[redacted]

Asa STEWART *v.* STATE of Arkansas

CA CR 98-1118 992 S.W.2d 147

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered June 2, 1999

John H. Bradley, for appellant.

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

JOSEPHINE LINKER HART, Judge. On December 20, 1996, the appellant was charged with capital murder. On February 17, 1998, two days before trial, the State amended the information to add the charge of aggravated robbery. Appellant's objection to the amended information was overruled, and after a trial, the jury found the defendant guilty of first-degree murder and aggravated robbery. Appellant was sentenced to serve consecutive sentences of twenty-five years on the first-degree murder conviction and forty years on the aggravated robbery conviction. On appeal, appellant contends the trial court erred in allowing the State to amend the information one day prior to trial, admitting

gruesome photographs into evidence, and denying his motion for a directed verdict on the charge of aggravated robbery. Appellant does not argue on appeal that there was insufficient evidence to support his conviction for first-degree murder. Arguments not raised on appeal are deemed abandoned. *See King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996). Therefore, this court will not address the sufficiency of the evidence to support the first-degree murder conviction.

On November 14, 1996, appellant and three companions had been at a rest stop outside Blytheville for approximately thirty minutes when the victim, Russell Hinkle, and his family drove into the park. When the Hinkle family arrived, two of appellant's companions were outside the door of the men's room, and the appellant and another companion were inside. However, all four were in the restroom when Hinkle entered. Soon after Hinkle went into the men's restroom, appellant's companion, DeAshley Wright, fired four shots, killing Hinkle. Appellant and his companions ran from the restroom with jackets pulled over their heads and left in their vehicle, which was backed into a parking place with a towel covering the license plate.

Appellant argues that the trial court erred in not granting appellant's motion for directed verdict on aggravated robbery. In reviewing the denial of a motion for a directed verdict, the court views evidence in the light most favorable to the State. *Harris v. State*, 331 Ark. 353, 961 S.W.2d 737 (1998). Evidence is considered sufficient if there is substantial evidence to support the verdict. *Id.* Direct or circumstantial evidence is substantial if it is of sufficient force to compel a conclusion one way or the other beyond speculation or conjecture. *Id.*

Although several witnesses testified at the trial, no evidence was presented that any property was taken or that there was an attempt or threat to take any property from the victim. When the appellant was questioned by the police, he stated that DeAshley asked if they wanted to rob someone, and he replied, "[N]aw, man, I ain't down to no robbing. . . ." The facts presented in this case merely show the appellant was present at the crime scene when his companion fired the gun and killed the vic-

tim. One might speculate the young men entered the restroom to commit murder, or to commit robbery, or to commit robbery and murder, or to use the facilities, unaware that anyone intended to commit a crime. The proof does not compel a conclusion one way or the other. Based upon the State's failure to present such evidence, the appellant's conviction for aggravated robbery is reversed and dismissed. Because we reverse and dismiss his conviction for aggravated robbery, we need not address appellant's objection to the State's amendment of the information to add the aggravated robbery charge.

Appellant also argues that the trial court erred by admitting three gruesome photographs into evidence. The first photograph shows the victim lying in a pool of blood near the restroom after the shooting. Appellant argues that this photograph is gruesome and the verbal descriptions given by witnesses adequately described the shooting. Two additional photographs, objected to by appellant, were autopsy photographs showing metal rods that were inserted through the gunshot wounds. Appellant argues that the trial court abused its discretion in admitting these photographs and asserts they were inflammatory and prejudicial. Appellant asserts that the photographs depicted the victim as if "pinned to a Styrofoam board as part of an insect collection."

Even inflammatory photographs may be admitted if they help explain an issue to be submitted to the jury. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993). The discretion of the trial judge will not be disturbed unless the photographs serve no valid purpose. *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997). The trial court found that the photograph of the victim lying outside the restroom should be admitted to show the location of the victim in relation to the restroom. The court also found that the photographs taken by the medical examiner's office helped the witness explain the path of the bullets through the victim's body. The photographs were admitted for valid purposes, and the probative value of the evidence was substantially outweighed by any danger of unfair prejudice that may have resulted from the introduction of the photographs. Thus, the trial court did not abuse its discretion in admitting the photographs, and appellant's conviction for first-degree murder is affirmed.

Affirmed in part; reversed in part.

ROGERS, PITTMAN, and GRIFFEN, JJ., agree.

ROAF and JENNINGS, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I do not agree that Asa Stewart's conviction and forty-year sentence for aggravated robbery should be reversed. On the night in question, Stewart and three other young men, Steven Edwards, Tyrell Pulley, and DeAshley Wright, were riding around in a car, armed with guns. They went to the rest stop on Interstate 55 just outside of Blytheville and backed the vehicle into a parking spot, with the license plate covered by a towel. They lurked around the rest stop for approximately thirty minutes until Russ Hinkle, the victim, and his wife and daughter stopped to use the rest rooms. As Mr. Hinkle approached the men's rest room, Steven Edwards and Tyrell Pulley, who were outside, quickly entered the rest room. DeAshley Wright and Stewart were already inside. Four shots were heard and Hinkle came out of the rest room and fell to the ground. All four young men ran from the rest room with jackets pulled up over their heads to hide their faces, got into the car, and sped away. They then went to the home of Steven Edwards where Stewart was observed by two people with a .38 weapon, and they were observed trying to clean a seat in the car by using mustard. The weapons were placed in a bag that was later found hidden in the stove of an abandoned house.

During the investigation of Hinkle's death, Stewart gave a statement to police officials in which he disclosed that while he and his companions were riding in the car, DeAshley Wright had talked about wanting to rob someone, and asked "Y'all wanna rob somebody?" However, Stewart maintained that he said "no" to the question, but admitted that he was in a stall of the restroom when Wright shot Hinkle.

Here, Stewart's statement provides the most telling evidence of one of the group's intention to rob a victim prior to going to the rest stop. Stewart willingly went with the other three persons to the rest stop with full knowledge of this intent. Before they arrived at the rest stop, a cloth was placed over the license plate of

the vehicle to prevent its being read by a witness. Once they arrived, Stewart and his cohorts waited in or around the bathroom for about thirty minutes before the Hinkles arrived. When Hinkle approached the rest room, one of the witnesses testified that she observed two of the men waiting just outside the door of the bathroom. When these two saw that Hinkle was coming to the bathroom, they also quickly entered the bathroom. Several shots were heard shortly thereafter, followed by four "young males" seen fleeing from the scene with their coats pulled over their heads to conceal their identities.

I am not unmindful of two decisions by our supreme court, one of which is cited by Stewart, that would arguably support a reversal of this conviction. In *Trotter v. State*, 240 Ark. 269, 719 S.W.2d 268 (1986), the supreme court reduced the appellant's sentence from aggravated robbery to that prescribed for the lesser-included offense of first-degree battery, finding that the appellant's out-of-court confession that he intended to commit a robbery was not corroborated by any other evidence. In *Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988), the court modified the sentence from that for aggravated robbery to the maximum sentence for the lesser-included offense of aggravated assault for the same reason. However, these cases can be distinguished from Stewart's case. In *Trotter*, the appellant entered a grocery store and immediately shot the owner in the neck, fired at the owner's brother, and exited the store. Four witnesses testified that no words whatsoever were spoken by the appellant or the man with him either before or after the shooting. In *Bishop*, the appellant and a companion entered a liquor store and the appellant swung a bottle of wine at the clerk working behind the counter, again without stating his purpose.

With regard to the shooting of Mr. Hinkle, unfortunately, he did not survive his chance encounter with the four armed young men in the public bathroom of a highway rest stop. We do not know what words were spoken, because they aren't talking, and he cannot. But we do have additional circumstances not present in *Trotter* or *Bishop* tending to corroborate Stewart's statement that a robbery was intended: Stewart and his companions lurked around the rest stop until the victim, an elderly man, entered

alone; two of the men quickly followed Hinkle inside; all were armed, and their car was poised for a quick getaway with the license plate concealed. I do not agree that the jury needed to resort to speculation to determine the purpose behind these actions.

The jury has the sole authority to evaluate the credibility of witnesses and to apportion the weight to be given to the evidence. *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998). It is for the jury to resolve any questions of conflicting testimony and inconsistent evidence, and the jury may choose to believe the State's version of the facts over the defendant's. *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998). Additionally, the supreme court has often stated that a defendant's improbable explanation of suspicious circumstances is admissible as proof of guilt. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997); *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993); *Bennett v. State*, 297 Ark. 115, 754 S.W.2d 799 (1988). The presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime in a manner suggestive of joint participation are relevant facts in determining the connection of an accomplice with the crime. *Harrell v. State*, 331 Ark. 232, 962 S.W.2d 325 (1998).

The jury clearly did not believe that Stewart was merely using the bathroom at the time of the shooting, or that he was totally oblivious to the preparations made to set the stage for a quick getaway. Viewing the evidence in the light most favorable to the State, I cannot say that a reasonable jury could not find that Stewart willingly participated in a botched robbery attempt, and would affirm this conviction.

JENNINGS, J., joins.

Renate HAPNEY *v.* RHEEM MANUFACTURING COMPANY

CA 98-678 992 S.W.2d 151

Court of Appeals of Arkansas
Division IV and I
Opinion delivered June 2, 1999

Sexton & Fields, P.L.L.C., by: *William J. Kropp III*, for appellant.

Warner, Smith & Harris, PLC, by: *Wayne Harris*, for appellee.

JOHN E. JENNINGS, Judge. Renate Hapney filed a workers' compensation claim, contending that she had sustained a ruptured cervical disc while working at Rheem Manufacturing on February 2, 1996. She proceeded under three alternative theories of compensability, arguing that her injury was: (1) caused by a specific incident and identifiable by time and place of occurrence under Ark. Code Ann. § 11-9-102(5)(A)(i) (Supp. 1997); (2)

caused by rapid repetitive motion under § 11-9-102(5)(A)(ii)(a) (Supp. 1997); and (3) a back injury not caused by a specific incident (i.e., gradual onset) under § 11-9-102(5)(A)(ii)(b) (Supp. 1997). The administrative law judge found the claim to be compensable, but the Commission reversed, holding that Mrs. Hapney had failed to meet her burden of proof. The issue on appeal is whether the Commission's decision is supported by substantial evidence. We hold that it is and affirm.

Mrs. Hapney had worked for Rheem Manufacturing since 1984. Before February 2, 1996, she worked primarily as a press operator, but on that day she was required to fill in on the assembly line. Her job was to attach two metal parts to an air-conditioning unit with a total of six screws. She testified that this required her to bend over to fit each plate to the unit and attach it with three screws. On February 2, she assembled 316 units during a ten-hour shift.

She testified that although her neck and right arm were hurting, she finished out her shift. On Monday, February 5, she returned to work and told the plant nurse she was having shoulder and neck pains and was sent to the company doctor, Dr. Carson. She was placed on light duty and worked the remainder of that week. On March 29, a cervical MRI disclosed a herniated disc at C5-6.

Mrs. Hapney testified that she had had an injury in April 1993 which resulted in shoulder surgery. She testified that she had had neck pain from time to time since that injury, but that the pain after February 2, 1996, was more severe. Rheem Manufacturing contended before the Commission that the herniated disc was a continuation of the 1993 injury. While Mrs. Hapney testified that she did not know when she was injured in February 1996, she believed it to be on February 2 because that was when the pain increased.

When the question is whether the Commission's decision is supported by substantial evidence, we will reverse only if we are persuaded that fair-minded persons could not reach the

Commission's conclusion. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998). The decision of the Commission is entitled to the same weight we give to a jury verdict. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998).

Mrs. Hapney first contends that her herniated cervical disc is compensable under Ark. Code Ann. § 11-9-102(5)(A)(ii)(b) as "a back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence." The Commission held that the gradual-onset exception for back injuries does not extend to the neck. Arkansas Code Annotated section 11-9-704(c)(3) (Repl. 1996) requires that the statute be strictly construed. Strict construction means narrow construction. *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998). Strict construction requires that nothing be taken as intended that is not clearly expressed. *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993). 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).

The first definition of "back" in the *American Heritage Dictionary* (2nd ed.) is "the region of the vertebrate body located nearest the spine, in man consisting of the rear area from the neck to the pelvis." The second definition is "the backbone or spine." The first definition contained in *Merriam Webster's Collegiate Dictionary* (10th ed.) is "the rear part of the human body esp. from the neck to the end of the spine." It is defined in the *Sloan-Dorland Annotated Medical-Legal Dictionary* as "the posterior part of the trunk from the neck to the pelvis." Although the cervical vertebrae are certainly part of the spine, we think that in common parlance "back" and "neck" are used to described different parts of the human body. The statute is at best ambiguous, and the supreme court has recently said that under those circumstances the administrative agency's interpretation is highly persuasive. *Social Work Licensing Bd. v. Moncebaiz*, 332 Ark. 67, 962 S.W.2d 797 (1998). Given the requirement of strict construction, we conclude that the Commission's interpretation of the statute was cor-

rect. The legislature could have easily used the word "spine" rather than "back," if that was what it intended.

Appellant next contends that the Commission was bound to find that her injury was the result of a "specific incident" under Ark. Code Ann. § 11-9-102(5)(A)(i). In this regard, the Commission noted that the appellant testified that she did not know when she was injured and did not report a work-related injury to her employer on February 2. It also noted that she did not provide a history of a specific incident to any of her treating physicians. We hold that the Commission's conclusion in this regard is supported by substantial evidence. *See, e.g., Stallings Bros. Feed Mill v. Stovall*, 221 Ark. 541, 254 S.W.2d 460 (1953); *Mikel v. Engineered Speciality Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Finally, appellant contends that the Commission erred in not concluding that her neck injury was caused by rapid repetitive motion under Ark. Code Ann. § 11-9-102(5)(A)(ii)(a). The Commission held that her actions were not sufficiently rapid to satisfy the statute and that furthermore there was insufficient evidence as to which of her movements on the assembly line actually involved her neck. While we have struggled with the language of this particular statute, we have not attempted to reduce the law to a mathematical formula. The issue will ordinarily be a question of fact, not one of law. *See Malone v. Texarkana Pub. Schs.*, 333 Ark. 343, 969 S.W.2d 644 (1998). Under the facts of this case we believe that the Commission's conclusion is supported by substantial evidence. *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998), is distinguishable on several grounds. The injury there was carpal tunnel syndrome, a typical "rapid repetitive" injury, and the claimant in *Boyd* had performed the same task for sixteen years, as opposed to the one day involved in the case at bar.

For the reasons stated, the decision of the Commission is affirmed.

STROUD and CRABTREE, JJ., agree.

GRIFFEN, ROAF, and ROGERS, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse this case and remand for an award of benefits, because I do not believe that Hapney should be denied benefits for an injury to her lower cervical area with trapezus muscle involvement, given the lack of a precise definition of "back injury" in our Workers' Compensation Statutes.

In pertinent part, Ark. Code Ann. § 11-9-102(5)(A)(ii)(b) (Repl. 1996) defines "Compensable injury" as:

> . . .
>
> (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:
>
> . . .
>
> (b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

The treatment notes from Hapney's doctors indicate that her complaints were of shoulder pain, primarily, with some cervical involvement. The initial diagnosis was right trapezius strain. The trapezius is either of the two large flat triangular muscles running from the base of the occiput, the back part of the skull, to the middle of the back. Eventually, she underwent an MRI of her spine, and it revealed disc herniation at C5-6 and some protrusion at C6-7 that was considered degenerative in nature. The treatment recommended by her physician was a spinal fusion at C5-6.

Mosby's Medical & Nursing Dictionary defines "back" as "the posterior portion of the trunk of the body between the neck and the pelvis." It goes on to state, however, that

> the back is divided by a middle furrow that lies over the tips of the spinous processes of the vertebrae. The upper cervical vertebrae cannot be felt in this furrow, but the seventh cervical vertebra is easily distinguished just above the more prominent first

> thoracic vertebra. The skeletal portion of the back includes the thoracic and the lumbar vertebrae and both scapulas.

"Neck" is defined as "a constricted section, at the part of the body that connects the head with the trunk." However, as is apparent from the anatomical drawing appended to this opinion, this "constricted section" may not appear until well up the cervical spine. Further, the very next entry in *Mosby's*, "backache," defines that malady as "pain in the lumbar, lumbosacral, or *cervical* regions of the back." (Emphasis added.) Additionally, the trapezius, the muscle in which Hapney's pain was first localized, is a muscle primarily of the back that extends to the base of the skull. Therefore, pain in the trapezius from overuse could be attributed to either the back, and be compensable, or the neck, and not be. Clearly, the lay terminology "back injury" does not provide us with a precise definition and renders the subject statutory provision ambiguous.

Although we are required to strictly construe workers' compensation statutes, Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996), *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998), this does not mean that we should impose a restriction on the scope of "back injury" that the legislature could easily have employed, but did not. The majority concludes that the legislature could have referred to spinal injuries rather than back injuries if it had intended to include the entire spinal column; it can just as easily be said that the legislature could have designated "thoracic" and "lumbar" spinal injuries had it intended to limit compensation to just those areas of the human back or spine.

