adopted and affirmed the decision of the law judge. Mr. White now raises two points in appealing the Commission's decision. He contends 1) that "there does not exist substantial evidence to support the decision" that he did not prove by a preponderance of the evidence that his injury occurred in the course and scope of his employment, and 2) that the injury is compensable under the personal comfort doctrine. We affirm.

We note initially that when a workers' compensation claim is denied, the substantial evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for the denial of the relief sought. *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987). On appeal in workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and will affirm if those findings are supported by substantial evidence. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue on appeal 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.*

Under Arkansas Code Annotated section 11-9-102(5)(A)(i) (Supp. 1997), an accidental injury causing internal or external harm to the body, arising out of and in the course of employment and which requires medical services or results in disability or death, is a compensable injury. Act 796 of 1993 excluded from the definition of "compensable injury" an injury inflicted upon an employee at a time when employment services were not being performed. *See* Ark. Code Ann. § 11-9-102(5)(B)(iii) (Supp. 1997). The term "employment services" is not defined by the Act.

In *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997), our supreme court affirmed the compensability of an injury suffered in an automobile accident by a nurse en route to provide nursing services in a patient's home. The *Olsten* decision included the Commission's construction of the term "employment services":

> [C]onsidering the ordinary and usually accepted meaning of this term in common language, we find that an employee is performing employment services when she is engaging in an activity which carries out the employer's purpose or advances the employer's interests. Obviously, an employee carries out the employer's purpose or advances the employer's interests when she engages in the primary activity which she was hired to perform. However an employee also carries out the employer's purpose or advances the employer's interests when she engages in incidental activities which are inherently necessary for the performance of the primary activity.

328 Ark. at 384, 944 S.W.2d at 526 (1997). We followed the reasoning of the *Olsten* court in *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), where we held that an employee is performing employment services when he is engaged in the primary activity that he was hired to perform or in incidental activities that are inherently necessary for the performance of the primary activity. We rejected the argument made in *Harding* that an employee's break advanced her employer's interest by allowing her to relax, which in turn helped her to work more

efficiently during the rest of her work shift. In that case, the claimant worked on the third floor of her office building but was not allowed to smoke there; on her way to the designated smoking area, she exited the elevator on the first floor, tripped over a rolled-up carpet, and was injured. The Commission found that her claim was not compensable because she was not performing employment services when she was injured. We addressed her arguments regarding compensability, arguments similar to those of appellant in the present case, as follows:

> Appellant argues, on public policy grounds, that her break advanced her employer's interest by allowing her to relax, which in turn helped her to work more efficiently throughout the rest of her work shift. We are not unsympathetic to this argument. Under former law, the definition of compensable injury did not include a strict requirement that the injury occur while the worker was performing employment services, and a claimant's activities at the moment of injury were relevant only to the separate and broader question of whether the injury arose out of and in the course of the employment. It is clear that, under former law, appellant's injury while en route to the break area would have been in the course of her employment pursuant to the personal-comfort doctrine. It may be true that the interests of both workers and employers would be better served by a more uniform application of an administrative remedy than they would be by the uncertainty inherent in a tort claim based on premises liability. Nevertheless, the legislature, rather than the courts, is empowered to declare public policy, and whether a law is good or bad, wise or unwise, is a question for the legislature, rather than the courts. In the present case, Act 796 of 1993 applies and, although appellant's break may have indirectly advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do. Consequently, we hold that the Commission did not err in finding that appellant was not performing employment services when she was injured.

62 Ark. App. at 138-39, 970 S.W.2d at 303-04 (citations omitted).

We again addressed the issue of whether a break advances an employer's interest in *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). In that case, the university provided

the employee two unpaid thirty-minute breaks and two paid fifteen-minute breaks. The employee, a food-service worker in the cafeteria, was injured when she slipped in a puddle of salad dressing as she was getting herself a snack in the cafeteria during a paid fifteen-minute break. There was testimony that the university provided free meals for cafeteria workers as inducement for them to remain on the premises, that the fifteen-minute breaks were occasionally interrupted by students asking workers for assistance, and that a worker who was approached by a student was required to leave her break and address the student's needs. The Commission found it compelling that appellant was reaching for an apple for personal consumption when she slipped and fell and was not assisting student diners or "otherwise benefitting the employer." We reversed the Commission's denial of the claim, ruling as follows:

> We hold that appellant was performing employment services at the time she was injured based on the fact that appellant was paid for her fifteen-minute breaks and was required to assist student diners if the need arose. Appellant's employer gleaned benefit from appellant being present and required to aid students on her break.
>
> We find *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), distinguishable. . . .
>
> Unlike the employer in *Harding*, the University of Arkansas required Ray to be available to work during her break and paid her for the time she was on break, presumably because she was required to help students. The University of Arkansas was clearly benefitted by Ray's being in the cafeteria and available for students during her paid break. The benefit was not tangential as in *Harding*, but was directly related to the job that Ray performed and for which she was paid. In distinguishing *Harding*, we specifically note that, unlike the break in *Harding*, the appellee employer in this case furnished food for its resting employees and paid for the break to induce them to be available to serve students even during the break period.

66 Ark. App. at 180-81, 990 S.W.2d at 560-61 (1999).

In the present case, appellant testified at the hearing that it was his job as a forklift operator to load veneer dryers with lum-

ber. Regarding his breaks, he stated that his workday was supposed to include two ten-minute breaks and a lunch break, but that he didn't get the official short breaks because there was no one to relieve him; that he therefore didn't have time to smoke in the designated areas, and he usually stayed in the job area to watch his job and be alert for the supervisor's call; that on the date of the accident he stepped about two feet away from his forklift to an outside door in front of No. 5 dryer, planning to smoke and watch his job; and that he had taken smoke breaks there in the past and his supervisor was aware of it. He testified that he fell when he stepped out the doorway and slipped on algae on the concrete, and that he heard his ankle snap. He wore a cast and didn't go back to work until almost nine weeks later. Although he couldn't put pressure on his leg when he first returned to work, he was working "full speed" by the time of the hearing.

Appellant argues that it appears from the employer's provision of three breaks a day that the employer believed that breaks were important for the business. He supports this argument with his unrebutted testimony that employees receive three breaks, the first for a smoke break, the second for lunch, and the third for a smoke break; that he sometimes did not get his breaks because no one was available to relieve him; that he commonly would stay in his job area to see if his dryers needed attention and to be alert for his supervisor, who might call him. He further testified that on the night he was injured his supervisor had told him to take the break when he could; that his supervisor previously had seen him in the area where he was injured and had never complained; and that when he sustained his injury, he was not more than approximately two or three feet from the forklift and twelve to fifteen feet from a dryer. He contends that at the time he was exercising a break, he was engaged in the services of his employment.

In *Harding*, we found that employment services were not being performed because the claimant was on a floor of the building other than that where she worked, headed for the only area where she was allowed to smoke. In *Ray*, we held that the benefit to the employer was not tangential as in *Harding*, but was directly related to the job that the employee performed and for which she was paid. We think that this case is governed by the

Harding case, and that there was substantial evidence to support the finding of the Commission that appellant was not performing employment services at the time of his injury, which occurred as he was exiting his work area to take a smoking break. Although appellant's break may have indirectly advanced his employer's interest, and although under former law and the personal-comfort doctrine the injury sustained en route to a break would have been in the course of employment, under Act 796 of 1993 this claim is barred by the finding that appellant was not performing employment services at the time of injury. *See Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998).

Affirmed.

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

Gary FRIGON *v.* Sue FRIGON

CA 98-1241 989 S.W.2d 931

Court of Appeals of Arkansas
Division III
Opinion delivered May 19, 1999

Ramsay, Bridgforth, Harrelson & Starling, by: *Rosalind M. Mouser*, for appellant.

Baim, Gunti, Mouser, DeSimone & Robinson, by: *Kenneth B. Baim*, for appellee.

OLLY NEAL, Judge. Gary Frigon appeals from an order of the Jefferson County Chancery Court finding that two withdrawals made by Frigon from his pension plan should be included as income for setting his child-support obligation. We cannot say that the chancellor abused his discretion in making his findings of fact and, therefore, affirm.

On June 14, 1991, the trial court entered a divorce decree pursuant to a complaint for divorce filed by Frigon on May 29, 1991. Frigon and appellee, Sue Frigon, had been married 13 years at the time the divorce decree was entered and were both practicing physicians in the Pine Bluff, Arkansas area. Frigon later relocated to Bentonville, Arkansas where he established a new medical practice. In a partial property-settlement agreement, appellee was awarded custody of the parties' minor child and, in turn, Frigon agreed to pay appellee $1,750 per month for child support. The trial court, however, reserved jurisdiction to enforce matters of custody and support upon the petition of either party.

On October 24, 1994, the trial court entered an order in regard to a motion for modification of support and visitation filed by Frigon. Upon agreement of the parties, the trial court ordered Frigon to pay child support in the following manner:

> (a) Beginning October 1, 1994, the amount of monthly child support to be paid by Gary Frigon for the benefit of [the parties' child] is reduced to $1,000.00 per month. This amount of child support shall continue until March 30, 1996.
>
> (b) On or before April 1, 1996, Gary Frigon shall calculate the amount of his child support for the next twelve-month period based on the following formula: [Frigon's] child support shall be equal to 13 percent of his gross adjusted income as reflected on his federal income tax return, less deductions for federal, state, self-employment taxes. Additionally, if [Frigon's] federal income tax return includes *a deduction for a payment made to [Frigon's] pension account, the amount of that pension payment shall be added to his net income for purposes of determining child support.* (Emphasis added.)
>
> (d) If [Frigon's] actual earnings for 1995 reflect that [Frigon's] monthly child support obligations for the period between October 1, 1994, and March 30, 1995, should have been either more than or less than $1,000 per month, [Frigon] shall adjust his child support payment for the next twelve-month period to include or deduct the amount of underpayment or overpayment made in that preceding eighteen-month period.
>
> (e) The base amount, with appropriate adjustments, shall be paid until April 1997, at which time the amount of child support will be recalculated based on [Frigon's] 1996 earnings. The parties will continue to use the methodology provided herein to determine the amount of child support that [Frigon] shall pay on a yearly basis.
>
> (f) [Frigon] shall begin paying the adjusted amount of child support on April 1 of each year. Further, on April 1 of each year, the parties shall enter into an interim order setting forth the amount of child support for the following year. At the time the interim order is entered, [Frigon] will also provide [appellee] with a copy of his federal income tax returns, along with his schedule C. [Frigon] will be allowed to deduct from his federal income tax returns all information relating to any earnings of his

> present wife, Sandi Frigon. After entry of the interim order, which shall not be prejudicial to either party, [appellee] will have thirty days to file a petition challenging the increase or decrease in child support. If [appellee] does not petition the court during this period of time, the child support set forth in the interim order shall become the amount to be paid by [Frigon] until the following year.

On February 7, 1997, the trial court entered an interim order to adjust Frigon's child-support obligation based on Frigon's 1995 tax return and the formula set out in its 1994 order. The trial court stated that Frigon's 1995 tax return reflected that his net income was $51,800, or $4,316.67 monthly. Thereafter, the trial court applied 13% to Frigon's monthly income and established that his child-support obligation was $561.17 per month. On March 3, 1997, appellee filed a petition to object to the calculations set forth in the February 7 order. She alleged that the calculations used to determine the appropriate child support from October 1994 to April 1996 were incorrect and that the same calculations should not be used to determine child support from April 1996 to April 1997. Appellee affirmatively pled that Frigon's 1995 income information was incomplete and that she had not received information on Frigon's 1996 income. Frigon denied that the 1995 information was incomplete, but admitted that the 1996 information had not been forwarded to appellee.

In an amended petition filed on November 5, 1997, appellee prayed for the trial court to determine any arrearage of child support in 1995, 1996, and 1997, and to determine the methodology used to calculate the child-support payments.

On March 25, 1998, appellee filed a letter brief to the trial court asserting that Frigon's pension withdrawal of $71,000 in 1995, and a withdrawal of $42,500 in 1996, should be included in calculating Frigon's 1995 and 1996 income for child-support purposes. Appellee contended that, as a result, Frigon incurred an arrearage of $7,298 in child support as of October 1997. In his letter brief, Frigon asserted that his pension contributions should be treated as income in the year they were made, but not in the year they were withdrawn. The trial court, however, found that the parties agreed that Frigon's child support would be equal to

13% of his gross adjusted income as reflected on his federal income tax return, less federal, state, and self-employment taxes. The trial court also found that the agreement of the parties mirrored the child-support guidelines established by the per curiam opinion of Arkansas Supreme Court on October 25, 1993, and that if Frigon's federal income tax return included a deduction for a payment made to his pension account, the amount of that pension payment would be added to his net income for purposes of child support. We note that the $42,500 and $71,000 withdrawals from Frigon's pension plan were not from any deductions on which child support had been calculated. Thus, the trial court found that the two pension withdrawals from Frigon's pension plan should be considered as income for setting Frigon's child-support obligation. The trial court concluded that the parties intended that Frigon's future contributions to his pension plan be included as income to Frigon for setting his child support. Nearly one month later, the trial court determined that Frigon's total child-support arrearage was $12,023 as of March 31, 1998.

Frigon argues that the child-support provision in the 1994 order addresses only contributions to his pension plan, which he agrees should be added back to his adjusted gross income. He contends that the order, however, is silent as to the treatment of withdrawals from his pension plan and that he has overpaid $12,287.24 in the years of 1995 and 1996, as reflected in the February 1997 order. Frigon further contends that the chancellor's findings have the effect of allowing an inequitable modification to the property-settlement agreement between the parties because a portion of the contributions made to his pension plan was partly monies he received from the property settlement.

The amount of child support lies within the sound discretion of the chancellor, and the chancellor's findings will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997).

In this case, there is no case law that directly addresses whether income for purposes of child support should include a withdrawal from the pension plan of the noncustodial parent.

However, Arkansas has established child-support guidelines to determine the sum that a noncustodial party must pay to meet his or her child-support obligations. *See In re Guidelines for Child Support*, 314 Ark. 644, 863 S.W.2d 291 (1993). In 1993, Arkansas established that income for the purposes of child-support calculations was identical to the definition of income stated in the Federal Internal Revenue Code, which states that "except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: . . . (11) Pensions; . . . ." 26 U.S.C. § 61(a) (1994).