The Arkansas Supreme Court has recently set forth the standard for review of ambiguous language in a workers' compensation statute in *Wilson v. Timberline Int'l, Inc.*, 332 Ark. 165, 964 S.W.2d 357 (1998), where the court stated:

> We begin our reconsideration by noting that the statutory language at issue is ambiguous; we must therefore interpret it using tools of statutory construction. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning. *Vanderpool v. Fidelity & Cas.*

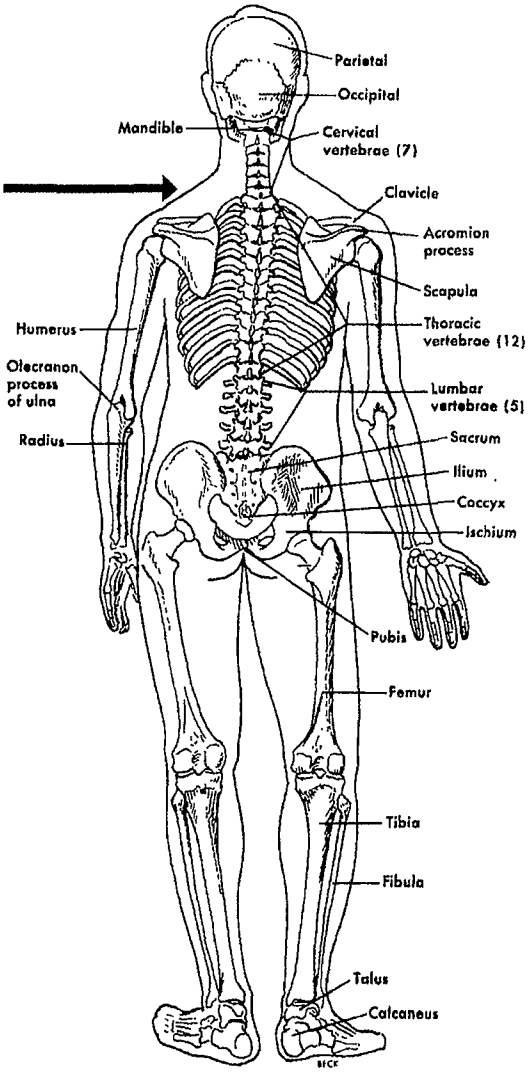
> *& Inc. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997). The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. *Graham v. Forrest City Housing Auth.*, 304 Ark. 732, 803 S.W.2d 923 (1991). In attempting to ascertain legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, legislative history, and other appropriate matters that shed light on the matter. *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997).

In this regard, Ark. Code Ann. § 11-9-101(b) (Repl. 1996) states in pertinent part: "The primary purposes of the workers' compensation laws are to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment[.]" That is the stated intent of the legislature, whatever other motives may have entered into the drafting of the specific provisions of the 1993 Act. Although we are sometimes required to turn a blind eye to work-related injuries not included by the legislature in the statutory definition of compensability, Ark. Code Ann. § 11-9-1001 (Repl. 1996); *see, e.g. Jobe v. Wal-Mart Stores, Inc.*, 66 Ark. App. 114, 987 S.W.2d 764 (1999), *Coble v. Modern Bus. Sys.* 61 Ark. App. 26, 966 S.W.2d 938 (1998), *Lay v. United Parcel Serv.*, 58 Ark. App. 35, 944 S.W.2d 867 (1997), and *Langley v. Danco Constr. Co.*, 57 Ark. App. 295, 944 S.W.2d 142 (1997), in this instance the majority has done so unnecessarily, and without justification.

In Hapney's case, the injury she suffered was to the areas of the lower cervical spine, which are as much identified with the trunk or upper back as with the neck. Denying her benefits because they are labeled "cervical" as opposed to "thoracic" is, in this instance, arbitrary and capricious.

ROGERS, J., joins.

Appendix:



POSTERIOR VIEW OF SKELETAL SYSTEM

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WENDELL L. GRIFFEN, Judge, dissenting. Although I agree that points two and three of the appeal should be affirmed, I disagree with the majority opinion regarding point one. That point maintains that the Workers' Compensation Commission erred when it held that the gradual-onset provision of Ark. Code Ann. § 11-9-102(5)(A)(ii)(b) does not render compensable an injury to the cervical spine because such an injury is not a "back injury" within the meaning of the statute. I would reverse the Commission on this point because the seven cervical vertebrae are part of the vertebral column known as the spine.

Appellant has been diagnosed as having herniated discs at two levels of her cervical spine (C5-6 and C6-7), with resulting spinal stenosis (narrowing of the nerve roots serving the affected vertebrae). She had worked for the employer for twelve years before February 2, 1996. On that date, an ice storm struck her locale and caused a shortage of workers. Appellant was temporarily assigned new job duties on a moving assembly line known as the 800 line. The reassigned job required that appellant use a screw gun to assemble parts to air conditioning and heating units while bending over the line. She performed the required movements on a new unit on the average of once every 1.89 minutes and completed an average of just over 31 units per hour. While doing so, her neck and right arm began hurting extensively. By the end of the day, she could not turn her head, it was painful for her to sit, and it was painful for her to lie down. These problems had not existed before February 2, 1996.

An Administrative Law Judge found that appellant proved that her injury was compensable under Ark. Code Ann. § 11-9-102(5)(A)(ii) (Repl. 1997), that the medical treatment for her injury was reasonable and necessary, that appellant had been rendered temporarily totally disabled from the February 2, 1996 injury date to a date yet to be determined, and that the employer and its insurance carrier had controverted appellant's claim so as to warrant the award of the maximum statutory attorney's fee. The Commission reversed the award in a split decision. The Commission held that the gradual-onset provision for nonspecific injuries prescribed in Ark. Code Ann. § 11-9-102(5)(A)(ii)(b) regarding

back injuries does not apply to injuries to the cervical spine such as sustained by appellant.

Although appellant attacks the Commission's decision that she failed to prove her neck injury was caused by a specific incident and is identifiable by time and place of occurrence as prescribed by Ark. Code Ann. § 11-9-102(5)(A)(ii)(a), I agree that a substantial basis exists in the record for the decision denying relief on that theory. Appellant testified that she did not know when her injury occurred on February 2, 1996, but that she was sure that it happened on that date during her work on the 800 line. Although I disagree with the Commission's view that this testimony is inadequate to establish a specific incident, our supreme court's decision in *Stallings Bros. Feed Mill v. Stovall*, 221 Ark. 541, 254 S.W.2d 460 (1953), and our decision in *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997), convince me that appellant's admission that her pain and injury resulted from a day of work on the 800 line supports the Commission's determination that her injury did not result from a specific incident, identifiable by time and place of occurrence.

Appellant also argues that her complaints stem from rapid repetitive motion as to be compensable under Ark. Code Ann. § 11-9-102(5)(A)(ii)(a), and that the Commission erred by deciding that she failed to prove that theory. Although I disagree with the Commission's determination that appellant's work of inserting six screws to each unit at the rate of 31.6 units per hour or one almost every two minutes while bending, stooping, and turning her neck was not rapid repetitive motion within the meaning of the statute, there appears to be no medical evidence that appellant's injury resulted from rapid repetitive motion. I am reluctant, given our standard of appellate review, to second-guess what appears to be the Commission's factual determination on this subject. The Commission may well have gotten this one wrong, but unless we are prepared to say that appellant's activities were rapid repetitive motion as a matter of law, reversal would require us to make what amounts to a de novo review of the facts.

However, I believe that the Commission erred as a matter of law when it held appellant's cervical spine injuries noncompensa-

ble under Ark. Code Ann. § 11-9-102(5)(A)(ii)(b). Given that our decisions have treated injuries to the shoulder as injuries to the body as a whole rather than scheduled injuries, *see Taylor v. Pfeiffer Plumbing & Heating Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983), whether an injury to the cervical spine is a back injury is a question of law. As such, the Commission's determination of that issue is instructive for purposes of appellate review, but does not justify the deference we accord its factual determinations. Even the definition of "back" cited by counsel for appellee at page 14 of his brief includes the "vertebral column with associated muscles (erector spinae and trasversospinalisis) and overlying integument" within the meaning of "back."

It is true that the back commonly refers to, in lay parlance, the "posterior aspect of trunk, below neck and above buttocks," as appellee argues. Yet the appellant's lay reference to her injury as involving her neck does not change the fact that it was, medically, to her cervical spine at two levels. Unless we are to judicially declare the cervical spine to not be part of the vertebral column — a declaration that would offend medical science at the very least — we should reverse the Commission's decision on this point.

The term "back" in § 11-9-102(5)(A)(ii)(b) is not a term of art or a technical term within the meaning of the Workers' Compensation Law or medical science, for that matter. In fact, the medical diagnosis attached to appellant's injury is that she sustained herniated discs at two levels of her cervical spine (C5-6 and C6-7), with resulting spinal stenosis (narrowing of the nerve roots serving the affected vertebrae). If medical science considers the cervical spine to be part of the "vertebral column with associated muscles (erector spinae and trasversospinalisis) and overlying integument" so as to be within the meaning of the term "back" — a fact conceded by counsel for appellee in its brief — I do not understand why the judicial system (including the quasi-judicial Commission) should be deemed better informed.

Gary W. BARBER *v.* DIRECTOR, Employment Security Department, and Rust Constructors, Inc.

E 98-66 992 S.W.2d 159

Court of Appeals of Arkansas
Division III
Opinion delivered June 9, 1999

[redacted]

J.T. Skinner, for appellant.

Phyllis Edwards, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Gary Barber appeals the denial of unemployment benefits after resigning from his position at Rust Constructors, Inc., on November 20, 1997. He had worked for Rust Constructors, Inc., for approximately nine months. He filed for benefits at the Employment Security Department, and appealed to the Appeal Tribunal and the Board of Review. The employer did not participate in any of

the hearings. He did not prevail at any of those levels, and he now appeals to this court. We affirm.

In appeals of unemployment compensation cases, the findings of fact by the Board of Review are conclusive if supported by substantial evidence, and our review is limited to determining whether the Board could reasonably reach its decision upon the evidence before it. *Hiner v. Director*, 61 Ark. App. 139, 965 S.W.2d 785 (1998); *Rodriguez v. Director*, 59 Ark. App. 8, 952 S.W.2d 186 (1997). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. This court reviews the evidence and all reasonable inferences deducible therefrom in a light most favorable to the Board of Review's findings. *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). We do not conduct a de novo review in appeals from the Board of Review. Even when there is evidence upon which the Board might have reached a different decision, our review is limited to a determination of whether the Board could have reasonably reached its decision based upon the evidence before it. *Hiner, supra*; *Cowan v. Director*, 56 Ark. App. 17, 936 S.W.2d 766 (1997).

Appellant was denied benefits, pursuant to Ark. Code Ann. § 11-10-513(c)(1) (1996), because the Board determined that he had left his last work voluntarily and not for good cause connected with the work. Appellant testified that the day before he resigned, he took off work to go deer hunting and had not called in to inform his supervisor because he did not have access to a telephone in the deer woods. The next day, he and a fellow worker, who had also taken off to go deer hunting, reported to work and were confronted by their supervisor regarding their absence. The supervisor presented each of them a written reprimand, and each refused to sign it. Appellant objected to the reprimand, maintaining that there was a disparate application of the absenteeism policy. Thereafter, the supervisor retrieved the reprimand documents and gave them two choices — either take a demotion with a pay cut or resign. Appellant chose to resign and seek benefits. In his initial application for unemployment compensation, appellant stated that he did not remember why he did not call in, though he knew he was supposed to inform his employer if he was

not going to report for work. During the hearing before the Appeal Tribunal, he testified that he did not call in because he was in the deer woods and had no access to a telephone. The Board found that the reprimand and demotion were reasonable means by which the employer sought to maintain management authority and did not constitute good cause connected with the work for appellant to leave his employment.

The term "good cause" means a justifiable reason for not accepting the particular job offered. *Rowlett v. Director*, 45 Ark. App. 99, 872 S.W.2d 83 (1994). To constitute good cause, the reason for refusal must not be arbitrary or capricious, and the reason must be connected with the work itself. *Id.* The question of what is good cause must be determined in the light of the facts in each case. *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (Ark. App. 1980). Although benefits will be denied an employee who leaves employment for general economic reasons not connected with some specific unfairness perpetrated by his employer, where the employer does an act that causes economic injury to the employee, that act may be good cause connected with the work within the meaning of the statute. *Jackson v. Daniels*, 269 Ark. 714, 600 S.W.2d 427 (1980); and *see Hiner v. Director, supra.*

We have recently held that good cause sufficient to have a successful unemployment benefits claim is cause that would reasonably impel an average able-bodied, qualified worker to give up his employment. *Garrett v. Director*, 58 Ark. App. 7, 944 S.W.2d 865 (1997). Good cause depends not only on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting, but also depends on the reaction of an average employee. *Id.* Good cause for quitting work involves good faith, the desire to work, and whether the employee took appropriate steps to remedy the situation causing the problem with the work; this issue presents a question of fact. *Morton v. Director*, 22 Ark. App. 281, 742 S.W.2d 118 (1987). It is settled that the factual determinations of the Board of Review must be affirmed if supported by substantial evidence and that this means legal evidence that a reasonable mind might accept as adequate to support a conclusion. *Victor Indus. Corp. v. Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981).

On these facts, we agree with the Board and find there to be substantial evidence to support its conclusion. There was proof in the record before the Board that appellant could have accepted the written reprimand and then taken appropriate steps to remedy what he perceived to be an arbitrary application of the attendance policy. Although appellant suffered an economic injury as the result of the employer's disciplinary action, the Board's determination that appellant's demotion and reduction in pay were reasonable responses by the employer to appellant's misconduct is supported by substantial evidence.

In closing, we note that appellant mentioned in his brief that the denial of benefits by the Board was on a ground "unanticipated by the Claimant in that he had previously been disqualified for violation of the employer's absenteeism policy." We disagree with this statement. Presumably, what is meant by this comment is that there was a change in grounds for denial at the Appeal Tribunal level and that this constituted an unfair lack of notice of the issues. At the local employment security office, appellant was denied benefits for misconduct connected with the work (*i.e.* violating the absenteeism policy). On appeal to the Appeal Tribunal, the referee modified the denial, basing her decision on Ark. Code Ann. § 11-10-513(a)(1), which is voluntarily quitting employment without good cause. The Board conducted a de novo review and affirmed the decision of the Appeal Tribunal. While there is some authority for reversal when the basis of denial is changed for the first time at the Board of Review level, *Linscott v. Director*, 9 Ark. App. 103, 653 S.W.2d 150 (1983), it has no application in the case before us. Here, the Board of Review denied benefits on the same basis as the Appeal Tribunal, and appellant did not seek a ruling from the Board of Review on the propriety of the modification by the Appeal Tribunal.

Affirmed.

CRABTREE and ROAF, JJ., agree.

Evelyn BALLETTI *v.* Audra MULDOON

CA 98-1098 991 S.W.2d 633

Court of Appeals of Arkansas
Division I
Opinion delivered June 9, 1999
[Petition for rehearing denied July 28, 1999.]

Frances Morris Finley, for appellant.

Hurst Law Offices, by: *Q. Byrum Hurst, Jr.*, and *Tylar C.M. Tapp III*, for appellee.

JOHN MAUZY PITTMAN, Judge. This appeal is brought from an order of the Garland County Probate Court denying probate of the last will and testament of John Hollyfield. We reverse and remand.

John Hollyfield died on October 9, 1996. He was survived by four children: Joni Evans, Ginger Hollyfield, James Hollyfield, and appellee Audra Muldoon. On June 26, 1996, three and one-half months prior to his death, Hollyfield executed a will in which he devised his entire estate to the John E. Hollyfield Living Trust. That same day, he amended the trust to make his longtime companion, appellant Evelyn Balletti, its primary beneficiary. Following Hollyfield's death, Balletti filed a petition to probate the will. Her petition was contested by Hollyfield's children. After a hearing, the probate judge found that significant questions existed regarding Hollyfield's execution of the will and Hollyfield's mental capacity. He therefore refused to probate the will. On appeal, appellant contends that the will was executed in accordance with the law and that appellee failed to prove that Hollyfield lacked the testamentary capacity to make the will.

On June 28, 1994, Hollyfield established the John E. Hollyfield Living Trust to receive the benefits to which he was entitled under several family trusts. Although the record does not contain the terms of the Living Trust, we do know that First Commercial Trust Company was named as trustee. On the same day that he established the Living Trust, Hollyfield signed a will devising all of his property to the trust. The will named First Commercial as Hollyfield's personal representative. Unfortunately, Hollyfield did not sign the signature page of the will. However, he initialed each page and signed the last page containing an attestation clause. The will was drafted by attorney David Goldman. One of the witnesses to the will was Patti Frazier, a secretary in Goldman's office.