Here, the 1994 order is not controlling because it is silent as to pension funds acquired by Frigon before the order was filed. However, we must point out that the terms of the 1994 order do not conflict with the 1993 child-support guidelines established by the Arkansas Supreme Court, in that monies available to Frigon in 1995 and 1996 should have been accessible to the parties' child for support purposes. Both the 1993 guidelines and the 1994 order provide that Frigon's federal income tax return would be the basis for determining income for his child-support obligation. Although Frigon argues that the trial court, in effect, modified the parties' property-settlement agreement by including his pension withdrawals as income for child-support purposes, we have stated that the chancellor always retains jurisdiction and authority over child support as a matter of public policy, and that, no matter what an independent contract states, either party has the right to request modification of a child-support award. *Warren v. Kordsmeier*, 56 Ark. App. 52, 938 S.W.2d 237 (1997); *Terry v. Terry*, 28 Ark. App. 169, 771 S.W.2d 321 (1989).

Therefore, we conclude that the trial court did not abuse its discretion in finding that the withdrawals from Frigon's pension plan are included as income for determining child support.

Affirmed.

BIRD and STROUD, JJ., agree.

Tulsi K. BHARODIA *et al. v.*
Norman and Linda PLEDGER

CA 98-138 990 S.W.2d 581

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered May 26, 1999

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Susan Gordon Gunter*, for appellants.

Morgan Welch & Associates, by: *Morgan E. Welch* and *Donald K. Campbell*, for appellees.

JOHN MAUZY PITTMAN, Judge. The appellants in this specific-performance case, Tulsi Bharodia and Amratben Patel, executed a contract whereby they agreed to purchase appellees' house for $425,000. Various conflicts arose, and appellants attempted to withdraw from the agreement. Appellees sued for specific performance and, after a hearing, the chancellor ordered appellants to specifically perform the contract. From that decision, comes this appeal.

For reversal, appellants contend that the chancellor erred in denying their summary-judgment motion based on election of remedies; in granting specific performance where appellees had already elected a different remedy by refusing to return the earnest money; in retaining jurisdiction where appellees had an adequate remedy at law; in failing to give effect to the contractual provision requiring appellees to provide a disclosure statement; in granting specific performance where appellees were in violation of the terms of the contract; and in awarding attorneys' fees in the exact amount of the earnest money. We find no error, and we affirm.

The transaction out of which this appeal arises began on August 3, 1994, when appellants offered to purchase appellees' house for $425,000. Appellants extended their offer to appellees by filling in the pertinent blank spaces in a four-page form contract provided to them by their real estate agent. When appellants made their offer, they deposited $5,000 in earnest money with appellees' real estate company. The next day appellees accepted the offer.

The parties' contract contains a provision that requires the seller to make a timely disclosure to the buyer of the condition of the house. In pertinent part, this provision states:

> Seller will provide to Buyer a disclosure about the condition of the Property which will contain information that it is true and correct to the best of the Seller's knowledge. The disclosure will be presented to Buyer within three (3) business days of acceptance of this offer. Buyer has three (3) business days after receipt of disclosure to accept or reject said disclosure. If Seller fails to provide the disclosure in a timely manner, or if Buyer finds the disclosure unacceptable within three (3) business days after receipt, this contract may be declared null and void by the Buyer, with Buyer to receive a refund of the earnest money.

It is undisputed that appellees failed to comply with this provision of the contract when they failed to make the requisite disclosure to appellants by August 9, 1994, which was three business days after the date upon which the offer was accepted.

On August 15, 1994, appellants delivered to appellees' real estate agent a writing entitled "Addendum To Offer and Acceptance." In the addendum, appellant Bharodia stated that appellants wished to be released from the contract because the house had many structural defects and needed a great many repairs. Appellants attached to the addendum a report prepared by an inspector that they had hired to examine the house. Significantly, no mention of appellees' failure to provide a disclosure statement was made in this addendum; instead, the issue was not raised until September 9, 1994, when appellants' counsel sent appellees' real estate company a letter requesting that appellees return to appellants their $5,000 in earnest money.

Appellees' real estate company interpled appellants' $5,000 in earnest money into the registry of the chancery court. In April 1995, appellees filed in chancery court a complaint requesting specific performance of the contract. In May 1995, appellants filed an answer to appellees' complaint. In their answer, appellants pled as a defense to specific performance that appellees had failed to comply with the provision of the contract requiring them to make a written disclosure of the condition of the house within three

business days of appellees' acceptance of the offer to purchase the house.

Trial was held in April 1997. After hearing the testimony of the parties, the real estate agents involved in the transaction, and other witnesses, the chancellor took the case under advisement. On July 14, 1997, the court handed down an order granting appellees' request for specific performance. In its order, the court found that appellees had breached the contract provision requiring them to make a written disclosure of the condition of the house within three business days of their acceptance of appellants' offer. However, the court found that appellants waived their right to declare the contract void. The court set forth this finding in its order as follows:

> [Appellants] in terminating the contract on August 15, 1994, did not list as one of their reasons the failure to receive the sellers' disclosure statement . . . . The Court finds that [appellees] have the burden of proof to show that the [appellants] received the sellers' disclosure statement. There is no signed receipt by [appellants] of receiving the disclosure statement and no corroborating evidence that [they] actually received the document. Since the burden of proof is on [appellees] to prove that [appellants] received the document, the Court finds that [appellees] failed in their burden of proof. Therefore, the Court finds that [appellants] did not receive the sellers' disclosure statement.
>
> [Appellants] terminated the contract with [appellees] by stating that there were alleged structural defects in the home. [Appellants] did not give as one of the reasons for termination the failure to receive the disclosure statement. Even though [appellants] had a right to terminate the contract for not receiving the disclosure statement, the Court finds [appellants] waived their right to terminate the contract using that as a reason . . . .

The court also entered an order awarding appellees' counsel an attorney's fee of $5,000.

■ ■ The standards we apply when we review a chancery court's decision are well established. Although we try chancery cases *de novo* on the record, we do not reverse unless we determine

that the trial court's findings of fact are clearly erroneous. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). In reviewing a chancery court's findings of fact, 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. *Id.* A chancery court's finding of fact is clearly erroneous when, although there is evidence to support the court's decision, after looking at all the evidence we are left with a definite and firm conviction that a mistake has been committed. *Bishop v. Bishop*, 60 Ark. App. 164, 961 S.W.2d 770 (1998); *Lowell v. Lowell*, 55 Ark. App. 211, 934 S.W.2d 540 (1996). Furthermore, we do not reverse a trial court's determination that a party breached a contract unless we conclude that the trial court's determination was clearly erroneous. *See Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997); *Jocon, Inc. v. Hoover*, 61 Ark. App. 10, 964 S.W.2d 213 (1998).

■ Appellants first contend that the chancellor erred in denying their summary-judgment motion based on election of remedies. We are unable to address this issue, however, because in the absence of special circumstances not applicable here, the denial of a motion for summary judgment is not subject to review on appeal. *Daniels v. Colonial Ins. Co.*, 314 Ark. 49, 857 S.W.2d 162 (1993).

■ ■ Appellants next contend that the chancellor erred in granting specific performance where appellees had already elected a different remedy by refusing to return the earnest money. Appellants argue that appellees elected the remedy of keeping the $5,000 in earnest money, and that appellees are therefore barred by the election-of-remedies doctrine from seeking a different remedy, i.e., specific performance of the contract. Election of remedies is an affirmative defense that must be specifically raised by defendants in their answer, and failure to do so results in a waiver of the right to assert the defense at trial. *Strout Realty, Inc. v. Burghoff*, 19 Ark. App. 176, 718 S.W.2d 469 (1986). Here it is clear that appellants did not raise the election-of-remedies defense in their answer, and that the issue was not considered until well into the litigation when the question was broached by the chan-

cellor. Given appellants' failure to raise this issue in the original responsive pleading, we find no error on this point.

Next, appellants argue that the chancellor erred in retaining jurisdiction where appellees, as vendors of the property, had an adequate remedy at law. We do not agree. Our supreme court has long held that, where an estate or interest in land is the subject matter of the agreement, the jurisdiction of a court of equity to enforce specific performance is undisputed and does not depend upon the inadequacy of the legal remedy in the particular case. *See, e.g., Dickinson v. McKenzie*, 197 Ark. 746, 126 S.W.2d 95 (1939).

Appellants next contend that the chancellor erred in failing to give effect to the contractual provision permitting appellants to declare the contract null and void if appellees failed to provide a disclosure statement in a timely manner. The chancery court recognized that the contract contained such a provision, but found that appellants had waived their right to declare the contract void because appellants failed to make any mention of appellees' failure to comply with the disclosure provision in their August 15, 1994, written addendum to the contract in which they asked to be released from their duty to buy the house. Instead, appellants merely stated in the addendum that they wanted to be released from the contract because of the many structural problems that were discovered after they had the house inspected on August 7, 1994. We think that the chancellor's finding of waiver is supported by the facts and the law. Arkansas courts have held that a party may waive a breach of contract by the other side, yet still be liable for his own subsequent breach of the contract. *Southern Pipe Coating, Inc. v. Spear & Wood Mfg. Co.*, 235 Ark. 1021, 363 S.W.2d 912 (1963). It has also been held that a party with knowledge of a breach of contract by the other party waives the right to insist on a forfeiture when he allows the other party to continue in performance of the contract. *Grayson-McLeod Lumber Co. v. Slack-Kress Tie & Stave Co.*, 102 Ark. 79, 143 S.W. 581 (1912); *Stephens v. West Pontiac-GMC, Inc.*, 7 Ark. App. 275, 647 S.W.2d 492 (1983). Finally, it has been said that:

> Where a party advances a particular reason for his conduct or decision arising under a contract, he cannot afterward advance another reason to the detriment of the opposing party. Where a party refuses to perform the contract on the ground of a specific breach by the other party he waives all other breaches then known to him.

17A C.J.S. *Contracts* § 492(1) (1963). Here, appellants knew three days after signing the agreement that appellees had failed to timely provide the disclosure statement, but based their attempted repudiation of the contract on other grounds. Furthermore, by failing to specify the lack of a disclosure statement as grounds for refusal to perform the contract, and by instead grounding their refusal on the alleged structural defects disclosed by their inspection, appellants encouraged further action by appellees. Appellees had a contractual right to repair any defects revealed by appellants' inspection of the premises. In furtherance of this right, appellees incurred expenses by hiring an engineer to perform an additional inspection of the house to determine its structural integrity and to recommend repairs that would be reasonably necessary to assure the continued structural performance of the house. Appellees' engineer prepared his report on August 24, 1994, and appellees at all times expressed their willingness to repair the defects in the home. It was not until approximately two weeks after appellees incurred this expense that appellants raised, for the first time, the failure to provide a disclosure statement as grounds for their refusal to perform the contract.

■ ■ It has been held that a party to a contract who intends to insist on a forfeiture must do so at once, and that the forfeiture will be waived if the other party is permitted to proceed with performance. *Arkansas Municipal Bond Bureau, Inc. v. Fouke Special School District No. 15*, 203 Ark. 677, 158 S.W.2d 28 (1942). Moreover, a party to a contract containing a time limit for performance will not be permitted to deny liability because the contract was not performed within the specified time if, after the expiration of that time limit, he induces the other party to continue in performance of the contract. *Id.* Although it is true, in the present case, that appellants refused to perform the contract,

they based that refusal on the existence of structural defects that appellees had a contractual right to cure. We think that appellants, by basing their refusal to perform on such defects, induced appellees to continue performance of the contract by engaging an engineer to recommend necessary repairs. In most cases, the issue of whether or not a waiver occurred is a question of fact, *Bright v. Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992), and under these circumstances, we cannot say that the chancellor's finding of waiver was clearly erroneous.

Next, appellants contend that the chancellor erred in granting specific performance where appellees were in violation of the terms of the contract. This point for reversal, in essence, asks us to review the case *de novo* and reverse on the grounds that the chancellor's order of specific performance was inequitable. However, because appellants' arguments under this point hinge on their assertions that they did not waive appellees' failure to provide a disclosure statement and that appellees were not entitled to specific performance because they had an adequate remedy at law, we need not address this point further because we have already decided those issues adversely to appellants.

Finally, appellants contend that the chancellor erred in awarding attorneys' fees. With regard to the chancery court's award of a $5,000 fee to appellees' counsel, we note that pursuant to statute a trial court may award attorney's fees to the prevailing party in an action involving breach of contract. Ark Code Ann. § 16-22-308 (Repl. 1994). Furthermore, the decision whether to award fees and how much to award is a discretionary determination that will be reversed only if the appellant can demonstrate an abuse of discretion. *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998). Here, appellees requested attorneys' fees in excess of $35,000, and we cannot say that the chancellor's award of $5,000 in attorneys' fees was an abuse of discretion.

Affirmed.

BIRD and MEADS, JJ., agree.

ROBBINS, C.J., and HART and NEAL, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. I respectfully dissent from the prevailing opinion's affirmance of the chancery court's determination that appellants waived their right to declare the contract at issue void because they did not specifically list in their August 15, 1994, written addendum to the contract appellees' failure to comply with the seller's disclosure provision as a breach of contract committed by the appellees. I conclude that the chancery court clearly erred in finding that appellants waived their right to declare the contract void based on appellees' breach of the disclosure provision. Because I so conclude, I also dissent from the prevailing opinion's affirmance of the chancery court's award of a $5,000 attorney's fee to appellees' counsel.

The chancery court erred in applying the legal principle of waiver to appellants' August 15, 1994, addendum to the contract. "Waiver" has a particular meaning in the law of contracts. Professor Farnsworth defines waiver as a term of art in the law of contracts as follows:

> The meaning of *waiver* has provoked much discussion. Although it has often been said that a waiver is "the intentional relinquishment of a known right," this is a misleading definition. What is involved is not the relinquishment of a right and the termination of the reciprocal duty but the excuse of the nonoccurrence of or a delay in the occurrence of a condition of a duty.

II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.5 at 425 (2d ed. 1998) (footnotes omitted). As a matter of Arkansas case law, the non-breaching party to a contract waives the other party's breach in two ways: by specifically excusing the breach or by permitting the breaching party to continue to perform, thereby becoming estopped from subsequently refusing to perform his contractual obligation on the basis of the other party's breach. *See, e g., Arkansas Mun. Bond Bureau, Inc. v. Fouke Special Sch. Dist. No. 15,* 203 Ark. 677, 158 S.W.2d 28 (1942) (estoppel); *Wolff v. Alexander Film Co.*, 186 Ark. 848, 56 S.W.2d 424 (1933) (estoppel); *Keopple v. Delight Lumber Co.,* 105 Ark. 233, 151 S.W. 259 (1912) (explicit excuse of breach); *Stephens v. West Pontiac-GMC, Inc.,* 7 Ark. App. 275, 647 S.W.2d 492 (1983) (estoppel). As noted in

the prevailing opinion, on September 9, 1994, appellants stated in a letter to the appellees' real estate agent that they wished to terminate the contract because of appellees' breach of the disclosure provision. From August 15, 1994, when appellants first stated their intention to declare the contract void, until the end of September 9, 1994, when appellants specifically stated that they wanted to terminate the contract because of appellees' failure to comply with its disclosure provision, appellants never excused the appellees' breach of the contract nor accepted efforts by appellees to repair the house; therefore, appellants did not waive appellees' failure to comply with their contractual duty to disclose defects in the house.