Approximately two years later, Hollyfield decided to amend the Living Trust to replace First Commercial with Boatmen's Bank as trustee. On or about June 7, 1996, he contacted Gold-

man's office and asked that the amendment be drafted quickly. According to Goldman's secretary, Barbara Funtenatto, Goldman was out of the office. Because Hollyfield was in a hurry, she drafted the amendment herself, with the advice and counsel of another lawyer that was familiar with trust work. She then gave the amendment to Hollyfield. Later, she showed the amendment to Goldman for his approval.

On June 21, Hollyfield was hospitalized with severe respiratory failure. According to Dr. George Queen, Hollyfield's physician for fifteen to twenty years, Hollyfield was seriously ill when admitted to the hospital. However, he improved over the next several days. During the course of his treatment, he received an antibiotic, a diuretic, a decongestant, Darvocet (a pain-killing drug), and Prednisone (an anti-inflammatory drug). Dr. Queen planned to release him from the hospital on July 4. However, on July 4, Hollyfield took a turn for the worse and was placed in the intensive-care unit. He remained hospitalized until August 1, approximately two months before his death.

On June 26, 1996, five days after he was hospitalized, Hollyfield executed the will that is the subject of this case. His execution of the will and several other documents that same day came about in the following manner. According to David Goldman, Hollyfield advised him that he wanted to revise his 1994 will and amend the terms of the Living Trust. Goldman drafted the necessary documents and directed Barbara Funtenatto and Patti Frazier to take them to the hospital for Hollyfield's signature. According to Funtenatto, she presented Hollyfield with three documents. The first was the revised will. It was the same in all material respects as the 1994 will except that it named Boatmen's Bank as personal representative rather than First Commercial. The second document was a re-typed version of the amendment that Funtenatto had prepared on June 7, which changed the trustee from First Commercial to Boatmen's. Funtenatto said that she had never been comfortable with the form of the amendment, so she re-typed it in the same format as the third document she was carrying, a second amendment to the Living Trust. This amendment apparently made several changes in the terms of the trust. It provided that, upon Hollyfield's death, appellant Evelyn Balletti

would receive $1,800 per month, plus the house that the two shared; an additional $300 per month if the house was not paid off at the time of Hollyfield's death; and all personal property and vehicles. The remainder of the trust property was to be distributed to Hollyfield's grandchildren. His children were to take nothing under the trust.

Funtenatto testified that she went over the documents with Hollyfield in a general way. According to her, he was already familiar with their contents. Hollyfield then signed the will. His signature was witnessed by Patti Frazier and by Doug Driggers, a patient representative at the hospital. Funtenatto notarized the signatures. The trust amendments, signed at the same sitting, did not require witnesses.

Later in the day on June 26, according to David Goldman, he was contacted by Hollyfield regarding an error in the second amendment. Goldman had mistakenly used the figure of $1,800 rather than $1,500 as the amount to be distributed to appellant. Goldman asked Funtenatto to make the necessary changes and take the corrected version to the hospital for Hollyfield's signature. She did so, saw Hollyfield sign the document, and notarized his signature the next day.

After his release from the hospital, Hollyfield executed no further documents pertaining to his will or his trust. There is no evidence that at any time prior to his death on October 9, 1996, he took any action to disavow the will or trust amendments he had executed on June 26.

After appellant filed her petition to probate the will and appellee filed her will contest, two days of hearings were held, several months apart. Appellee and her siblings contended that the signature on the will was suspect and that their father had been too ill to have the mental capacity to execute a will. The probate judge agreed and entered an order denying probate of the will. This appeal followed.

Before we begin our analysis of the issues, it is important to establish the scope of our review. We limit our decision to the efficacy of the 1996 will, not the 1994 will or the trust amend-

ments. The 1994 will was not the subject of appellee's contest. The efficacy of the trust amendments was outside the jurisdiction of the probate court, being a chancery matter. *See Schenebeck v. Schenebeck*, 329 Ark. 198, 947 S.W.2d 367 (1997). The probate judge recognized this and viewed the questions surrounding the trust amendments merely as evidence bearing on the validity of the will. We will do likewise.

Probate cases are reviewed *de novo* on the record. *Guess v. Going*, 62 Ark. App. 19, 966 S.W.2d 930 (1998). However, an order of the probate court will not be reversed unless clearly erroneous. *Id.* Clearly erroneous means that, although there is evidence to support the court's findings, the appellate court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.* In this case, although there is evidence to support the probate judge's decision, the evidence as a whole firmly convinces us that a mistake has been committed.

To explain the reasons behind our holding, we explore the manner in which the probate judge reached his decision. In his remarks at the close of the evidence and in his final order, the judge cited numerous factors that gave him pause concerning the genuineness of Hollyfield's signature on the will and Hollyfield's mental capacity. First, he was concerned that Barbara Funtenatto did not testify that she had taken a revised second amendment to Hollyfield until she was specifically asked about it at the second hearing. Secondly, he recalled appellant's testimony as being that the signature on the original second amendment was not Hollyfield's. Next, the court expressed concern that Patti Frazier had witnessed the 1994 will, even though Hollyfield had not properly signed the will. Further, the judge cited "the medication testimony and Dr. Queen's testimony." By "medication testimony," he is referring to the testimony of pharmacist Donald Cobb that a patient taking Darvocet and Prednisone would be mentally impaired to some extent. Finally, the judge discussed "the tremendous disparity" in Hollyfield's signatures between the time he entered the hospital on June 21 and his placement in intensive care on July 4. When Hollyfield checked into the hospital on June 21, he signed a patient questionnaire. On June 26, he allegedly executed the will and the trust amendments. On July 4, he signed a

procedure authorization form. According to the probate judge and the testimony at trial, the signatures differed considerably.

The above factors, coupled with Hollyfield's illness, led the court to conclude that serious doubts were raised about both the execution of the will and Hollyfield's capacity "which when taken together then results in the burden by the proponent . . . together with the countervailing evidence not having been met."

We first address the issues surrounding the genuineness of Hollyfield's signature on the will. Appellant argues that she proved the will was executed in accordance with the formalities of the law and that the probate judge should not have disregarded the testimony of the witnesses to the will. We agree. A will, other than a holographic one, must be executed by the signature of the testator and at least two witnesses. Ark. Code Ann. § 28-25-103(a) (1987). Appellant, who offered the will for probate, had the burden of proving the genuineness of Hollyfield's signature. *Ross v. Edwards,* 231 Ark. 902, 333 S.W.2d 487 (1960). We believe she met her burden in this case.

With due respect to the probate judge, the factors he mentioned as the bases for his ruling either have only the slightest probative value with regard to the signature on the will or they are based on a misunderstanding of law or fact. It is true that Barbara Funtenatto's credibility was compromised when she did not mention the revised second amendment at the first hearing. However, that fact has very little bearing on the question of whether Hollyfield actually signed his will. With regard to appellant's testimony that the signature on the original second amendment purportedly was not Hollyfield's, her testimony was not so unequivocal as the trial judge remembered. Her testimony was in fact unclear on this point. Although she expressed slight doubt that the signatures on the second amendments were the same, she did affirm that the signatures were "similar." As to Patti Frazier's witnessing of Hollyfield's signature on the 1994 will, the judge was apparently concerned that Frazier witnessed a will in which there was no testator's signature. Although Hollyfield did not sign the proper signature page, he initialed each page and signed an attestation page at the end of the will. Our supreme court has recog-

nized that such a signature may meet the formal requirements for executing a will. *See Scritchfield v. Loyd*, 267 Ark. 24, 589 S.W.2d 557 (1979). Therefore, it is not as if Frazier witnessed a document that was obviously invalid. Finally, the court's concern with the disparity in signatures on the documents signed while Hollyfield was hospitalized did not take into account that Hollyfield was in severe physical distress when he signed the June 21 and July 4 documents.

We fully understand the probate court's concern that something appeared amiss in the execution of the signatures of the trust amendments. However, when we focus solely on the signature to the 1996 will, we see that the only truly disinterested witness, Doug Driggers, testified that he saw Hollyfield sign the will. There is nothing in the record, as abstracted, that would merit disregarding Driggers's testimony, and on *de novo* review we find it to be persuasive. Further, the only other persons in the room, Barbara Funtenatto and Patti Frazier, testified that they also observed Hollyfield signing the will. David Goldman testified that he and Hollyfield had thoroughly discussed the revisions to be made to the will. The will was virtually identical to the one Hollyfield signed in 1994. Finally, Hollyfield made no attempt to change the will between the time he executed it and the time of his death, although he did return home, conduct other business, and receive visitors, including his attorney, without the appellant present. Although two of Hollyfield's children testified that the signature on the 1996 will was not his, they offered no basis for their testimony other than their bare assertions. Further, each admitted that she stood to benefit from such testimony. Upon our *de novo* review of the entire evidence, we hold that the probate judge's findings regarding the execution of the will are clearly erroneous.

Next, we address the issues concerning Hollyfield's testamentary capacity. If the maker of a will has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property and to comprehend how he is disposing of it, and upon what consideration, he possesses sufficient mental capacity to execute such instrument. *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984). Appellant argues that the probate judge in this case erred by placing the burden of proof on her

to prove Hollyfield's mental capacity and that he erred in finding that Hollyfield was incompetent to execute his will. We agree with appellant on both counts.

With regard to the burden of proof, once the proponent of a will, such as appellant, shows that the will is rational on its face and has been executed and witnessed in accordance with the testamentary formalities, the party challenging the will's validity is required to prove by a preponderance of the evidence that the testator lacked mental capacity. *In re Estate of Davidson*, 310 Ark. 639, 839 S.W.2d 214 (1992). Appellant proved that the will was executed in accordance with the law. Therefore, the burden was appellee's to show that Hollyfield lacked the mental capacity to execute his will.

In its finding on this issue, the probate court relied on evidence that Hollyfield was ill on June 26, 1996, and on testimony by Donald Cobb that the drugs Hollyfield was taking could cause mental impairment. The evidence regarding the effect of Hollyfield's illness consisted primarily of the testimony of appellee and her sisters that their father was very ill and that, on or around June 26, he spoke of things in the past as though they were happening in the present. However, none of them could say with certainty that they saw their father on the 26th. Regarding Donald Cobb's testimony concerning the effects of Darvocet and Prednisone, he admitted that Dr. Queen would be in a better position than he to judge the effect of these drugs on Hollyfield. Dr. Queen testified that, while the drugs might cause impairment in some patients, he knew of nothing that would render Hollyfield incompetent to sign his will on June 26.

Evidence of Hollyfield's competency was offered by the only persons who were in the room with Hollyfield when he signed the will — Doug Driggers, Barbara Funtenatto, and Patti Frazier. Each of them said that Hollyfield was alert and aware of what he was doing when he signed the will. Further, David Goldman testified that, in his conversations with Hollyfield, he knew the contents of his estate and the objects of his bounty. According to Goldman, Hollyfield did not provide for his children in his Living Trust because they were already provided for by another family trust. Finally, the will Hollyfield executed on the 26th was virtu-

ally identical to the will he signed in 1994, a time when his competency was not questioned.

There is no doubt that Hollyfield was seriously ill at the time he executed his will and may have had some mental lapses during the course of his hospital stay. However, physical incapacity and partial eclipse of the mind will not invalidate a will if the testator has sufficient capacity to remember the extent and condition of his property and who his beneficiaries are. *Green v. Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983). Likewise, proof of forgetfulness or abnormal acts does not necessarily establish a lack of testamentary capacity. *Rogers v. Crisp*, 241 Ark. 68, 406 S.W.2d 329 (1966).

Based upon the foregoing, we hold that the probate judge's finding that John Hollyfield lacked the capacity to execute his will was clearly erroneous.

Finally, we address appellee's contention that this case should be affirmed due to deficiencies in appellant's abstract. She complains that appellant did not abstract the pleadings or Hollyfield's medical records. We had no difficulty with the absence of the medical records from the abstract. They were sufficiently explained in the testimony of Dr. Queen. Regarding the pleadings, such as the petition to probate the will and the petition contesting the will, it would have been helpful if they had been abstracted. Generally, pleadings and the order appealed from are the bare essentials of an abstract. *See Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999); *Oliver v. Washington County*, 328 Ark. 61, 940 S.W.2d 884 (1997). Appellant provided us with the order appealed from but not the pleadings. Nevertheless, her omission was not so flagrant as to make a decision "well nigh impossible." *See Arkansas Department of Human Servs. v. Southerland*, 65 Ark. App. 97, 985 S.W.2d 336 (1999). Therefore, we decline to affirm on this basis.

For the reasons stated, the case is reversed and remanded with directions to enter an order consistent with this opinion.

Reversed and remanded.

STROUD and GRIFFEN, JJ., agree.

Azalea MATTHEWS *v.* STATE of Arkansas

CA 98-1110 991 S.W.2d 639

Court of Appeals of Arkansas
Division IV
Opinion delivered June 9, 1999

William R. Simpson, Jr., Public Defender, by: *Lott Rolfe, IV*, Deputy Public Defender, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in this juvenile-delinquency case is the daughter of Larry and Shirley Matthews. Larry Matthews died and Shirley Matthews was injured in a fire that began in the early morning hours of February 16, 1998, outside the master bedroom of their home. Traces of

accelerants were found in the hallway leading to the master bedroom, and gasoline cans were found in and outside the home. Appellant gave a statement in which she admitted that she poured the contents of a half-full can of gasoline in front of her mother's bedroom door, set fire to the gasoline, and went outside. After a juvenile-court hearing, appellant was found to have committed capital murder and attempted capital murder, was adjudicated delinquent, and was committed to the custody of the Division of Youth Services for an indeterminate period of time not to exceed her eighteenth birthday, with a recommendation that she be detained until she reaches the age of twenty-one. From that decision, comes this appeal.

For reversal, appellant contends that her statement to the police should have been suppressed because the police officer who took her statement did not obtain her parent's consent to the waiver of her right to counsel or inform her that she had the right to have a parent present with her during questioning; because her statement was not the product of a knowing and intelligent waiver of her rights under Ark. Code Ann. § 9-27-317 (Rep. 1998); and because her statement was coerced in violation of the Fifth Amendment to the United States Constitution. Appellant also contends that there was insufficient evidence to support her adjudication as a delinquent for committing capital murder and attempted capital murder. We affirm.

■ We first address appellant's contention that the evidence was insufficient to support her adjudication as a delinquent for committing capital murder and attempted capital murder. In reviewing the sufficiency of the evidence in a delinquency case, we consider only the proof that tends to support the finding of guilt, and we will affirm if the finding is supported by substantial evidence. *McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998).

■ Viewing the evidence, as we must, in the light most favorable to the appellee, the record shows that appellant admitted that she poured gasoline in the hallway leading to her parents' bedroom and ignited it with a match. Appellant's sister was getting her baby ready to leave and getting her keys while appellant

did this. After lighting the gasoline, appellant, her sister, and the baby left the house. She stated that she heard her daddy screaming as the room burned, and heard glass breaking as he tried to escape the room but was thwarted by bars on the window. When asked to explain her reason for starting the fire, appellant responded that she "just wanted to do something." Appellant's mother testified that appellant was disciplined earlier in the week for being suspended from school, and that this was the first time that Mr. Matthews had whipped her. A fireman who arrived at the scene testified that the appellant, her sister, and the baby were in the front yard when he drove up, that the girls were not upset but were instead unusually calm, and that they did not approach him to tell him that their parents were in the flaming house, but instead related this information only after being asked if anyone was still inside. Neither of the girls exhibited any emotion whatsoever nor asked how their father was. After the fire was extinguished, however, appellant's sister asked the firemen to see if there was $700.00 in her father's pocket. Shortly thereafter, the girls were seen giggling and laughing in appellant's bedroom. The arson investigator for the Little Rock Fire Department testified that he found no accidental causes for the fire, but that hydrocarbon traces were detected in the hallway leading to the master bedroom. He offered his expert opinion that the fire was started by some sort of accelerant. We hold that the evidence was sufficient to support her adjudication as a delinquent for committing capital murder and attempted capital murder.

Appellant next contends that her statement should have been suppressed because, prior to questioning, she was not informed of her right to speak with or have a parent or guardian present during questioning, and because no parent or guardian consented to appellant's waiver of her right to counsel. This argument, however, fails to take account of the manner in which the law was changed by Act 67 of the Second Extraordinary Session of 1994, which eliminated the requirement that a juvenile's waiver of rights form must be signed by a parent, guardian, or custodian. *Misskelley v. State*, 323 Ark. 449, 469, 915 S.W.2d 702, 712 n.5 (1996). Prior to 1994, Ark. Code Ann. § 9-27-317 (Repl. 1993) provided, in pertinent part, that:

> (a) Waiver of the right to counsel shall be accepted only upon a finding by the court from clear and convincing evidence, after questioning the juvenile, that:
>
> * * *
>
> (3) The parent, guardian, custodian, or counsel for the juvenile has agreed with the juvenile's decision to waive the right to counsel.
>
> * * * *
>
> (f) All waivers of the right to counsel shall be in writing and signed by the juvenile and his parent, guardian, or custodian.