The prevailing opinion affirms the chancery court's analysis of the waiver issue based on the following statement cited in 17A C.J.S. *Contracts* § 492(1) at 697 (1963): "Where a party refuses to perform the contract on the ground of a specific breach by the other party he waives all other breaches then known to him." This statement in C.J.S. is supported by a footnote citation to *Warner Co. v. MacMullen*, 112 A.2d 74 (Pa. 1955). However, the Pennsylvania Supreme Court's reasoning in *Warner Co.* belies the expansive interpretation given the decision by the author of C.J.S.

Like the instant case, *Warner Co.* involved an appeal of an order granting a plaintiff specific performance of a contract for the sale of real property. The court's reasoning in *Warner Co.* is based on estoppel — a theory that is inapposite to the instant case, given that appellants never indicated they were willing to accept efforts by appellees to repair the house. With regard to waiver of a breach of contract by estoppel, in *Warner Co.* the Pennsylvania Supreme Court stated:

> It is a firmly established principle, founded on the doctrine of equitable estoppel, that a refusal to perform the obligations of a contract on the ground of a specific breach assigned as the reason for such refusal, constitutes a waiver of all other breaches then known to him; where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, *after litigation has begun*, change his mind, to the detriment and

> disadvantage of the other party, and seek to justify his action by advancing some other reason.

Warner Co., 112 A.2d at 77-78 (internal footnote omitted) (emphasis added). If the facts of this case were before it, the *Warner Co.* court would not conclude that appellants were estopped, by waiver, from declaring the contract at issue void. It would not do so because appellants did not wait until after appellees sued them for specific performance to put forth appellees' failure to comply with the seller's disclosure provision of the contract as a basis for their refusal to purchase the appellees' house. As noted above, appellants first noted this failure in a letter their counsel sent to appellees' real estate company on September 9, 1994. Appellees did not file suit against appellants, seeking specific performance, until seven months later, in April 1995. I dissent from the prevailing opinion's affirmance of the chancery court's determination of the "waiver" issue because it rests, via C.J.S., on an overly broad interpretation of *Warner Co.*, *supra.*

Moreover, I am unpersuaded by the prevailing opinion's citation of *Arkansas Mun. Bond Bureau, Inc. v. Fouke Special Sch. Dist. No. 15,* 203 Ark. 677, 158 S.W.2d 28 (1942). This case is merely an example of the estoppel sort of waiver of a breach of contract. It holds that the non-breaching party to a contract waives the other party's breach by permitting that party to continue to perform, thereby becoming estopped from subsequently refusing to perform his contractual obligations on the basis of the other party's breach.

The prevailing opinion finds a factual basis for its estoppel analysis by noting that the appellees incurred expenses by hiring an engineer to inspect their house to determine whether it was structurally sound. It also notes that the engineer prepared a report of his inspection of appellees' house before appellants specifically stated that they wanted to terminate the contract because of appellees' failure to comply with the contract's disclosure provision. The prevailing opinion's effort to find a factual basis for its estoppel theory is unavailing.

As the prevailing opinion itself notes, the appellees had a right, pursuant to the contract, to repair defects in their house, but only if the repair would not cost more than $2,000. It was the appellees' intention to pursue this contractual right that led them to hire an engineer to inspect their house. The appellants never took the position that they would buy the house if appellees would have it inspected by an engineer and have any defects in the house repaired. Appellants did not permit or induce appellees to hire the engineer. In effect, the prevailing opinion asserts that appellants are estopped by their initial silence concerning appellees' failure to comply with the seller's disclosure provision as a breach of the contract. However, estoppel arises out of silence if the action taken by the party asserting estoppel was the natural result of the silence. *See Anadarko Petroleum Co. v. Venable*, 312 Ark. 330, 850 S.W.2d 302 (1993). The appellees' decision to hire an engineer to inspect their house arose out of their pursuit of their contractual right to have their house repaired, not out of any silence by appellants.

With regard to the chancery court's award of a $5,000 fee to appellees' counsel, I note that pursuant to statute a trial court may award attorney's fees to the prevailing party in an action involving breach of contract. Ark. Code Ann. § 16-22-308 (Repl. 1994). However, because I would reverse the chancery court's order directing specific performance of the contract at issue, the appellees would no longer be the prevailing parties. When a judgment is reversed on appeal, any attorney's fee award made by the trial court to the appellee's trial counsel is also reversed. *American Health Care Providers, Inc. v. O'Brien*, 318 Ark. 438, 886 S.W.2d 588 (1994); *Brookside Village Mobile Homes v. Meyers*, 301 Ark. 139, 782 S.W.2d 365 (1990); *Mecco Seed Co.* v. *London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994).

For the reasons set forth above, I respectfully dissent from the prevailing opinion in this case. I conclude that the chancery court's order directing appellants to close the purchase of appellees' house should be reversed and this case remanded.

ROBBINS, C.J., and NEAL, J., join in this dissent.

Robert McDANIEL *v.* Steve LINDER

CA 98-1122 990 S.W.2d 593

Court of Appeals of Arkansas
Division I
Opinion delivered May 26, 1999

[redacted]

Charlie L. Rudd, for appellant.

Steve Westerfield, for appellee.

JOHN MAUZY PITTMAN, Judge. The parties in this tort case rented adjacent boat stalls on Lake Hamilton in Garland County, Arkansas. In July 1995, appellant attached a battery charger to the battery of his boat and left the charger connected, unattended, while he went out of town for three or four days. Appellant's battery exploded and spewed battery acid onto appellee's pontoon boat. Appellee filed suit alleging that his pontoon boat was damaged by appellant's negligence. After a bench trial, the trial court found that appellee sustained damages to his pontoon boat in the amount of $2,907.60; that appellant had been negligent; and that appellant's negligence was the proximate cause of the damages to appellee's pontoon boat. From that decision, comes this appeal.

For reversal, appellant contends that the evidence is insufficient to support the trial court's finding of negligence because the

explosion was not foreseeable, and that the evidence is not sufficient to support the award of damages. We find some merit in appellant's second contention and, consequently, we affirm upon agreement of remittitur.

We first address appellant's contention that his actions were not negligent because the explosion was not foreseeable. Citing Prosser's treatise on the law of torts, the Arkansas Supreme Court has noted in *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983), that the question of foreseeability may be one of fact, depending on the case.

> [I]f reasonable persons could not differ about the determination [of foreseeability] on the evidence before the court, it is decided by the trial judge, or by the appellate court. If, on the other hand, reasonable persons could differ, then the trial judge must explain the applicable legal concept to the jury, and leave to the jury the responsibility of making the evaluative determination — the application of that concept to the facts, as they find them to be.

W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 45, at 320 (5th ed. 1984).

In the present case, appellant testified that he removed his battery from its normal, shielded location behind a curtain under the seat of his boat, and placed the battery, uncovered, in the center of his boat. Appellant stated that he then attached a ten-amp tapering battery charger to his battery and left for Kansas City. When he returned from Kansas City three or four days later, he went to the boat dock and found that his battery had exploded. Appellant testified that he had previously charged the battery in the same manner approximately twenty-five times without mishap.