This statute was significantly changed by Act 67 of the Second Extraordinary Session of 1994, and now provides that:

> (a) Waiver of the right to counsel at a delinquency or family in need of services *hearing* shall be accepted only upon a finding by the court from clear and convincing evidence, after questioning the juvenile, that:
>
> * * *
>
> (3) The parent, guardian, custodian, or counsel for the juvenile has agreed with the juvenile's decision to waive the right to counsel.
>
> * * * *
>
> (f) All waivers of the right to counsel, except those made in the presence of the court pursuant to subsection (a) of this section, shall be in writing and signed by the *juvenile.*

Ark. Code Ann. § 9-27-317 (Repl. 1998) (emphasis added). After limiting the provisions regarding waiver of one's right to counsel in subsection (a) to the enumerated types of hearings, Act 67 also added a new subsection, Section 9-27-317(g)(2), to deal specifically with waiver of counsel in the context of interactions between law enforcement officers and juveniles, and which provides that:

> (g)(2)(A) No law enforcement officer shall question a juvenile who has been taken into custody for a delinquent act or criminal offense if the juvenile has indicated in any manner that he:
>
> (i) Does not wish to be questioned;

(ii) Wishes to speak with a parent or guardian or to have a parent or guardian present; or

(iii) Wishes to consult counsel before submitting to any questioning.

(B) Any waiver of the right to counsel by a juvenile shall conform to subsection (f) of this section.

The legislative intent behind these changes was clearly defined in the emergency clause of Act 67, which stated that:

> It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas meeting in the Second Extraordinary Session of 1994 that *the present law requiring the written agreement of a parent, guardian, or custodian before a juvenile taken into custody on an allegation of delinquency may waive counsel and make a statement severely hampers the ability of law enforcement officers to question detained juveniles.* It is further found that confusion exists as to the authority of law enforcement officers to question juvenile witnesses without the prior approval of a parent, guardian, or custodian. Therefore, *in order to immediately allow juveniles taken into custody to waive counsel and make a statement under the same standard as adult arrestees*, and to clarify the authority of law enforcement officers to take statements of juvenile witnesses, an emergency is hereby declared to exist . . . .

(Emphasis added.)

Appellant asserts that, because a person subject to custodial interrogation must be informed of his right to remain silent and right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966), appellant should likewise have been informed of her right to have a parent or guardian present during questioning. We do not agree. The rights enumerated in the now-familiar *Miranda* warnings arise out of the federal constitution; appellant's right to have a parent or guardian present during questioning arises out of state law. Appellant cites no authority for the proposition that *Miranda* applies to rights arising exclusively under state law. In *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996), the Arkansas Supreme Court held that, under subsection (g), the burden is on the juvenile to ask to consult with his parent. Consequently, we hold that the trial court correctly ruled that the police officer was not required to inform appellant of her right to have a parent or

guardian present prior to questioning. Furthermore, in light of the changes effected by the 1994 amendment to section 9-27-317 that limited its scope to delinquency or family in need of services hearings, and the clear legislative intent to permit juveniles to waive counsel during police investigations in the same manner as adult arrestees, we hold that it was unnecessary under current law for appellant's parent, guardian, or custodian, to consent to her waiver of the right to counsel in connection with her custodial statement.

Appellant further contends that her statement should have been suppressed because it was not the product of a knowing and intelligent waiver of her rights under Ark. Code Ann. § 9-27-317. We make this determination by reviewing the totality of the circumstances surrounding the voluntariness of the waiver, including the age, experience, education, background, and intelligence of the defendant, as well as lack of advice of constitutional rights, length of detention, repeated and prolonged questioning, and the use of physical punishment. We will reverse a trial court's ruling on this issue only if it was clearly erroneous. *Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998); *see Noble v. State*, 319 Ark. 407, 892 S.W.2d 477 (1995).

Section 9-27-317(f) provides that all waivers of the right to counsel, except those made in the presence of the court pursuant to section 9-27-317(a), shall be in writing and signed by the juvenile. The record shows that appellant was thirteen years old and in seventh grade at the time of the investigation. She had some experience with juvenile court, having been previously found delinquent for fleeing in 1995. By the time the present investigation commenced, Mr. Matthews had been pronounced dead and Mrs. Matthews was hospitalized. Detective Knowles took appellant's statement. He arrived at the police department at approximately 3:15 a.m., and the interview concluded at 4:24. Detective Knowles stated that, because of appellant's age, he employed a different procedure when he advised her of her rights. Although, when questioning an adult, Detective Knowles would normally explain the *Miranda* rights one time only, because of appellant's age he went through the *Miranda* rights twice. He stated that appellant verbally and physically indicated that she understood the rights, and that he was convinced she understood the waiver when

she signed it. This testimony was borne out by the transcript of the interview. Detective Knowles further stated that appellant appeared to be alert and oriented, that her demeanor was very cool and calm, and that her speech was clear and forthright.

The essence of appellant's argument under this point is that, given appellant's age, no knowing and intelligent waiver of rights was possible unless an adult was present. However, in a case involving a twelve-year-old defendant, we noted that youth alone will not prevent a voluntary confession or a knowing waiver of constitutional rights. *Ingram v. State*, 53 Ark. App. 77, 918 S.W.2d 724 (1996). Furthermore, it is clear that appellant was expressly offered independent adult advice and counsel when she was informed that she could be provided with an attorney free of charge. Although appellant's age is a factor to consider in determining the voluntariness of her waiver, *id.*, our review of the totality of the circumstances has not convinced us that the trial court's ruling on the issue of waiver was clearly erroneous.

Finally, appellant contends that her statement should have been suppressed because it was obtained through intimidation and coercion. At the delinquency hearing, appellant testified that she originally told the police that she did not set her house on fire, and made her self-incriminatory statement only because the police officer told her he was going to send her to the county jail if she kept on lying. However, this differed from her recorded statement, in which appellant affirmed that she had been treated "okay," had not been hurt by anyone, and had not been told what to say. Furthermore, Detective Knowles testified that, although he did not believe appellant's initial exculpatory version of the events, he did not intimidate, coerce, or influence appellant in any way regarding her statement. When testimony on the circumstances surrounding the taking of a custodial confession is conflicting, it is the trial court's province to weigh the evidence and resolve the credibility of the witnesses. *Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998). In light of the totality of the circumstances, we hold that the trial judge did not err in finding that appellant's confession was voluntarily given.

Affirmed.

ROAF and HART, JJ., agree.

Catherine TILLERY *v.* Carroll EVANS

CA 98-1070 991 S.W.2d 644

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 9, 1999

Law Offices of Susan A. Fox, by: *Susan A. Fox*, for appellant.

Cochran, Schneider & Croxton, P.A., by: *Mary M. White Schneider*, for appellee.

JOSEPHINE LINKER HART, Judge. The appellant, Catherine Tillery, appeals from the chancery court's order granting the appellee, Carroll Evans, additional visitation with their minor child. The appellant argues that the chancery court erred when it increased the appellee's visitation rights when such relief was not prayed for in the appellee's petition and when there was no proof of a significant change in circumstances. While her first argument was not preserved for appellate review, we find her second argument meritorious and reverse and remand for proceedings consistent with this opinion.

The appellant and the appellee are the biological parents of Macy Evans, who was born on June 7, 1995. On May 9, 1996, the appellee filed a complaint seeking custody of Macy, subject to reasonable visitation for the appellant. The appellant, on May 15, 1996, filed a counterpetition to establish paternity in which she claimed that she was the appropriate party to have custody of Macy, subject to reasonable visitation for the appellee. An agreed order of paternity was entered on August 6, 1996, that granted custody of Macy to the appellant and specifically set out the appellee's visitation. The visitation included alternating weekends, certain alternating holidays (which included Easter), Christmas Day to December 30 of each year, Father's Day, one week during the months of July and August, and other times mutually agreed to by the parties.

On April 22, 1998, the appellee filed a petition requesting that the appellant be cited for contempt, for allegedly violating his Easter holiday visitation. In this petition, the appellee also sought a change of the custody of Macy, alleging that the appellant's behavior was erratic, that he believed the appellant was abusing drugs or alcohol, and that she was residing with a brother-in-law who abused his own wife and children. On April 23, 1998, the court entered an order setting a temporary hearing for May 5, 1998, for the appellant to show cause why she should not be held

in contempt for her failure to comply with the court's prior visitation order.

At the hearing, the appellee testified and then called the appellant. After the appellee's counsel questioned the appellant on direct examination, the court remarked that it had "heard enough" and dismissed the appellee's petition. The court further stated, "If you want to try again and have some factual basis for your claim, a change of circumstances, then you will be free to do that within ten days." The court further stated, "[I]f you find that the child is in danger of being some place in some one particular person's company and you can state the factual basis for that then you may have a cause of action." It further remarked, "I don't see anything wrong with either parent that's been shown to exist here." The court, however, further ordered, as stated in an order entered May 22, 1998, that "the child's visitation shall be as ordered in the original Order of Paternity dated the 6th day of August, 1996, which shall include the Court's standard visitation which allows that each party is entitled to one-half (1/2) of the child's free time to be spent with each parent until or upon such time as the child becomes school age and begins attending public school."

The appellant first argues that the chancery court erred in increasing the appellee's visitation with Macy when he did not request such relief in his petition for contempt. That argument, however, was not made below. Consequently, it was not preserved for appellate review. *See, e.g., Jones v. Jones*, 27 Ark. App. 297, 770 S.W.2d 174 (1989).

Citing *Leonard v. Stidham*, 59 Ark. App. 5, 952 S.W.2d 189 (1997), in which this court reversed an identical modification order, the appellant argues that the chancery court erred when it radically increased the appellee's visitation rights when there was not any proof of a significant change in circumstances. In a nonjury trial, a party who does not challenge the sufficiency of evidence does not waive the right to do so on appeal. *Jones, supra.* In reviewing chancery court's findings of fact, we give due deference to its superior position to determine the credibility of the witnesses and the weight to be accorded their

testimony and do not reverse unless the court's findings were clearly erroneous. *Reaves v. Reaves*, 63 Ark. App. 187, 975 S.W.2d 878 (1998). Modification of visitation rights is not permitted unless there is a sufficient change in circumstances pertinent to visitation. *Leonard, supra.* We indulge in the presumption that the trial court acted properly and made the findings necessary to support its judgment. *Jocon, Inc. v. Hoover*, 61 Ark. App. 10, 964 S.W.2d 213 (1998).

Here, the court summarily dismissed a petition that alleged that the appellant was acting erratically, was abusing drugs or alcohol, and was residing with a brother-in-law who abused his own wife and children. After it dismissed the petition, it remarked that the parties should "state the factual basis" if Macy was in danger in a particular person's company and that there was not "anything wrong" with the appellant. In view of the court's dismissal of the petition and its remarks, there were not sufficient facts from which the court could determine that there was a change in circumstances supporting the modification of visitation. *See Leonard, supra* (the chancery court erred in making a significant modification of visitation rights in the absence of a material change in circumstances). The modifications by the chancellor were clearly erroneous, and we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

ROAF and GRIFFEN, JJ., agree.

ROGERS, J., concurs.

PITTMAN and JENNINGS, JJ., dissent.

JUDITH ROGERS, Judge, concurring. I concur in the result to reverse and remand this case. I point out, however, that the chancellor cut off the hearing and testimony in this case and stated he would hold a hearing in ten days. Instead, the chancellor handed down a decision and did not allow appellant to put on her case-in-chief. Thus, I believe that the case should be reversed and remanded for a full hearing.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent from the majority's holding that there was no proof of a signifi-

cant change in circumstances to support a modification of visitation. The parties are the parents of a child born in 1995. Although the parties have never been married, the child was born while appellant was cohabiting with appellee in appellee's house. Some time after the child's birth, the parties briefly separated. Appellant moved away from appellee's home, paternity was established, and an order providing for child support and visitation was entered. This is the visitation order that was modified by the chancellor in the present case. Since that order was entered, appellant returned to appellee's home, cohabited for a time, and left again. She and the child are currently living with relatives. Appellee has remained in the home where the child has lived for all but four months of her life.

The majority appears to have concluded that, because the chancellor did not find a sufficient change of circumstances to support a change of custody, there was therefore no proof of a change of circumstances relating to visitation. This conclusion is in error. Our supreme court has held that, although it is necessary to establish that there are changed circumstances pertinent to visitation in order to modify visitation rights, it is not necessary to establish the same degree of changed circumstances that would be necessary to warrant a change of custody. *Harris v. Tarvin*, 246 Ark. 690, 439 S.W.2d 653 (1969). The chancellor's comments regarding the absence of sufficient proof to justify a change of custody therefore have no bearing on the question of whether the circumstances have changed sufficiently to support a modification of visitation.

The record shows that, since the previous visitation order was entered, appellant moved out of appellee's home and, together with the child, went to live in the home of a relative under circumstances that are crowded and less than ideal. There was evidence to show that the environment and influences at appellant's current residence are detrimental to the best interest of the child. These facts quite clearly establish that there has been a substantial change of circumstances sufficient to warrant increased visitation. *See Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993).

I respectfully dissent.

JENNINGS, J., joins in this dissent.

Mark WILSON *v.* Deanna WILSON

CA 98-724 991 S.W.2d 647

Court of Appeals of Arkansas
Division IV
Opinion delivered June 9, 1999

[redacted]

[redacted]

Ronald L. Griggs, for appellant.

Robert L. Depper, Jr., for appellee.

JOSEPHINE LINKER HART, Judge. After the parties' divorce, the chancellor awarded appellee, Deanna Wilson, custody of the parties' two children and allowed appellee to move with the children to California. Appellant, Mark Wilson, argues on appeal that both rulings were clearly against the preponderance of the evidence. We disagree and affirm.

The court reviews chancery cases *de novo* and reverses the findings of the chancellor only if his findings are clearly against the preponderance of the evidence. *Rector v. Rector*, 58 Ark. App. 132, 947 S.W.2d 389 (1997). In deciding which parent should have custody of a child and what is in the best interest of the child, the chancellor has the burden of evaluating the witnesses and their testimony. *Id.*

Appellant and appellee married April 24, 1984, separated September 9, 1996, and divorced in October 1997. During the

marriage, they lived in El Dorado, near appellant's family. After the separation and more than a year before the divorce, appellee, who worked as a travel agent, obtained employment with an agency in Little Rock, and she and her daughters moved to Benton. In June 1997, appellee was laid off from her job for medical reasons, and she remained unemployed at the time of the divorce hearing.

Appellee asserts on appeal that she is the proper custodian for the children because she always has been the primary caretaker for the children. According to her, appellant spent little time with his family, choosing instead to spend his time hunting and going out with friends. When he was home, he separated himself from the family by eating his meals in front of the television instead of joining appellee and the children at the dining table. Appellee related that after the separation, appellant, in the presence of the children, became physically violent toward her and had on several occasions threatened to commit suicide. Further, appellant did not visit his children from Christmas 1996 until appellee took the children to El Dorado during their spring break from school in 1997. During the children's visit, appellant went to Colorado, leaving the children with grandparents. Appellee admitted that on one occasion, she denied visitation to the appellant when he appeared at her home without notice. She testified that appellant refused to pay her child support until he was ordered to do so by the court.

Appellant denied that he had committed any acts of violence or threatened to commit suicide. He asserted that both parties took care of the children and that he had cared for the children during the day when he worked a night shift. He reported that he cooked for the family and took the children hunting with him 50% of the time. He complained appellee denied him visitation with the children unless he paid child support. He disclosed that he made car payments instead of paying child support because the car note was in his name.

In support of the chancellor's award of custody to appellee, the evidence established that appellee is the caretaker of the children and that appellant has separated himself from the lives

of his children. Also, appellant failed to support the children until required to do so by court order some ten months after the separation. Further, appellant failed to visit the children for an extended period of time after the separation. In reviewing this evidence, we cannot say the chancellor's decision was clearly against the preponderance of the evidence.

We also conclude that the chancellor's ruling allowing appellee to move the children to California was not clearly against the preponderance of the evidence. Again, the best interest of the child remains the ultimate objective in resolving child custody and related matters. *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994). That determination cannot be made in a vacuum, but requires that the interest of the custodial parent also be taken into account. *Id.* While the court should not interfere with parental visitation for frivolous or inadequate reasons, the opportunity for a better lifestyle for the custodial parent and children should not be forfeited solely to maintain visitation when reasonable alternative visitation is available to the noncustodial parent and the advantages of the move are substantial. *Id.*

The custodial parent bears the threshold burden to prove some real advantage to the children and himself or herself in the move. *Id.* Once the custodial parent has met this burden, then the court should consider the following factors: (1) the prospective advantages of the move in terms of its likelihood to improve the general quality of life for both the custodial parent and the children; (2) the integrity of the motives of the custodial parent in seeking the move to determine if the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent; (3) whether the custodial parent is likely to comply with substitute visitation orders; (4) the integrity of the noncustodial parent's motives in resisting the removal; and (5) whether there will be a realistic opportunity for visitation that can provide an adequate basis for preserving and fostering the parent relationship with the noncustodial parent if removal is allowed. *Id.*

In analyzing the first factor, appellee, who worked during the marriage as a travel agent, had been unemployed since

June 1997. She presented the court with evidence that employment as a travel agent was available in California. Although appellee admitted she wants to be near Gary Mainerich, a man she met through her employment before the separation, this was not the only reason she wanted to move. Appellee intends to continue her career as a travel agent and improve her life and the lives of her children. There was ample evidence supporting the chancellor's conclusion that the relocation presented appellee with the opportunity to improve her finances and the quality of life of herself and the children.

As for the second factor, no evidence was presented by appellant that appellee's motive in seeking to move to California was to impede his visitation with the children. After the parties separated, appellee voluntarily drove the children from their home in Benton to El Dorado so they could visit with appellant and his family. In fact, the evidence established that appellant traveled to the children's home in Benton only one time to visit after the separation, and his family never attempted to visit the children at their home in Benton. Further, when appellee took the children to El Dorado during the 1997 spring break from school, appellant left and went to Colorado.

Regarding the third factor, appellant acknowledged he is currently visiting with the children every other weekend pursuant to the court's temporary order. There was no evidence that appellee has ever interfered with this court-ordered visitation or any other court order.

With respect to the fourth factor, appellant stated he opposes the children moving to California because the children have always been close to his family, the move will separate the children from him and his family, and the move will disrupt the childrens' lives. Appellant claimed appellee's move to Benton disrupted the children's lives, and he would not allow her to do so again. Further, he contends that the move would allow appellee to be near Mainerich.

The children lived in Benton for approximately a year before the divorce, and during that time appellant and his family made little effort to visit the children. Additionally, when appellant's young daughters visit him, he does not awaken them nor have an adult caretaker present when he goes to work, but leaves the children alone in his house. They are alone one and one-half hours each morning before one of his close relatives comes to pick the children up. Furthermore, he presented no evidence that the children's association with Mainerich was harmful in any way. On the contrary, the evidence showed that Mainerich provided financial support for the children when appellant did not.

Regarding the fifth factor, the chancellor properly awarded appellant extended summer and Christmas visitation with the children. He further ordered that the costs of transportation to and from visitation be divided between the parties, and suspended appellant's obligation to pay child support during his summer visitation. The chancellor sought to foster the parental relationship of appellant by allowing the parties to expand visitation, if they so agreed, and by giving him financial relief from child support during visitation.

Giving due regard to the factors presented in *Staab*, we find that the chancellor's decision to allow appellee to move the children to California was not clearly against the preponderance of the evidence.

Affirmed.

JENNINGS and NEAL, JJ., agree.

Eleanor MATTHEWS *v.*
JEFFERSON HOSPITAL ASSOCIATION

CA 98-1308 991 S.W.2d 629

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 8, 1999

Philip M. Wilson, for appellant.

Ramsay, Bridgforth, Harrelson & Starling LLP, by: *William M. Bridgforth*, for appellee.

TERRY CRABTREE, Judge. In this workers' compensation case, the appellant, Eleanor Matthews, seeks benefits from the appellee, Jefferson Hospital Association, for bilateral carpal tunnel syndrome. The Commission affirmed the Administrative Law Judge (ALJ) and denied benefits. The Commission found that appellant's injury was not compensable because she failed to prove by a preponderance of the evidence that it arose out of and in the course of her employment with appellee and because it was not the major cause of her disability and need for medical treatment. For reversal, appellant contends that the Commission's findings were not supported by substantial evidence. We affirm.

On March 1, 1981, appellant became employed at Jefferson Hospital in Pine Bluff. After that date, appellant held a number of administrative positions for appellee and began to experience bilateral carpal tunnel syndrome symptoms in February 1996. Appellant came under the care of Dr. John Lytle, an orthopedist, and he performed a carpal tunnel release surgery on appellant's right wrist on December 31, 1996.

The Commission reviewed appellant's work history with appellee and found that she performed several duties from day to day, including answering incoming telephone calls, maintaining all personnel records for employees, handling all filing, interviewing applicants for employment and performing reference checks, completing paperwork and record-keeping for new hires, performing inquiries with nurses' aide registry for prospective employees, keeping daily attendance records for employees, working with Medicaid and Medicare forms, keeping minutes of meetings, handling payroll, traveling to the hospital's main facility, running errands, performing productivity studies, and handling the mail and photocopying. In light of appellant's testimony regarding her job responsibilities, the Commission believed that appellant's typing duties "represented a relatively minor component of her overall work duties."

On appeal, appellant asserts that the Commission lacked substantial evidence to support its decision. In this instance, appellant's argument portion of her brief consisted of only two paragraphs. Within it she offers no convincing argument or relevant citation of authority. We do not consider an assignment of error presented in the brief not supported by convincing argument or authority. *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (Ark. App. 1980).

Furthermore, in her brief, appellant relies upon the ALJ's decision rather than the Commission's findings. On an appeal of a workers' compensation proceeding, the appellate court reviews only the findings of the Commission and ignores those of the ALJ. *Graham v. Turnage Employment Group*, 60 Ark. App. 150, 960 S.W.2d 453 (1998).

Affirmed.

PITTMAN and BIRD, JJ., agree.

HART, NEAL, and GRIFFEN, JJ., dissent.

OLLY NEAL, Judge, dissenting. I respectfully dissent from the majority's determination that the Commission's decision must be affirmed because in the majority's opinion appellant "offers no convincing argument or citation of authority." While the brevity of the appellant's argument causes some concern, such concern is overshadowed by the glaring error present in the Commission's decision. I believe appellant made the most convincing argument in her sole argument on appeal, *i.e.*, that the Commission erred in finding that she failed to meet her burden of proof.

The Commission wrote that it was deciding the merits of appellant's claim pursuant to the standard set forth in *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998). Prior to the *Kildow* opinion, the decisions of this court required that a claimant who alleged work-related carpal tunnel syndrome prove by a preponderance of the evidence that the work engaged in consisted of rapid repetitive motion. We held that the repetitive requirement was satisfied where multiple tasks were performed. *See Lay v. United Parcel Serv.*, 58 Ark. App. 35, 944 S.W.2d 867 (1997). The supreme court rejected our analysis in *Kildow*, and concluded that carpal tunnel syndrome is specifically categorized as a compensable injury and not as a type of rapid repetitive motion. The court also listed the factors that a claimant must satisfy to be awarded benefits for his/her injury: (1) that the injury arose out of and in the course of employment; (2) objective medical evidence that the injury is compensable; and, (3) that the injury is the major cause of the disability or need for treatment. The Commission held that the appellant did not show that she sustained an injury arising out of and in the course of her employment. However, the Commission supplied the following rationale for its decision:

In the present case, we find that the claimant failed to show by the greater weight of the evidence that she sustained carpal tunnel syndrome arising out of and in the course of her employment with the respondent. In reaching that decision, we note that Dr. Lytle has opined that the claimant's injury is causally related to a long-term history of employment as a *typist*. However, in assessing the weight to be accorded Dr. Lytle's opinion in this regard, we understand Dr. Lytle to be under the impression that the claimant engaged in some form of hand intensive job duties(as a typist) for the respondent. However, our review of the claimant's work history as brought out by her hearing testimony indicates that since some time in 1992, the claimant has actually been assigned as a receptionist/assistant to the administrator of the Davis Life Care Facility. In that capacity, claimant's work activities have included (1) answering all incoming telephone calls to the Davis Facility; (2) maintaining all personnel records for the employees at the Davis Facility; (3) handling all filing for the Davis Facility; (4) interviewing applicants and performing reference checks on applicants seeking employment at the Davis Facility; (5) completing all paper work and record keeping for new hires at the Davis Facility; (6) performing inquiries with the nurses' aide registry for prospective employees; (7) keeping daily attendance records for employees at the Davis Facility; (8) working with Medicaid and Medicare forms required by the Davis Facility; (9) keeping minutes of all meetings conducted at the Davis Facility; (10) handling payroll for the employees at the Davis Facility; (11) traveling by automobile to the hospital's main facility to pick up and drop off items on a regular basis; (12) regularly "running errands" also consisting of traveling by automobile to doctor's offices or other locations; (13) performing the productivity studies for the Davis Facility; and (14) handling the mail and photocopying requirements for the Davis Facility. Moreover, we understand from the claimant's testimony that typing duties actually represented a relatively minor component of her overall work duties (the claimant testified that typing duties actually represented 25% to 40% of her time), and we therefore find that Dr. Lytle's opinion is based on a misunderstanding of the claimant's actual work duties at the Davis Facility. Moreover, we find that the greater weight of the credible evidence indicates that the claimant's work-related duties were not hand intensive to a

> sufficient degree to establish that the fourteen duties indicated above caused an injury arising out of and in the course of the claimant's employment for the respondent.

It is this portion of the Commission's opinion that reflects the manner in which the Commission reached its decision that gives me great cause for concern. The Commission's reasoning bears a striking resemblance to that employed by this court in decisions prior to the supreme court's *Kildow* opinion. *See, e.g.*, *Baysinger v. Air Systems, Inc.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996). As stated earlier, since *Kildow*, claimants no longer have to show that their work involved rapid repetitive motion in claims for disability related to carpal tunnel syndrome. My concern is that the Commission appears to have applied the incorrect standard for evaluating the compensability of a carpal tunnel syndrome claim, where it lists appellant's various duties in determining whether her condition arose out of and in the course of her duties. The manner in which the Commission chose to analyze the compensability of appellant's claim bears more than striking resemblance to the multiple-tasks analysis this court applied to carpal tunnel claims prior to *Kildow*.

I am also puzzled as to why the Commission would conclude that Dr. Lytle's opinion should be afforded little weight because he related the appellant's carpal tunnel to her history of being a typist. Dr. Lytle made the following findings regarding appellant's carpal tunnel syndrome diagnosis:

> This is, in my opinion, a work related problem from her long-term history of being a typist. This is a classic example of a problem developed insidiously that she did not recognize nor have a cause or reason for. She did not understand or know the diagnosis of carpal tunnel prior to these findings. She realized that there was something wrong with her hand and had not made all of the appropriate connections.

The Commission's findings accurately reflect the testimony given by appellant that 25% to 40%, or two to three hours a day of her time was spent typing. Appellant testified that she did not engage in any activities outside of work, such as knitting, crocheting, or

anything other than her work for appellee. Here, the Commission seems to once again focus on the repetitive nature of appellant's work activities in suggesting that the percentage of time she spent typing in a typical work day was not sufficiently hand-intensive to produce carpal tunnel syndrome. That is simply not what the law requires a claimant to prove.

Even more puzzling to me is the following finding of the Commission:

> Consequently, we find that the claimant failed to establish that her carpal tunnel syndrome arose out of and in the course of her employment. In reaching this conclusion, we also note that the claimant participated in exercise at the health club known as the "Wellness Center" in 1994, and at that time experienced numbness in her fingers similar to the numbness experienced as a result of the alleged work-related carpal tunnel syndrome that was diagnosed in 1996. In this regard, we note that Dr. Lytle's opinion makes no reference whatsoever to the claimant's 1994 symptoms which she experienced while exercising at a health club.

With regard to this finding, appellant testified that she "walked" on a track at the Wellness Center. She did not testify, nor was there any evidence presented, that she performed exercises that required the use of her hands while at the Wellness Center.

Because I believe that the Commission evaluated the compensability of appellant's claim using the incorrect standard, I would reverse and remand this matter.

HART and GRIFFEN, JJ., join in this dissent.

ALCOA *v.* Carroll E. CARLISLE

CA 98-781 992 S.W.2d 172

Court of Appeals of Arkansas
Division III
Opinion delivered June 16, 1999

Rose Law Firm, by: *Phillip Carroll*, for appellant.

Kaplan, Brewer & Maxey, P.A., by: *Silas H. Brewer, Jr.*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellee Carroll E. Carlisle, who is sixty-five years of age, brought a workers' compensation claim against appellant Aluminum Company of America (ALCOA) on March 2, 1993, alleging that he had suffered hearing loss as a result of his employment. ALCOA defended, in part, on the ground that Mr. Carlisle's claim was barred by the applicable two-year statute of limitations. Arkansas Code Annotated section 11-9-702(a)(1)(A) (Repl. 1996) provides:

> A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

After a hearing, the Workers' Compensation Commission found that the claim was not barred by the statute of limitations. Relying on *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992), the Commission ruled that the limitations period had not started to run because Mr. Carlisle had never suffered a loss in earnings as a result of his alleged injury. The Commission further determined that Mr. Carlisle suffered a 5.6% permanent impairment to his hearing as a result of his employment, and awarded benefits pursuant to that finding. In addition, ALCOA was ordered to provide Mr. Carlisle with amplification devices for treatment of his condition.

ALCOA now appeals the decision of the Commission. For reversal, it argues that the Commission erred in finding that the claim was not barred by the statute of limitations. ALCOA also contends that the Commission erred in basing its decision on a single audiogram performed in 1993, and in ignoring nonwork-related causative factors such as age, nonwork-related noise, and preemployment hearing loss.

Mr. Carlisle testified on his own behalf at the hearing before the Commission. He stated that he began working for ALCOA in 1956 and was laid off in 1958. He subsequently attended a body and fender school, and was recalled to work for ALCOA in 1960. Mr. Carlisle has worked for ALCOA since 1960, and continues to work there.

Mr. Carlisle worked around the "ball mills" from 1962 to 1965. He described this area as being very noisy, and stated that he worked without ear plugs. Since 1965, he has worked in several different buildings with varying noise levels. Mr. Carlisle testified that he started wearing ear plugs when they were made available in the 1970s or 1980s.

Mr. Carlisle indicated that he has been experiencing ringing in his ears for the past several years. He stated that the ringing started when he was working near the ball mills in the early 1960s, but at that time it would go away. Mr. Carlisle explained that, for the last five or six years, "I have a ringing in my ears, its like crickets, but it stays there all the time." He further stated:

> I've known for the last ten years that noise can damage my hearing and I wear hearing protection. When you start losing your hearing and you have a ringing in your head, you know it. I presumed for the last ten or fifteen years it was caused by noise at the plant. I'm not sure that's what it was but I presumed it was. I didn't have any other explanation for it. And I knew I had ringing in my ears. I knew it interfered with my hearing.

ALCOA performed periodic audiograms on its employees beginning in 1971. After the tests were performed, the employee would get a letter that, among other things, informed him of the results. In April 1989 and April 1990, Mr. Carlisle received letters informing him that his hearing had remained unchanged. Then, on April 23, 1991, he received the following correspondence:

> Recently you had your hearing checked in the Medical Department, and the results indicate that there has been a decrease in your hearing ability. This diminished ability in hearing may be due to several factors: aging, medication, or noise. Although you are not currently exposed to excessive amounts of noise in your job, to prevent further hearing changes, you are encouraged to wear hearing protection while working around noisy off-the-job

> equipment such as tractors and chain saws, or while participating in noisy hobbies, such as target shooting.

Dr. Michael E. Winston gave Mr. Carlisle an audiological evaluation on December 8, 1993, and reported that Mr. Carlisle was suffering from hearing loss and was a candidate for binaural amplification. Dr. David J. Orchik reviewed the test results provided by Dr. Winston and interviewed Mr. Carlisle, and he concluded that Mr. Carlisle was suffering a 6% hearing impairment.[1] Dr. Orchik further testified that it was his belief that the hearing loss is related to Mr. Carlisle's employment with ALCOA, and that Mr. Carlisle would benefit from amplification devices.

ALCOA's first argument is that the Commission erred in failing to find that Mr. Carlisle's claim was barred by the two-year statute of limitations. We find that the Commission erred in ruling that the statute of limitations was inapplicable, and we reverse and remand on that basis.

In resolving this issue, we are guided by the precedent set in *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999), a recent opinion delivered by our supreme court that reversed our decision published at 63 Ark. App. 160, 975 S.W.2d 863 (1998). In that case, the supreme court held as follows:

> The Court of Appeals cited Larson's treatise on Workers' Compensation Law for the proposition that for scheduled injuries, compensation for a specified number of weeks is payable *without regard to the presence or absence of wage loss* during that period and that the effect on earning capacity is a *conclusively presumed* one, instead of a specifically proved one based on the individual's actual wage-loss experience. This theory means that a claimant seeking benefits for a scheduled injury is not required to prove a loss of earnings or earning capacity in order to be entitled to compensation. The impact on a claimant's earnings or earning capacity is *conclusively presumed*.
>
> Applying this theory to the two-prong test recited in *Hall's Cleaners, supra,* a work-related noise-induced hearing-loss injury

[1] The Commission reduced Mr. Carlisle's hearing impairment rating to 5.6% using Dr. Winston's report and AMA guidelines. This adjustment is not at issue in this appeal.