Carl Wells, a battery specialist, testified that even nondefective batteries connected to nondefective chargers can explode if a spark ignites the gasses emitted by the battery. Mr. Wells stated that a spark could result from any slight movement of the contacts, such as might be caused by wind, waves, or a bird landing on them, or from a short circuit inside the battery itself. He further testified that, after twelve to fourteen hours, the battery would

begin to deteriorate internally and could short-circuit from the heat created by the continuous charging. Mr. Wells stated that batteries must be handled very carefully and covered during charging for protection, and that he would not leave a battery charger connected for four days because the danger of an explosion was too great.

Kenneth Kirkley testified that he was in the marine business and that he was familiar with boats and batteries. He stated that he charges batteries in the course of his business and that, before doing so, he removes the battery from the boat and isolates it from materials that could be damaged by battery acid. Mr. Kirkley also testified that he recommends to his customers that they likewise remove their batteries from their boats before charging them.

On this record, we cannot say that the trial judge erred in finding that the danger of explosion was foreseeable.

We next address appellant's contention that the evidence does not support the award of damages.[1] It appears from the record that appellee obtained an estimate showing that the cost of repairs to his pontoon boat would be $2,574.60. Appellee testified that he also had the boat cleaned and repaired a table, damaged in the explosion but not listed as an item to be repaired in the estimate, for a total cost of $333.00. The trial judge awarded damages totaling $2,907.60, the sum of these amounts. Appellant contends that the trial judge erred in awarding damages based on the estimated cost of repair because this was not the best evidence of damages in this case. We agree.

The measure of damages for damage to a vehicle is the difference in the fair market value of the vehicle immediately before and immediately after the occurrence. *Daughhetee v. Shipley*, 282 Ark. 596, 669 S.W.2d 886 (1984). An appraisal of the estimated cost of repair is acceptable evidence of the difference between the value of the vehicle before and after it was damaged.

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[1] The appellee asserts that this issue is not preserved for appeal because it was not included in appellant's directed verdict motion. However, in a non-jury trial, it is not necessary to move for a directed verdict in order to test the sufficiency of the evidence of damages on appeal. *Sipes v. Munro*, 287 Ark. 244, 697 S.W.2d 905 (1985).

First Marine Insurance Co. v. Booth, 317 Ark. 91, 876 S.W.2d 255 (1994). However, the difference in market value before and after the occurrence may be established by cost of repairs only when other competent proof of market value is absent and the cost of repairs is the best available evidence of market value. *Beggs v. Stalnaker*, 237 Ark. 281, 372 S.W.2d 600 (1963); *see* H. W. Brill, *Arkansas Law of Damages* § 29-4, at 397 (2d ed. 1990). The *Beggs* court held that, where the jury was presented both with evidence of cost of repair and with competent appraisals of market value, the appraisals of market value were the best evidence available. *Beggs v. Stalnaker*, 237 Ark. at 284, 372 S.W.2d at 602. In the present case the trial court was likewise presented with appraisals of market value and, insomuch as these appraisals of market value were introduced into evidence by the appellee as plaintiff below, we think they should be regarded as competent and the best available evidence of market value. Consequently, we hold that the trial judge erred in basing his award on the estimated cost of repairs.

■ ■ Nevertheless, we do not believe that the error necessarily requires a new trial. In *Johnson v. Gilliland*, 320 Ark. 1, 896 S.W.2d 856 (1995), the supreme court said that:

> Ordinarily, a general verdict is a complete entity that cannot be divided, requiring a new trial upon reversible error. When, however, a trial error relates to a separable item of damages, a new trial can sometimes be avoided by the entry of a remittitur. *Jacuzzi Brothers, Inc. v. Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994); *Wheeler v. Bennett*, 312 Ark. 411, 849 S.W.2d 952 (1993); *White River Rural Water District v. Moon*, 310 Ark. 624, 839 S.W.2d 211 (1992). As Mr. Johnson testified that the fair market value of the boat was $10,000, we have no hesitation in declaring that a remittitur is in order. Should Mr. Johnson submit a petition within seventeen days, requesting a remittitur of damages from $20,250 to $10,000, we will affirm as modified. Otherwise, as a general verdict cannot be divided, we must remand for a new trial of Mr. Huntsberger's cross-complaint against James Johnson. *See Jacuzzi Brothers, Inc. v. Todd, supra; Interstate Freeway Serv., Inc., v. Houser*, 310 Ark. 302, 835 S.W.2d 872 (1992).

Johnson v. Gilliland, supra, at 9. The amount of the remittitur in such cases is fixed by the highest estimate of the element of dam-

age affected by the error. *Martin v. Rieger*, 289 Ark. 292, 711 S.W.2d 776 (1986). In the case at bar there was evidence that appellee's pontoon boat was in excellent condition prior to the explosion, and that a boat of that type in such condition had a market value of $7,300.00. There was also evidence that, following the explosion and after appellee expended $333.00 in repairs, the pontoon boat had a market value of $4,800.00. Consequently, should appellee submit a petition within seventeen days requesting a remittitur in damages from $2,907.60 to $2,833.00, we will affirm as modified. Otherwise, we must remand for a new trial.

Affirmed as modified.

STROUD and GRIFFEN, JJ., agree.

Frankie L. WEBB, Jr. *v.* STATE of Arkansas

CA CR 98-1292 990 S.W.2d 591

Court of Appeals of Arkansas
Division I
Opinion delivered May 26, 1999

William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. On December 8, 1997, appellant, Frankie L. Webb Jr., pled guilty in the Pulaski County Circuit Court to aggravated assault and terroristic threatening and was placed on probation for five years and fined $500.00. On the same day, he pled guilty in the same court to possession of a controlled substance and was placed on five years' probation and fined $500.00. The order was silent on whether the terms of probation were to run consecutively or concurrently. The State subsequently sought revocation of appellant's probation in both cases alleging that Webb had been found in possession of drugs and a firearm. A revocation hearing was held on March 16, 1998. Appellant was found in willful violation of the terms of his probation and was sentenced to six years' imprisonment for the aggravated assault and terroristic threatening offenses and ten years' imprisonment for the possession of a controlled substance, to be served consecutively. Appellant argues that the trial court was without authority to order the sentences in the cases to be served consecutively. We disagree and affirm.

Appellant argues, correctly, that when the trial court placed him on probation and imposed a fine of $500.00 in the original cases, a valid judgment of conviction was entered. Ark. Code Ann. § 5-4-301(d)(1) (Repl. 1997). It is also true that by law appellant's terms of probation ran concurrently. Ark. Code Ann. § 5-4-307(b) (Repl. 1997). A trial court cannot modify or amend an original sentence once it is placed into execution. *DeHart v. State*, 312 Ark. 323, 849 S.W.2d 497 (1993). A sen-

tence is placed into execution when the trial court issues a judgment of conviction, unless the court specifically delays execution upon other valid grounds. *Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995).

Appellant concludes from these authorities that on revocation of his probation, the trial court was without authority to run the two sentences consecutively. We do not agree. Arkansas Code Annotated section 5-4-309(f) (Repl. 1997) provides that if the court revokes probation, it may impose any sentence on the defendant that might have been imposed originally for the offense of which he was found guilty. The case at bar is somewhat similar to *Diffee v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986). There the defendant was both fined and placed on probation as to a term of imprisonment. When his probation was revoked, he argued that the circuit court lacked the power to sentence him to a term of imprisonment because a sentence had already been "imposed." She had been fined and the fine had already been paid.