> does not become compensable until (1) the injury develops or becomes apparent, and (2) the claimant suffers a loss in earnings on account of the injury, *which loss is conclusively presumed.* Because the statute of limitation does not begin to run until both elements of the rule are met, and because of the *conclusive presumption* as to loss of earnings, which satisfies the second element, the statute of limitation with respect to work-related noise-induced hearing loss begins to run when the hearing loss becomes apparent to the claimant.

337 Ark. at 104, 989 S.W.2d at 156-7. (Emphasis in original.)

The supreme court then concluded:

> Here, appellee became aware of his hearing loss in February 1978. The statute of limitation began to run in February 1978, and because his hearing did not continue to deteriorate[2], appellee's claim became time-barred in February 1980, pursuant to Arkansas Code Annotated § 11-9-702(a)(1) (1987).

Id. (Footnote ours.)

In the instant case, the Commission found that the statute of limitations never started to run because Mr. Carlisle had not suffered any wage loss, and in light of the decision in *Minnesota Mining & Mfg. v. Baker, supra,* this conclusion was erroneous. Consequently, we reverse and remand to the Commission for it to make findings of fact and conclusions of law in light of the supreme court's decision in *Minnesota Mining & Mfg. v. Baker, supra.* Because we must reverse and remand on the limitations issue, we do not reach the substantial evidence argument raised by appellant.

Reversed and remanded for further proceedings consistent with this opinion.

CRABTREE and ROAF, JJ., agree.

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[2] Whether a continued deterioration of work-related hearing-loss affects application of the two-year limitations period has not been presented to us.

Linda LAWHON *et al.* *v.* AYRES CORPORATION *et al.*

CA 98-406 992 S.W.2d 162

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 16, 1999
[Petition for rehearing denied August 25, 1999.]

Roscopf & Roscopf, P.A., by: *Charles B. Roscopf*; and *Thompson & Llewellyn, P.A.*, by: *James M. Llewellyn, Jr.*, for appellants.

Wright, Lindsey & Jennings, by: *Patrick J. Goss*, for appellee/cross-appellant Ayres Corporation.

Butler, Hicky & Long, by: *Phil Hicky*, for appellee Crowley Ridge Aviation, Inc.

JOHN MAUZY PITTMAN, Judge. This case arose out of the crash of an Ayres Turbo Thrush airplane on April 5, 1994, that resulted in the death of the pilot, James H. Lawhon. The airplane was manufactured by Ayres Corporation for the purpose of aerial application of agricultural materials. On April 3, 1996, Mr. Lawhon's widow filed this action against the manufacturer, Ayres Corporation, and the company that regularly serviced and inspected the aircraft, Crowley's Ridge Aviation, Inc. Appellants' claim against Ayres was based on allegations of negligent design or manufacture, failure to test and warn, strict liability, and breach of warranty. Appellants' claim against Crowley's Ridge was based on allegations of fraud, misrepresentation, negligent service and inspection, and breach of warranty. Appellants' theory of the case hinged on their contention that the airplane's wing structure failed in flight, causing the airplane to strike the ground. Appellees' case turned on their assertion that the crash was caused by pilot error and that the wing did not separate from the aircraft until after the aircraft struck the ground. Prior to trial, appellants presented a motion in limine seeking to exclude evidence that Mr. Lawhon had a reputation of being a skilled but reckless pilot. Ayres likewise filed a motion in limine asking the court to exclude evidence of other accidents involving aircraft manufactured by Ayres, of service publications issued by Ayres describing problems with certain aircraft, of subsequent remedial measures taken by Ayres after Mr. Lawhon's accident, and of any testimony regarding the above-listed items by appellants' expert witnesses. Both motions in limine were denied, and the evidence was admitted at trial. The jury returned a verdict on special interrogatories finding that Mr. Lawhon's death was not the result of any negligence or other breach of duty on the part of appellees, but was instead proximately caused by his own negligence. From that decision, comes this appeal.

On appeal, appellants contend that the trial court erred in allowing testimony concerning Mr. Lawhon's prior conduct and reputation. We reverse and remand on direct appeal.

At trial, Ayres elicited from John Broome, a pilot for an agricultural flying service, testimony that Mr. Lawhon was a skillful pilot with a reputation for being reckless. Later, Crowley's Ridge offered the testimony of Bruce Hayes, a businessman engaged in the field of aircraft repair and the sale of aircraft parts, who stated that Mr. Lawhon was a "cowboy" who was "hard on an airplane."

Rule 404 of the Arkansas Rules of Evidence provides that:

> (a) *Character Evidence Generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> (b) *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *Brown v. Conway*, 300 Ark. 567, 781 S.W.2d 12 (1989), the Arkansas Supreme Court held that the trial court erred in admitting evidence showing a character trait in a civil assault case, and explained that Rule 404(a) means that, in civil cases, the general rule is that neither party may offer evidence that the other had a trait of character that made it likely that he acted in conformity therewith on the occasion that gave rise to the lawsuit. *See Powell v. Burnett*, 304 Ark. 698, 805 S.W.2d 50 (1991). It has been noted

that the rule excluding character evidence as circumstantial proof of propensity is enforced virtually without exception in civil cases. W. Dent Gitchell, *Charting a Course Through Character Evidence*, 41 ARK. L. REV. 585 (1988). In the present case, no exception to the rule is applicable, and there was no purpose for the testimony regarding Mr. Lawhon's reputation as a reckless "cowboy" other than to show that he was flying recklessly at the time of the accident that gave rise to this lawsuit; consequently, we hold that the trial court erred in admitting this testimony. Given that the key question at trial was whether the crash was caused by mechanical failure or by pilot error, and that there was competent evidence supporting either conclusion, we think that the error was sufficiently prejudicial to warrant reversal.[1]

We next address Ayres's arguments on cross-appeal. Ayres contends that the trial court erred in admitting evidence of other accidents involving aircraft manufactured by Ayres; in admitting evidence of service publications by Ayres describing problems with Ayres's aircraft and directing work to be done to repair the problems; in admitting evidence of measures taken by Ayres subsequent to Mr. Lawhon's accident to remedy problems with the Ayres Turbo Thrush aircraft; and in allowing appellants' expert witnesses to testify about other accidents involving Ayres aircraft, service publications by Ayres, and subsequent remedial measures involving the Ayres Turbo Thrush.

The evidence in question was introduced in conjunction with the testimony of two expert witnesses, Raymond Ladd and Robert Hochman. Mr. Ladd is an expert in the areas of aircraft

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[1] Appellees contend that this issue is not preserved for appeal. We disagree. The bench conference and ruling on appellants' motion in limine was somewhat disjointed in that many issues were being discussed simultaneously. Furthermore, reputation evidence was not included in appellants' attorney's initial statement of matters he was objecting to. Nevertheless, the issue of the admissibility of reputation testimony did eventually arise during the somewhat lengthy bench conference. The trial judge ruled that "reputation can be brought in," and appellants' attorney asked that the court note his objection to that ruling. Because a motion in limine that is expressly denied preserves the issue for appeal so that no further objection at trial is required, *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995), appellants' argument is properly before us.

maintenance, service inspection, structural repair, and the monitoring of structural repair. His testimony was directed to the question of whether Ayres failed to warn Mr. Lawhon of a known defect in the wing structure of the aircraft. In researching the manner in which Ayres had issued warnings in the past following accidents involving the wing structure of its aircraft, Mr. Ladd reviewed the service bulletins, service letters, and airworthiness directives concerning the aircraft. A list of the service publications was introduced during Mr. Ladd's testimony as plaintiff's exhibit 35. Following his research, Mr. Ladd prepared a summary showing how long it had taken Ayres to issue service bulletins following the accidents. This summary was introduced as plaintiff's exhibit 37. Robert Hochman was qualified as an expert in the field of metallurgy. His testimony concerned the question of whether the crash was caused by a metal fatigue fracture in the wing structure. In arriving at his conclusion, he relied on a report of a similar occurrence in the Netherlands. One page of that report, containing a photograph of the part that failed in the Netherlands accident, was introduced into evidence for the purpose of comparison with the corresponding part on Mr. Lawhon's aircraft.

Ayres asserts that evidence of other accidents involving Ayres aircraft, and of service publications by Ayres describing problems and remedies, should not have been admitted because there was no evidence that the accidents described therein arose out of the same or substantially similar circumstances to the accident at issue in the present case, and because those items of evidence constitute hearsay. We do not agree. Although our supreme court held, in *Houston General Insurance Co. v. Arkansas Louisiana Gas Co.*, 267 Ark. 544, 592 S.W.2d 445 (1980), that evidence of similar occurrences is admissible only when it is demonstrated that the events arose out of the same or substantially similar circumstances, we think that appellants met their burden of establishing that fact in the case at bar. The evidence was introduced in the context of Mr. Ladd's testimony regarding warnings previously issued by Ayres; the accidents in question all involved Ayres aircraft and were followed by warnings and recommendations regarding corrective measures. Because appellants alleged

that Ayres had failed to issue a proper warning following the incident in the Netherlands that did involve a structural failure substantially similar to that which was alleged to have occurred in the present case, we think that the "circumstances" at issue with regard to the remaining incidents are not so much the causes of the accidents per se, but instead the circumstances surrounding the subsequent issuance of warnings by Ayres. *See Ford Motor Company v. Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993).

With regard to Ayres's hearsay argument, we note that the disputed items of evidence were relied upon by the experts in formulating their opinions and that the experts testified at trial regarding the content of those items of evidence. The experts could properly do so because an expert may base his opinion on facts reasonably relied upon by experts in the particular field even though the facts relied on are hearsay. . Although it is true that Rule 703 is not intended to give an expert witness license to merely repeat hearsay for the sake of bringing such information before the fact-finder, *Sims v. Safeway Trails, Inc.*, 297 Ark. 588, 764 S.W.2d 427 (1989), under this rule an expert must be allowed to disclose to the trier of fact the factual basis for his opinion because the opinion would otherwise be left unsupported, and the trier of fact would be left with little if any means of evaluating its correctness. *Carter v. St. Vincent Infirmary, supra.* Therefore, even assuming *arguendo* that the summaries and service publications were hearsay, these items of evidence were cumulative to the testimony of the expert witnesses who described them in explaining how they arrived at their opinions. No prejudice results where the evidence erroneously admitted was merely cumulative, *Thompson v. Perkins*, 322 Ark. 720, 911 S.W.2d 582 (1995), and we do not reverse for harmless error in the admission of evidence. *Cumberland Financial Group, Ltd. v. Brown Chemical Co.,* 34 Ark. App. 269, 810 S.W.2d 49 (1991).

However, a different result is required with regard to evidence of one particular service bulletin, SB-AG-39, that was issued by Ayres in response to Mr. Lawhon's crash. This bulletin was referenced in plaintiff's exhibits 35 and 37. The former

exhibit described the bulletin as requiring a wing spar inspection to detect *before failure* cracks in the lower spar of wing assemblies that could result in wing separation from the aircraft. We agree with cross-appellant's argument that this constituted evidence of a subsequent remedial measure that was inadmissible under Ark. R. Evid. 407. That rule precludes proof of negligence or culpable conduct by evidence of measures taken after an event that, if taken previously, would have made the event less likely to occur. Although evidence of subsequent remedial measures need not be excluded under Rule 407 if offered for another purpose, *see id.*, or where the subsequent remedial measure is taken by a third party rather than by a defendant, *see Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995), we can discern no purpose for this evidence other than to show culpability on the part of Ayres, and there is no indication in the record before us that the bulletin was issued by a third party other than Ayres. In the absence of any applicable exception to Rule 407, we hold that the trial court erred in permitting evidence of SB-AG-39.

Reversed on direct appeal; affirmed in part and reversed in part on cross-appeal; and remanded.

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

CRABTREE and JENNINGS, JJ., dissent.

TERRY CRABTREE, Judge. From a verdict for the defendant in this case, the appellants appeal alleging that the trial court erred in permitting two witnesses to testify as to the reputation of the deceased as a pilot. I disagree with the majority opinion that the issue was preserved for appeal and that the plaintiff was prejudiced by the testimony.

The appellant filed a Motion in Limine to preclude the introduction of certain evidence. The Motion requested the court to prohibit the defendants from mentioning or referring to any of the following matters in the presence of the jury until each of the matters was brought to the attention of the court outside the presence of the jury: 1) prior aircraft accidents involving James H. Lawhon; 2) beverage consumption of the deceased; 3) reference to

National Transportation and Safety Board Factual Report or Proximate Cause; 4) stipulations; 5) reference to the motion; and, 6) that opposing counsel show in advance all demonstrative evidence they propose to introduce at trial. Mr. Goss, attorney for the one of the defendants, actually brought up the issue concerning reputation in the community for recklessness. The following colloquy occurred between the parties and the court:

> MR. GOSS: As to the reputation evidence, your Honor, or evidence of being a reckless pilot, some of that — that's just reputation not necessarily based on things that are more than ten years in the past. I think it will be more —
>
> MR. ROSCOPF: (*Interposing*) If your Honor please that Bell Helicopter case hits that right on the — right on the head.
>
> MR. HICKY: Your Honor, let me say this. The Bell Helicopter case went to competency at a certain time. It did not go to reputation. We are talking about reputation in the community of a person which I seriously contend that under the Rules of Evidence permit that type of proof, and it is certainly going to be indicated that the method and manner in which Mr. Lawhon entered the field on this occasion was a reckless manner.
>
> MR. ROSCOPF: If your Honor please there is no question that they can offer evidence in that respect. But insofar as offering proof of prior occurrences or reputation of prior occurrences, that is absolutely irrelevant; and certainly, if it isn't irrelevant under 402 it is highly prejudicial and its probative value is overcome by the prejudicial nature of that kind of testimony and we submit that even evidence of testimony of reputation would not be admissible and should be excluded in this case.
>
> THE COURT: I think reputation can be brought in. It is admissible. I don't want any beer — beverage consumption talked about, and then of course reputation is supposed to be reputation testimony, not factual proof. The rules cover that and how you are supposed to handle that.
>
> MR. GOSS: That's the way we intend to, your Honor.
>
> THE COURT: Now there's, obviously on cross examination and things like that you can get into some factual things involving

somebody testifying about somebody's reputation, but I think you all know what the rules say about it when you present reputation testimony. It's not factual incidents, it's reputation.

MR. ROSCOPF: If your Honor please we would like to note — we would like to note our objection to that ruling.

THE COURT: It will be noted.

The plaintiff failed to object when questions concerning the reputation of the deceased were asked during trial. We have held many times that failure to object to the testimony at trial precludes review by this court. The reasoning behind the rule is obvious; the parties must give the trial court the opportunity to decide the issue before presenting it on appeal. *Berry v. St. Paul Fire & Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997). There are exceptions to this rule and one of the exceptions is a ruling on a Motion In Limine. In *Neal v. State*, 320 Ark. 489, 898 S.W.2d 440 (1995), the Supreme Court stated: "When a motion in limine seeking to exclude evidence has been denied, the objection raised in the motion may be pursued on appeal without its having been renewed when the evidence was received." In my opinion, the plaintiff did not request specific relief in his Motion in Limine that dealt with general reputation evidence but requested that reference to evidence of specific acts of the deceased be precluded without first advising the court. The trial court granted all the relief requested by the appellant. The issue of general reputation evidence was brought up during the discussion between the attorneys and the court by one of the defendants' attorneys. Further, in my opinion, the gist of the trial court's ruling was that the reputation evidence would be admitted according to the rules and the circumstances. This is far from a definitive ruling that would eliminate the need for a contemporaneous objection. The plaintiff should have apprised the trial court of its objection to the evidence at the time it came in to give the court the opportunity to rule on the issue.

Finally, I cannot agree that the plaintiff was prejudiced by the testimony that was elicited from two witnesses. The first state-

ment alleged to have been prejudicial was the response to the attorney's question:

> Q: And his reputation, I believe you told me in your deposition, was that he was a skillful pilot but that he also had a reputation of being reckless, is that correct?
>
> A: That's correct, yes sir.

The second statement was by Allen Bruce Hayes and was as follows:

> Q: What was Mr. Lawhon's reputation as a pilot?
>
> A: Jim did an excellent job for the farmers, but he was extremely hard on his equipment — a cowboy and hard on an airplane.

Mr. Hayes went on to testify that the deceased was a ton over gross when he took off.

The record in this case consists of 1,447 pages. Twelve witnesses testified, including expert witnesses. This case was vigorously tried to a jury. It is difficult to imagine that two sentences, one agreeing with a statement made by the attorney for the defendant and another that the deceased did an excellent job but was a cowboy and hard on an airplane, were sufficient for the jury to disregard the documentary evidence, photographs, other testimony of the witnesses, and the expert testimony contained in a record consisting of 1,447 pages. In my opinion, there is no prejudice, and the trial court should be affirmed.

I dissent.

JENNINGS, J., joins in this dissent.