The supreme court held that no sentence had been imposed when the defendant was placed on probation. The court said:

> We do not regard the $500 fine as a "sentence imposed," because the statute is directed to a revocation of probation and thus is referring to the possible sentence to imprisonment that gave rise to the probation. In *McGee* as here the defendant pleaded guilty and was placed on probation for three years. There as here the court revoked the probation and imposed a five-year sentence. We held that Section 43-2332, as revised in 1979, did not apply, because no sentence had been pronounced when the defendant was placed on probation.
>
> . . .
>
> The appellant paid the fine, but she violated the conditions of probation. No authority is cited by counsel for the notion that every time a court accompanies a fine with probation, double jeopardy occurs when the probation is revoked. The argument is so lacking in merit that we do not discuss it at length.

The cases relied on by the appellant are distinguishable. In *Hadley v. State*, *supra*, the defendant had been actually sentenced to two concurrent terms of imprisonment. It was held that the trial court's subsequent attempt to modify the sentences to run them

consecutively was invalid. Likewise in *Cashion v. State*, 265 Ark. 677, 580 S.W.2d 470 (1979), an actual sentence of imprisonment had been put into execution and a subsequent attempt to modify the sentence was reversed. *See also Nelson v. State*, 284 Ark. 156, 680 S.W.2d 91 (1984).

Under Ark. Code Ann. § 5-4-307(b) the trial court was bound to order the original terms of probation to run concurrently. Under Ark. Code Ann. § 5-4-309(f) on revocation, however, the trial court was within its authority to run the sentences consecutively. This is because no sentence of imprisonment had yet been imposed.

Affirmed.

ROGERS and GRIFFEN, JJ., agree.

LLOYD'S OF LONDON *v.* David WARREN

CA 98-1039 990 S.W.2d 589

Court of Appeals of Arkansas
Division I
Opinion delivered May 26, 1999

Daggett, Van Dover, Donovan & Perry, PLLC , by: *Jesse B. Daggett*, for appellant.

Victor L. Hill, for appellee.

TERRY CRABTREE, Judge. This case involves a motion for new trial. A jury sitting in Phillips County Circuit Court returned a verdict in favor of the appellee, David Warren, but failed to award appellee any damages. The court entered judgment for appellee on February 13, 1998. Ten days later, appellee made a written motion for new trial citing Arkansas Rule of Civil Procedure 59(a)(5) & (6). On March 25, 1998, the court entered an order granting appellee's motion for new trial pursuant to Rule 59. On appeal, the appellant, Lloyd's of London, challenges that order arguing that the trial judge abused his discretion in granting the motion. We disagree with appellant and affirm.

Appellee alleged that on or about June 7, 1993, his 1986 Isuzu I-Mark automobile was stolen from the front lawn of his parents' home in West Helena, Arkansas, and dragged by thieves into the street fronting the home, where appellee's personal prop-

erty contained within the vehicle was stolen, and the car was set on fire. Appellee filed a claim with appellant under his parents' homeowner's insurance policy. Subsequently, an amendment to the claim was submitted with a list of the items that were stolen from appellee's car. Appellant refused to pay any portion of the claim.

Appellee filed a series of complaints against appellant on the homeowner's policy issued by appellant to appellee's father, alleging causes of action for breach of contract, bad faith, and punitive damages. Arguing that he was an "insured" under the policy because he lived with his parents, that the loss of the contents of his vehicle had occurred on the "insured premises," and that appellant had wrongfully failed to pay for the loss of the contents of the vehicle, appellee filed complaints alleging damages for breach of contract and bad faith in the amount of $14,593.70. Subsequently, he argued that he had suffered lost income as a part-time musician due to appellant's failure to pay the claim for a musical instrument alleged to have been contained within the vehicle at the time of the loss.

Appellant responded to each of appellee's complaints, arguing that even if appellee was an insured under the policy, the loss had not occurred on the insured premises. As a result, appellant denied any liability under its homeowner's policy. At trial, the jury heard the testimony of eight witnesses. After deliberating, the jury returned two completed verdict forms. Ten members of the jury found for appellee on both of his causes of action, but they assessed no damages against appellant on either of the claims. On the second verdict form, signed only by the foreman, the jury returned a unanimous verdict for appellant and assessed no damages.

■ ■ Appellant argues on appeal that the circuit judge abused his discretion in setting aside the jury verdict and in granting appellee's motion for new trial. Rule 59(a)(6) of the Arkansas Rules of Civil Procedure provides that a new trial may be granted to all or any of the parties on all or part of the issues on the application of the party aggrieved when the verdict or decision is clearly against the preponderance of the evidence. While the trial

court has some discretion in setting aside a jury verdict, there is no longer the broad discretion that the supreme court formerly recognized. *Ray v. Green*, 310 Ark. 571, 839 S.W.2d 515 (1992). The trial court has limited discretion in the matter, as it may not substitute its view of the evidence for the jury's except when the verdict is clearly against the preponderance of the evidence. *Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996); *see Collins v. Treadwell*, 54 Ark. App. 100, 923 S.W.2d 882 (1996). The test this court applies in reviewing the trial court's granting of a motion for new trial is whether the judge abused his discretion; a showing of abuse of discretion is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Richardson v. Flanery*, 316 Ark. 310, 871 S.W.2d 589 (1994); *Nationwide Mut. Fire Ins. Co. v. Bryson*, 60 Ark. App. 293, 962 S.W.2d 824 (1998). The supreme court has described this standard as requiring a showing of "clear" or "manifest" abuse of discretion by acting improvidently or thoughtlessly without due consideration. *See Razorback Cab of Fort Smith, Inc. v. Martin*, 313 Ark. 445, 856 S.W.2d 2 (1993).

First, appellant asserts that the trial court improperly made reference to an inconsistency in the verdict forms in its order granting a new trial. We note that appellee never contended or raised the issue of the inconsistent verdict forms as a basis for the new trial. Although the trial court made reference to the inconsistent verdict forms, the judge based his order on Ark. R. Civ. P. 59. Therefore, it is not necessary for us to entertain appellant's argument regarding inconsistent verdict forms.

Appellant further argues that the lower court lacked a sufficient basis to order a new trial and therefore abused its discretion. Appellee requested a new trial based upon the inadequacy of damages and the fact that the jury's decision was contrary to a preponderance of the evidence adduced at trial. Rule 59(a) of the Arkansas Rules of Civil Procedure allows a motion for a new trial to be granted upon a showing of one of eight reasons. *See Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997). One permissible reason is that "the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to law." Ark. R. Civ. P. 59(a)(6). In this instance, we believe that the trial judge

reasonably found that the jury's verdicts for both appellant and appellee were against the preponderance of the evidence and affirm.

Affirmed.

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

Judith M. MOW *v.* William S. MOW

CA 98-1191 990 S.W.2d 578

Court of Appeals of Arkansas
Division I
Opinion delivered May 26, 1999

David W. Talley Jr., for appellant.

Kinard, Crane & Butler, P.A., by: *Mike Kinard*, for appellee.

ANDREE LAYTON ROAF, Judge. Judith M. Mow (Mrs. Mow) appeals an order by the Columbia County Chancery Court granting judgment on the pleadings to appellee William S. Mow (Mr. Mow) and dismissing with prejudice her motion to modify the parties' divorce decree. Her motion was filed ninety-one days after the entry of the final decree and sought relief pursuant to the provisions of Rule 60 of the Arkansas Rules of Civil Procedure. On appeal, Mrs. Mow argues that the chancellor's decision was clearly erroneous because she pleaded facts relating to fraud practiced by her ex-husband that met the standard of proof required by Rule 60(c)(4) of the Arkansas Rules of Civil Procedure. We agree that the chancellor properly denied Mrs. Mow the relief she sought, but for a different reason than stated by the chancellor, and we affirm.

The Mows married on June 25, 1991, and separated on March 30, 1997. Mr. Mow filed a petition for divorce on March 31, 1997, and that same day, Mrs. Mow, who was not represented by counsel, waived service and appearance, and consented to a property-settlement agreement. A divorce decree that incorporated by reference the property settlement agreement and contained a permanent injunction against harassment by the respective parties was filed for record on May 7, 1997. On July 27, 1997, Mr. Mow petitioned the court to enforce the restraining order. Mrs. Mow filed her response on August 6, 1997, ninety-one days after the entry of the decree, and that same day, in a separate pleading, moved to modify the divorce decree. In that motion she alleged that in the execution of the property settlement agreement she was not represented by legal counsel, was suffering with depression and alcoholism for which she had been hospitalized, had been locked out of the marital residence, and had been required by Mr. Mow to go to his attorney's office under a threat that her child from a previous marriage would be taken away from her permanently. She also alleged that Mr. Mow represented to her that the proposed settlement was a fair division of the assets of the marriage, but that she later determined that she did not receive an equal share. In his response to Mrs. Mow's motion, Mr. Mow denied the allegations of fraud and overreaching and prayed that the motion be dismissed for want of equity and merit and, in the alternative, for failure to state a claim upon which relief could be granted pursuant to Rules 12(b) and 9(b) of the Arkansas Rules of Civil Procedure.

After discovery, in which Mrs. Mow did not materially add to the body of facts relating to the allegations of fraud and overreaching, Mr. Mow moved for judgment on the pleadings, pursuant to Rule 12(c) of the Arkansas Rules of Civil Procedure, and his motion was granted. The trial court found that Mrs. Mow failed to plead sufficient facts that Mr. Mow practiced the kind of fraud that would allow the court to set aside a judgment after ninety days pursuant to Rule 60(c) of the Arkansas Rules of Civil Procedure and dismissed Mrs. Mow's motion with prejudice.

On appeal, Mrs. Mow argues that the chancellor's decision to dismiss her motion with prejudice was clearly erroneous because

she met the standard of proof required by Rule 60(c). She cites *Ward v. McCord*, 61 Ark. App. 271, 966 S.W.2d 925 (1998) (quoting *United States v. Throckmorton*, 98 U.S. 61 (1878)), for the proposition that setting aside a decree pursuant to Rule 60(c) is appropriate "where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced upon him by his opponent," and contends that hers is just such a case. Moreover, referring to the examples of extrinsic fraud listed in *Throckmorton*, she contends that Mr. Mow's promise that he would "take care of her" in the property settlement agreement constituted a "false promise of compromise."

Mrs. Mow further asserts that the instant case is distinguishable from *Ward v. McCord, supra*, in which this court reversed the granting of a new trial on a property settlement that was entered into after the appellant had fraudulently concealed assets, because in the instant case, only ninety-one days had elapsed since the entry of the decree whereas in *Ward*, six years had elapsed. She also contends that *Alexander v. Alexander*, 217 Ark. 230, 229 S.W.2d 234 (1950), another case in which a chancellor's decision to vacate an order was overturned on appeal, is distinguishable because the "cited concern" that there would be "no end to the litigation" is not present in the instant case. Her arguments are without merit.

Rule 60(c)(4) states:

> (c) *Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days.* The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days after the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
>
> . . . .
>
> (4) For fraud practiced by the successful party in obtaining the judgment.

Ark. R. Civ. P. 60(c). In *Parker v. Sims*, 185 Ark. 1111, 51 S.W.2d 517 (1932), the supreme court explained the type of fraud that will warrant the setting aside of a judgment:

> The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed. It must be a fraud practiced upon the court in the procurement of the judgment itself.

185 Ark. at 1116, 51 S.W.2d at 519-20 (citations omitted). The fraud for which a decree will be canceled must consist in its procurement and not merely in the original cause of action. *First Nat'l Bank v. Higginbotham Funeral Serv., Inc.*, 36 Ark. App. 65, 818 S.W.2d 583 (1991). It is not sufficient to show that the court reached its conclusion upon false or incomplete evidence, or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, an issue in the proceeding before the court which resulted in the decree assailed. *Id.* The party seeking to set aside the judgment has the burden of showing that the judgment was obtained by fraud, and the charge of fraud must be sustained by clear, strong, and satisfactory proof. *Id.*

Here, the fraud that Mrs. Mow complains of apparently lies in her claim that she should have gotten a better deal in the property settlement. She does not dispute that she agreed to the property settlement, but contends only that she should have been treated better by her estranged husband. Accordingly, the fact that an agreement was indeed reached simply does not allow a conclusion that there was a false promise to compromise. Therefore, the fraud that Mrs. Mow alleges, if indeed it is fraud, is clearly intrinsic, not extrinsic, and *Ward v. McCord, supra*, is strong authority for affirming the chancellor in the instant case. In *Ward*, we held that fraudulent concealment of marital property was "intrinsic fraud." Here we have little more than Mrs. Mow's claim that Mr. Mow promised to be fair, but failed to give her an equal share of the marital assets, which is not remarkably different from the situation in *Ward*.

However, in affirming the chancellor's disposition of Mrs. Mow's motion, we note that a motion is not a pleading as defined by the Arkansas Rules of Civil Procedure. *See* Ark. R. Civ. P. 7 & 10. Nonetheless, in our *de novo* review of the record we have concluded that Mrs. Mow's motion received all due consideration. "Although it is not clearly prescribed in the rules, presumably the Court must either hold a hearing for argument of a motion or must direct or permit other response by the respondent." David Newbern, *Civil Practice and Procedure* § 10-3 (2d ed. 1993); Ark. R. Civ. P. 6(c), 7(b)(1). "Most motions resulting in orders require a hearing, and occasionally, evidence may be presented." Newbern, § 16-5.

In the chancellor's letter opinion to the parties' attorneys he stated: "This matter was set for hearing on May 6, 1998, at 1:30 p.m. At that time, both of you announced that as the issues were adequately pled and briefed, that there was no need for a hearing and that the Court could review the file and make its findings." The letter opinion further stated that the chancellor determined that Mr. Mow's motion for judgment on the pleadings should be granted because Mrs. Mow had failed to "fact-plead her allegation of fraud as required under Rule 12(b)(6)."

Because we can affirm the chancellor if we determine that he reached the right conclusion even if for the wrong reason, we need not consider the propriety of granting a judgment on the pleadings with respect to a motion. As stated earlier, even if Mrs. Mow's allegations can be said to amount to allegations of fraud, it would amount to intrinsic fraud and, as such, would not provide a basis for relief under Rule 60(c). Both parties submitted briefs to the court and agreed that their motions could be decided without a hearing. Under the circumstances, Mrs. Mow's motion received due consideration as contemplated by our rules of civil procedure, and it was appropriate for the trial court to deny the motion and the relief she requested.

Affirmed.

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