Bobby and Angie ULLOM *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 98-601 992 S.W.2d 813

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 16, 1999
[Petition for rehearing denied August 25, 1999.]

F. Lewis Steenken, for appellants.

Johnny E. Gross, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellants in this termination-of-parental-rights case were the parents of a daughter born on August 1, 1996. On August 20, 1996, the child, who was then only twenty days old, was treated for a spiral fracture of her left humerus. The fracture was of unexplained origin, and hospital personnel reported the incident to the Arkansas Department of Human Services (ADHS). ADHS took emergency custody of the child and, following an investigation and probable cause hearing, she was adjudicated as dependent-neglected on September 17, 1996. Following that adjudication, the child remained in foster care and a case plan was developed that required the appellants to participate in counseling, attend parenting class, and continue supervised visitation with the child. Subsequently, a review hearing was held, and appellants' visitation was modified to permit unsupervised visitation in the home.

However, during the first, brief, unsupervised visit on February 8, 1997, the child was again injured and suffered extensive facial bruising. Unsupervised visitation was suspended, and ADHS filed a petition to terminate appellants' parental rights. Shortly thereafter, supervised visitation was resumed, and a hearing on the termination petition was held on May 16, 1997, and January 2, 1998. On January 23, 1998, the trial judge entered an order terminating appellants' parental rights. From that decision, comes this appeal.

For reversal, appellants contend that the findings supporting the trial court's order terminating parental rights were not based on clear and convincing evidence. We find no error, and we affirm.

At the hearing, ADHS argued, *inter alia*, that the termination of parental rights was appropriate under Ark. Code Ann. § 9-27-341 (Supp. 1995), which in pertinent part provides that:

> (b) [A]n order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (1) That it is in the best interest of the juvenile, including consideration of the following factors:
>
> (A) The likelihood that the juvenile will be adopted if the termination petition is granted, and
>
> (B) The potential harm caused by continuing contact with the parent, parents, or putative parent;
>
> (2) Of one (1) or more of the following grounds:
>
> (A) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months, and, despite a meaningful effort by the Department of Human Services to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent. It is not necessary that the twelve-month period referenced in this subdivision (b)(2)(A) immediately precede the filing of the petition for termination of parental rights, or that it be for twelve (12) consecutive months;
>
> * * * *
>
> (E)(i) That, subsequent to the filing of the original petition for dependency-neglect, other factors or issues arose which

> demonstrate that return of the juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors, or rehabilitate the parent's circumstances, which prevent return of the juvenile to the family home.
>
> * * * *
>
> (F) The juvenile court has found the juvenile victim dependent-neglected as a result of neglect or abuse that could endanger the life of the child, sexual abuse, or sexual exploitation, and which was perpetrated by the juvenile's parent or parents. Such findings by the juvenile court shall constitute grounds for immediate termination of the parental rights of one (1) or both of the parents.

Termination of parental rights is an extreme remedy in derogation of the natural rights of the parents. Nevertheless, parental rights will not be enforced to the detriment or destruction of the health and well being of the child. *Crawford v. Department of Human Services*, 330 Ark. 152, 951 S.W.2d 310 (1997). Pursuant to Ark. Code Ann. § 9-27-341(b), *supra*, the facts warranting termination of parental rights must be proven by clear and convincing evidence. In reviewing the trial court's evaluation of the evidence, we will not reverse unless the trial court clearly erred in finding that the relevant facts were established by clear and convincing evidence. *Anderson v. Douglas*, 310 Ark. 633, 637, 839 S.W.2d 196 (1992). Clear and convincing evidence is the degree of proof that will produce in the fact-finder a firm conviction regarding the allegation sought to be established. *Id.* Furthermore, we will defer to the trial court's evaluation of the credibility of the witnesses. *Crawford v. Department of Human Services, supra.*

In the present case, appellant Bobby Ullom testified at the probable cause hearing that he, his wife, and the child were at his parents' house the day before he took the child to the hospital. He stated that the child was constantly being handed around at his parents' house, and that his eighteen-month-old nephew and nine-month-old niece were "kissing on her and pulling on her," but that there was always an adult holding and supervising the child. He further stated that no one at his parents' house that day

could recall the child being injured, and that appellants first noticed that something was amiss when she "got fussy" on the way home from his parents' house. According to his testimony, appellants initially believed that the child was suffering from gas, but that she cried all night. He stated that, when he picked the child up the next day, her arm fell, he heard a popping sound, and the child began to scream. Appellants then took the child to a hospital emergency room where the doctor informed them that the child had sustained a spiral fracture and explained that such an injury results when an arm is twisted. Mr. Ullom testified that appellants remained in the hospital all day, spoke with a detective who was investigating the incident, and were told that they would not be allowed to take the child home. Finally, he testified that he did not injure the child and did not know how the injury occurred.

Appellant Angie Ullom's testimony at the adjudication hearing mirrored Mr. Ullom's testimony at the earlier hearing. In addition, she stated that the child could not crawl or grasp objects at the time she sustained the spiral fracture, that the appellants were the only people who had contact with the child on the day the injury was reported, that she had not intentionally injured the child, that she would not allow anyone to injure the child, and that she did not know how the injury occurred.

Appellant Bobby Ullom also testified at the adjudication hearing, essentially repeating his testimony at the probable cause hearing. He added that he had been physically abused by his stepmother when he was a small boy and that he had trouble controlling his anger when he was a child, but stated that he had matured a lot since then. Finally, he stated that his past experiences caused him to resolve that he would never treat his children the way he had been treated.

The termination hearing was conducted on May 16, 1997, and on January 2, 1998. Dr. Barry Allen testified that the child had been in his office on at least eleven occasions. When he first examined her in August 1996, he determined that she had sustained a spiral fracture of the left humerus. He testified that the child did not have any bone disease that would make her more

susceptible to such injuries, that she could not have caused the injury herself, and that it was very unlikely that the injury could have been caused by an eighteen-month-old child or by someone picking up the child. He further testified that the primary cause of spiral fractures to children under the age of three was abuse, that no other explanation had been proposed that would explain the injury, and that he believed that it was very likely that the spiral fracture was the result of child abuse.

Dr. O.L. Henderson testified that he saw the child in the emergency room in August 1996. He explained that a spiral fracture usually occurs because a torsional force has been applied to the bone, and that most spiral fractures in children under the age of three occur because someone has twisted the child's arm. He testified that these injuries are generally not accidental and that, in children of this age group, the injury would have to have been caused by someone else. Although he could not categorically rule out the possibility that the spiral fracture had been caused by an eighteen-month-old toddler, he stated that it was very unusual for an eighteen-month-old to break the bone of another child, that picking up a newborn by the arm would not cause this type of injury, and that breaking a long bone in this manner would require quite a bit of force and violence. He also testified that a child injured in this manner would begin crying uncontrollably and could not be consoled. Finally, he testified that, although the child's injury could have resulted in nerve damage, blood vessel damage, and loss of the limb, the possibility of loss of life was very remote.

Dr. Charles Akin testified that he saw the child on February 8, 1997, when she was brought in for evaluation of bruising around the face. He testified that the child had fresh, blue bruises about the left brow, left eye, the left side of the nose, and the cheek, and that she had the same bruises on the right side of her face to a lesser degree. He further testified that he examined the toy that allegedly had fallen on the child's face and stated that, dropped from a height of six inches, the toy could not have caused bruises of the type sustained by the child. He stated that, dropped from a height of six inches, the toy would have caused a more isolated mark, if any, and that, even had the toy been rammed into

the child's face, it would have caused a less diffuse and more isolated pattern of bruising.

Christy Evans, the child's foster mother, testified that when she picked up the child following the unsupervised visitation on February 8, Mr. Ullom was waiting with a toy in his hand. She testified that Mr. Ullom told her that he had been sitting on the floor next to the child when she reached up and pulled the toy out of his hand, and that the toy hit her in the face. She testified that she examined the child and noticed bruising across one whole side of her face, small bruises on the other side, and darkening on the back of her head that looked like a bruise.

Angie Ullom also testified at the termination hearing. Much of her testimony regarding the spiral fracture injury was in reiteration of her testimony regarding that incident at the previous hearing. Significant additions to her testimony regarding that incident included her statement that, on August 21, 1996,[1] the child had been crying intermittently but was sleeping when Mr. Ullom came home in the evening. She stated that, as she went into the kitchen to get a bottle for the child, she saw Mr. Ullom pick up the child out of her chair. She testified that he blocked her vision of the child as he bent down, and that the child screamed. Regarding the bruising incident, Mrs. Ullom stated that Mr. Ullom was holding a toy over the playpen, that the child reached up for the toy, and that the toy hit the child's face. She testified that she made six telephone calls on February 8 regarding the injury, but that she did not telephone ADHS because she was afraid they would take the child away from her. She also stated that she would do anything to get the child back, and that she and Mr. Ullom had done everything that ADHS had asked them to do. She further stated that they had attended counseling sessions, parenting classes, and visitation with the child, and that they continued to attend counseling and visitation even after being informed that ADHS intended to move to terminate their parental rights.

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[1] While Ms. Ullom testified that these events occurred on August 21, other evidence indicates that they occurred on August 20. The exact date is not significant to our decision.

The termination hearing was concluded on January 2, 1998. Heather Bailey testified that she began working on the Ullom case in September 1996, and continued as caseworker through July of 1997. She stated that, following the investigation of the toy incident and the determination that it was another act of abuse, the goal of the case plan changed on March 24 from reunification to termination of parental rights and adoption. She testified that the revised case plan was shown to the Ulloms, but that they did not sign it. She further testified that the agency continued to work toward reunification and to provide services to appellants even after March 24: visitation continued, the parents were required to maintain employment, and Mr. Ullom was required to attend anger-control counseling. She stated that appellants continued to be cooperative even though they knew that the ADHS goal was now termination of parental rights.

Melissa Bratton testified that she took over the Ullom case on July 9, 1997. She stated that she considered reunification to be the goal even though appellants had been told that ADHS would pursue termination in the absence of a valid explanation for the child's injuries. She stated that a case plan was drawn up on October 15 that had reunification as its goal. She further stated that reunification would be an attainable goal if a plausible explanation for the child's injuries were offered, even if that explanation consisted of an admission that one of the parents intentionally harmed the child.

Bobby Ullom also testified. The chief distinction between Mr. Ullom's prior testimony was that, on this occasion, he stated he no longer believed that the child's arm had been broken by his nephew.[2] Instead, he testified, he now believed that the child's

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[2] Mr. Ullom testified as follows:

This is my third time to testify in [this] matter. At the time I told the Court that [the child] had been fussy the night before she went to the hospital, I think that at the time she was not in pain. The next morning I went to work, at the time Angie was in the recliner and [the child] was sitting on her chest. When I came home for lunch Angie said that [the child] was better, but she was still pretty fussy. I went back to work after lunch, I came home about 4:00. When I came home [the child] was in the bouncy seat and Angie went to fix her a bottle. I reached down to pick [the child] up out of the seat, and I believe that was when her arm may

arm was broken when it became entangled in a safety strap as he attempted to remove her from her chair. He conceded that this differed from his earlier testimony, and that he had not mentioned entanglement in the safety strap to physicians or investigators following the incident. He also testified that he had had a problem with violent outbursts while in elementary school, and that he had been suspended for fighting during the tenth grade. He could not recall whether or not he was expelled from high school, but he stated that he believed that the counseling he participated in had corrected his previous problem with controlling his anger.

For reversal, appellants contend that the findings supporting the order of termination were not based on clear and convincing evidence. They first argue that the evidence was insufficient to support a termination order based on Ark. Code Ann. § 9-27-341(b)(2)(A) (Supp. 1995) because the evidence failed to show that the child had continued out of the home for one year, or that ADHS had made a meaningful effort to rehabilitate the home and correct the conditions that caused removal. We do not agree. The child was adjudicated dependent-neglected on September 17, 1996. The termination hearing began on May 16, 1997, and concluded on January 2, 1998, and the termination order was not entered until January 23, 1998. Consequently, at the time the hearing was concluded, the child had in fact "continued out of the home for one year" as required by the statute, and any error that may arguably have resulted from the filing of the termination petition before the statutory period had elapsed was thereby cured. *See Donna S. v. Arkansas Department of Human Services*, 61 Ark. App. 235, 966 S.W.2d 919 (1998).

Nor can we say that the evidence was insufficient to support a finding that ADHS made a meaningful effort to rehabilitate the home and correct the conditions that caused removal. The evidence, particularly the medical evidence that the child's injuries simply could not have occurred in the manner appellants say they did, clearly supports a finding that one or both of the parents intentionally abused the child, and that both of the parents

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have gotten caught under the strap. I didn't tell the Court that I thought her arm had been caught under the strap in the previous hearings.

intentionally concealed the abuse by giving false histories of the origins of the injuries. The evidence also shows that, to remedy the situation, ADHS provided parenting classes, counseling sessions, and anger counseling for Mr. Ullom, and continued to provide services aimed at reunification up to the final day of the hearing. Although it is readily apparent that such services will be of little use if the parents conceal the source of the abuse by providing false histories of the origins of the child's injuries, that is a circumstance wholly within the control of appellants and it does not render the attempts to remedy the situation unmeaningful. It is, under Ark. Code Ann. § 9-27-341(b)(2)(A) (Supp. 1995), ultimately the parents' duty to remedy the conditions causing removal and, under the circumstances of this case, we think that the trial judge could properly find that they failed to do so despite a meaningful effort by ADHS to rehabilitate the home.

Nor do we agree with appellants' argument that there was no evidence that appellants manifested any incapacity or indifference to remedy the subsequent issues or factors that demonstrate that return of the child to the family home would be contrary to the child's health, safety, or welfare, and that removal therefore was improper under Ark. Code Ann. § 9-27-341(b)(2)(E)(i) (Supp. 1995). Appellants argue that they have complied with all the requirements imposed on them by ADHS and have accepted responsibility for the child's injuries. This argument, however, ignores the evidence supporting the trial judge's express finding that the injuries were perpetrated by appellants. Appellants have stated that they accept responsibility, but they accept responsibility only for accidental injuries of problematical origin when the great weight of the evidence indicates that those injuries were intentionally inflicted at a time when only appellants were present with the child. Appellants have indeed complied with the case plan but, even after they began attending parenting classes and counseling sessions, the evidence shows that the child was injured on the very first occasion that appellants were allowed unsupervised visitation, and a medically impossible explanation was again given for the child's injuries. The evidence of the extreme youth of the child when the abuse was begun, and the evidence that the abusive behavior was resumed at the first

opportunity even after the child was removed from the home, demonstrates that return of the child to the family home would be contrary to the child's health, safety, and welfare. Furthermore, appellants' continued denial of personal responsibility and efforts to conceal the source of the abuse demonstrate that they have manifested the incapacity or indifference to remedy the subsequent issues. *See Corley v. Arkansas Department of Human Services*, 46 Ark. App. 265, 878 S.W.2d 430 (1994). We hold that the evidence in this case was sufficient to support termination of appellants' parental rights, and we affirm.

Affirmed.

MEADS, J., agrees.

ROGERS, J., concurs.

BIRD, STROUD, and ROAF, JJ., dissent.

JUDITH ROGERS, Judge, concurring. I join with the majority to affirm the trial court's decision to terminate parental rights. This is a very troubling case because this course of action is not to be taken lightly. Because of the tender age of the child, the opportunity of the trial judge to assess the weight and credibility of the evidence and observe the parents, and the unreasonable action of the parents in not seeking immediate aid for this baby until after calling relatives and their attorney, I conclude that the child must be protected and removed from this home.

I am concerned, however, with the Department of Human Services' inadequate pursuit of intensive early reunification efforts. Given the teaching of child experts that abuse suffered as a child is one predictor of abuse and violence committed as an adult and given the abusive history and violence of the father as testified to in the record, I must conclude that serious intensive efforts should have been made on behalf of this family by DHS.

SAM BIRD, Judge, dissenting. I respectfully dissent from the prevailing decision, which affirmed the trial court, because I do not believe that the evidence clearly and convincingly supports the chancellor's conclusion that appellants abused

their child or that any other ground exists for the termination of appellants' parental rights.

The trial court appears to have concluded that there was clear and convincing evidence to support three grounds for granting the petition to terminate the appellants' parental rights:

> (1) that [the child] was dependent-neglected as a result of unexplained abuse or neglect that could endanger the life of the child and was perpetrated by the juvenile's parents;
>
> (2) that subsequent to the filing of the original petition for dependency-neglect, other factors or issues arose which demonstrate that the return of the juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and that, despite the offer of appropriate family services, the parents have manifested the incapacity or indifference to remedy the subsequent issues or factors, or rehabilitate the parent's circumstances, which prevents return of the child to the family home; and
>
> (3) that the juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months, and despite a meaningful effort by the Department of Human Services to rehabilitate the home and correct the conditions which caused the removal, those conditions have not been remedied by the parent. It is not necessary that the twelve-month period referenced in this subdivision (b)(2)(A) immediately precede the filing of the petition for termination of parental rights, or that it be for twelve (12) consecutive months.

The first of these "grounds" is not a basis for the termination of parental rights, either under Ark. Code Ann. § 9-27-341 (Supp. 1995), that was in effect at the time of the filing of the termination petition, or under the amendment, Ark. Code Ann. § 9-27-341 (Supp. 1997), that became effective during the pendency of this action. Although injuries that are at variance with the history given are defined in Ark. Code Ann. § 9-27-303(4)(b)(i) (Repl. 1998) as abuse, the mere occurrence of an injury to a child, the cause of which is unexplained, is not a basis that the legislature has determined to be a ground for the termination of parental rights.

Although the second ground relied upon by the trial court for terminating appellants' parental rights is contained in Ark. Code Ann. § 9-27-341(b)(2)(E)(i) (Supp. 1995), as well as in the 1997 amendment (Ark. Code Ann. § 9-27-341(b)(2)(G)(i) (Repl. 1998)), there is simply no evidence in the record that supports termination on that ground. The court's order does not identify the "other factors or issues" that arose subsequent to the filing of the petition, but this is apparently a reference to the incident on February 8, 1997, when appellants had the child in their home for a day of unsupervised visitation and, according to appellants, the child's face was bruised when she was struck by a plastic toy that dropped out of Bobby Ullom's hand into her playpen, striking her in the face.

Even assuming that the occurrence of this incident was a sufficient factor or issue to demonstrate that the return of the child to her family was contrary to her health, safety, or welfare, there was no evidence that, "despite the offer of appropriate family services, the parents have manifested the incapacity or indifference to remedy the subsequent issues or factors, or rehabilitate the parents' circumstances." To the contrary, all evidence on this point clearly demonstrates that the appellants had done everything that the court and ADHS had asked of them, including maintenance of stable employment and housing, strict adherence to their visitation schedule, successful completion of parenting classes, and anger-management counseling. There is certainly no evidence to support a finding that the appellants manifested the "incapacity or indifference" to remedy the problems that resulted in the child's removal. Heather Bailey, the caseworker for ADHS assigned to the Ullom case, even testified at the termination hearing that, as the goal of DHS's case plan, she advised in favor of reunification of the child with appellants.

Finally, I disagree with the conclusion of the prevailing judges that the evidence was sufficient to establish by clear and convincing evidence that termination was appropriate under Ark. Code Ann. § 9-27-341(b)(2)(A) because the child had not been out of appellants' home for twelve months, either when the termination petition was filed or when the hearing thereon was commenced.

The dates applicable to this case are not disputed. ADHS first took custody of the child at the hospital on August 20, 1996, following the diagnosis of the spiral fracture to her left arm. The child was adjudicated to be dependent-neglected on September 17, 1996, less than thirty days after ADHS took custody of her. ADHS's petition for termination of parental rights was filed on February 18, 1997, only five months following the dependency-neglect adjudication, and the hearing on the termination petition was begun on May 16, 1997, less than nine months after custody of the child was placed in DHS custody. After five witnesses testified on behalf of ADHS, the hearing was recessed, to be reconvened on July 29, 1997. However, the July 29 hearing did not materialize, and the matter was subsequently reset for, and concluded on, January 2, 1998.

It is obvious from the dates set forth above that the hearing for termination of appellants' parental rights was begun before the child was out of appellants' home for twelve months. In fact, the record reflects that five out of ADHS's seven witnesses testified at the hearing on May 16, 1997, including the three medical doctors whose testimony was relied upon by ADHS to prove that the child had been abused. The prevailing judges conclude that, although the termination hearing began only nine months after the child was removed from appellants' home, any error that may have resulted was cured because the hearing was not *concluded* until after the lapse of twelve months from the child's removal from appellants' home. They rely on *Donna S. v. Arkansas Dep't of Human Servs.*, 61 Ark. App. 235, 966 S.W.2d 919 (1998), to support this proposition.

Assuming, arguendo, that *Donna S.* is a correct interpretation of § 9-27-341(b)(2)(A), it is distinguishable from the case at bar. In *Donna S.* we affirmed the termination of parental rights upon a petition that was filed before the required twelve months out of home had lapsed, but where the termination hearing was not *conducted* until *after* the children had been out of the parent's home for fourteen months. In the case at bar the hearing was conducted, in substantial part, less than nine months after the child's removal from appellants' home. Applying the reasoning of the prevailing judges, a hearing on a petition for termination of parental rights

could be commenced immediately after the removal of a child, and the twelve-month out-of-home requirement of § 9-27-341(b)(2)(A) will have been satisfied so long as one last witness is left to testify after the lapse of twelve months. I disagree because such reasoning nullifies the obvious purpose for the twelve-month out-of-home requirement.

The requirement for a twelve-month lapse before the consideration of a petition for removal of a child from its parents' home is obviously intended to allow ADHS a reasonable period of time to "make a meaningful effort . . . to rehabilitate the home and correct the conditions that caused the removal . . . ." In fact, this purpose is expressed in § 9-27-341(a) where it is stated that "[t]he intent of this section is to provide permanency in a juvenile's life in all instances where return of the juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and it appears from the evidence that return to the family cannot be accomplished in *a reasonable period of time*." For the purposes of § 9-27-341(b)(2)(A), I believe the legislature has said that twelve months of meaningful rehabilitation efforts after removal of the child from its parents' home is a reasonable period of time that must elapse before the court may consider a petition for termination of parental rights.

It is hard for me to believe that, after embarking on a course intended to terminate the Ulloms' parental rights and to place the child for adoption, ADHS was motivated to exert much of an effort to rehabilitate the Ulloms' home or to correct the conditions that caused the child's removal. In fact, the record does not reflect that ADHS did anything to accomplish a goal of reunification after February 8, 1997, except to permit supervised visitations, and these visits were only permitted because, according to Heather Bailey, "[w]e have to provide visitation until the day of termination." All other reunification efforts, including parenting-skills training, counseling, anger management, etc., were completely abandoned when the termination petition was filed.

I also disagree with the prevailing judges' characterization and interpretation of some of the evidence presented at the termination hearing. For example, in summarizing the testimony of

Dr. Barry Allen, the prevailing opinion states that he testified that the spiral fracture suffered by the Ulloms' child was "very likely . . . the result of child abuse." However, the prevailing judges do not mention that in a letter to the Benton County Department of Human Services in December, 1996, Dr. Allen stated, "[t]he fracture is consistent with maltreatment syndrome, however other etiologies for this fracture cannot be eliminated at this time." This report indicates quite clearly that almost four months after the occurrence of the fracture, causes other than abuse had not been eliminated by Dr. Allen.

It is apparently significant to the prevailing judges that Dr. Allen testified that he had seen the child on "at least eleven occasions," presumably to emphasize how many times she required medical attention. However, they fail to point out that four of those occasions were on four consecutive days, including the day appellants brought the child to the emergency room with the fracture to her arm, and that two of the occasions (February 17 and March 11, 1997) were follow-up visits relating to the bruises on her face. The record is silent as to the dates and purposes of the other five visits, but they obviously did not relate to any alleged incidents of abuse by appellants because at all times subsequent to August 20, 1996, except for the one unsupervised visit on February 8, 1997, the child was in the custody of ADHS.

I also disagree with the prevailing judges' interpretation of the testimony of Dr. O.L. Henderson when they attribute to Dr. Henderson a statement that "a child injured in this manner would begin crying uncontrollably and could not be consoled." However, the prevailing opinion fails to give the context surrounding Dr. Henderson's statement. An examination of the abstract reveals that this statement was actually developed during appellants' cross-examination of Dr. Henderson when he stated that:

> In this age group, an adult picking a child up whose limb is trapped in some way could apply enough force to easily break the arm. There would certainly be a tug, you would notice the resistance. At that point the child would start crying, uncontrollable crying, and you could not console the child.

The prevailing opinion fails to point out that this description by Dr. Henderson is entirely consistent with the testimony of appellant Bobby Ullom that when he picked up the child from her "bouncy seat," he heard a loud "popping sound, like a finger would pop," then the child's arm "fell back" and she let out a loud scream. Bobby immediately took the child into the kitchen and showed Angie Ullom what was wrong with her arm, and they took her to the emergency room. The prevailing opinion also makes no mention of Dr. Henderson's testimony on direct examination that "[u]sually when this fracture occurs there is a noticeable pop when the bone breaks."

I believe that the prevailing opinion has also misconstrued the testimony of Dr. Henderson when it stated that the doctor "testified that, although the child's injury could have resulted in nerve damage, blood vessel damage, and loss of the limb, the possibility of loss of life was very remote." Here, again, the prevailing opinion has taken Dr. Henderson's statement out of context, thereby attributing to the doctor a meaning neither stated nor intended by him. The abstract reveals that the doctor actually said:

> This injury would be a one-incident occurrence which would have worsened by not taking her to the hospital, and moving it around, but was not a life threatening injury. This type of injury could have caused nerve and blood vessel damage *if untreated, and further dislocated by moving it around. At that point* it could have resulted in the loss of a limb. The possibility of loss of life would be very remote. (Emphasis added.)

It is obvious from this exact quote that the risk of nerve and blood-vessel damage, and loss of limb, existed *only if the injury went untreated and became further dislocated by moving it around*, circumstances that did not exist in this case. Bobby Ullom testified that he picked up the child from her "bouncy seat" and heard the "popping sound" after he came home from work at about 4:00 p.m. Angie Ullom testified that Bobby came home from work between 4:00 and 4:30, and that they took the child to the emergency room at about 5:00 p.m. Dr. Allen testified that he first examined the child in the emergency room during the evening of August 20, 1996, although the time of her admission to the emergency room is not revealed by the abstract. Dr. Henderson even

testified that, from his examination, he determined the blood vessels were not ruptured, that the fracture was not displaced, and that the injury had occurred "fairly recently." Never has ADHS contended that the appellants failed to seek timely and appropriate medical care for the child following the discovery of her injury.

The prevailing judges also suggest that Bobby Ullom's testimony at the probable-cause hearing and his testimony at the termination hearing were inconsistent, thereby implying that he was less than truthful in his inability to explain how the child's injury occurred. Again, an analysis of the context of Bobby's testimony points up the fact that there is no inconsistency. At the probable-cause hearing, in response to questions by appellee's counsel about the circumstances that led to the child's trip to the emergency room, Bobby Ullom delivered a lengthy dissertation of the events of the two days that preceded that occasion. He recounted that on the day before, they had been at his parents' house where their baby was the center of attention, with between ten and twenty relatives handling and passing her around, including an eighteen-month-old nephew and a nine-month-old niece, constantly kissing and pulling on her. He said that while the child would be sitting in an adult's lap, the eighteen-month-old nephew was especially persistent in walking over and tugging on her arms in an effort to pull her down where he could kiss her. Bobby recalled that he had just bought a truck that day and that he and Angie had been in and out of the house all day, working on the truck.

Bobby testified that at about 9:30 p.m., when the child started getting "fussy," they headed for home. He stated that when they put the child in her car seat she was real fussy and screaming, but they paid little attention because they thought she was just experiencing gas. When they got her home and put her in her crib, they noticed that she could not lie on her left side at all, that she slept very little during the night, and that Angie was up with her all night long. When he got up to go to work the next morning, Angie was still up with her, and he noticed that the baby would only sleep when Angie held her to her chest, "immobilized where she couldn't move." He stated that when he came home after work, Angie told him that when she picked the child up she noticed that she was holding her left arm differently than she did

before, and differently than she held her right arm. Bobby said that he also noticed that while sitting in her "bouncy seat," the child's left arm was "laid to the side," differently than she usually positioned it.

Bobby stated that while Angie went in the kitchen to get the child a bottle, he picked her up from the "bouncy seat" by sliding one hand under her bottom and the other hand under her neck, and that when he lifted her, her left arm "just kind of fell," she screamed, he heard a popping sound "like whenever you would pop your finger," and that when he wiggled her arm, she screamed even louder. He said that he immediately showed Angie, they both started crying, and they rushed her to the emergency room.

Significantly absent from Bobby's testimony during the probable-cause hearing is the statement attributed to him by the prevailing opinion that he "believed the child's arm had been broken by his nephew."[1] However, the prevailing judges undertake to draw a comparison between his nonexistent testimony at the probable-cause hearing and his testimony sixteen months later at the termination hearing by implying that he now believed that his child's arm was broken when it became entangled in a safety strap as he attempted to remove her from her chair.

To test the validity of the prevailing judges' comparison, it is also necessary to examine in detail Bobby's testimony at the termination hearing. At that hearing, after briefly reiterating the events of the day, Bobby stated that he had thought about the incident for a long time, and that he did then believe that when he picked up his child from her "bouncy seat" and heard the "popping" sound, he knew then that something was wrong but that he was so stunned by her screaming that he was only paying attention to her welfare. He now believed that the velcro strap that held her in the chair had only been opened on one side, but should have

[1] Although the prevailing opinion sets forth in a footnote a portion of the testimony of Bobby Ullom, it should be noted that this testimony is taken from the termination hearing. The prevailing opinion reveals no testimony of Bobby Ullom from the probable cause hearing to the effect that he believed his baby's arm was broken by his eighteen-month-old nephew.

been opened on both sides. He said that it was only after he and Angie had had a long time to think about it and to review their actions of the day leading up to the discovery of the fracture that they were able to come up with the logical explanation.

He admitted that he had not testified earlier about the child's arm being caught in the chair because at the earlier hearing he was relating the events leading to the discovery of her injury and was not thinking about an explanation for it. However, it is little wonder that at the termination hearing Bobby's concentration turned from a mere recitation of events to an explanation of the cause of the child's fracture, considering the inexplicable (and, in my opinion, highly inappropriate) action of the trial judge in writing a letter to the parties' attorneys advising the parties that "without acceptance of responsibility by someone (especially for the broken arm) reunification is not likely to occur." According to the record, this letter was written after several witnesses had already testified *for* ADHS at the termination hearing but *before* any witnesses had testified for appellants. In fact, according to Melissa Bratton, one of appellants' ADHS caseworkers, the appellants were told that this "accept-responsibility-or-else" requirement contained in the judge's letter thereafter became a part of the case-management plan as a condition of reunification. In view of the judge's letter that, as a condition of reunification, "someone" must accept responsibility for the child's broken arm, and the inclusion of this requirement in ADHS's case plan, it becomes readily apparent why Bobby's testimony (which came months after the judge's letter was written) shifted from a general description of events over a two-day period to a description of a specific incident (lifting the child from her "bouncy chair" without unfastening the velcro strap) as the "logical explanation" for her arm fracture. Bobby was obviously doing exactly what the judge and ADHS had stated would be required as a condition of reunification, accepting responsibility for the child's fracture.

The majority opinion contains the statement that "the great weight of the evidence indicates that [the child's] injuries were intentionally inflicted at a time when only appellants were present with the child." I disagree. The only evidence offered by ADHS as to the cause of the child's injuries was the testimony of the

doctors who stated that although the child's injuries are of the type usually associated with abuse, other etiologies could not be ruled out. There is absolutely no evidence to support the proposition that appellants or anyone else intentionally injured the child.

I would be remiss in not taking the time to comment on the concurring opinion of Judge Rogers in which she sets forth her reasons for joining in affirming the trial court. In her concurring opinion, Judge Rogers states, as one reason for her affirmance, her concern about "the unreasonable action of the parents in not seeking immediate aid for this baby." I am at a complete loss to understand the basis for this concern because, as already noted, there was neither an allegation nor was any evidence presented by ADHS that the Ulloms delayed in taking their baby to the hospital emergency room after the discovery of her injury. I am equally puzzled by Judge Rogers' reference to the failure of ADHS to pursue intensive early reunification efforts in view of the "abusive history and violence" of Bobby Ullom. I find no basis in the evidence to support a conclusion that Bobby Ullom has a history of abuse or violence beyond his own admission that twelve or thirteen years ago, as a child in elementary school, he had trouble controlling his anger, and that he once got an in-school suspension in the tenth grade for fighting. I hardly find these incidents sufficiently troubling to justify labeling Bobby Ullom as abusive or violent.

In my view, this is a sad case where a three-week-old baby has been permanently removed from the home of her parents for no other reason than that she was injured in two unfortunate accidents, and the speculation that the injuries were caused by one or both of her parents upon the testimony of doctors that such injuries are usually, but not necessarily, the result of abuse. Such evidence falls far short of the requirement of Ark. Code Ann. § 9-27-341(b), which states that orders for the termination of parental rights must be based on a finding of clear and convincing evidence.

Although I believe the decision of the chancellor should be reversed outright, in view of the lapse of almost three years since the appellants and their child have had any significant time

together, I would reverse and remand this case to the trial court with instructions to direct ADHS to resume its reunification efforts with all due deliberation.

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

Rene DUCHAC *v.* CITY of HOT SPRINGS

CA 98-1270 992 S.W.2d 174

Court of Appeals of Arkansas
Division II
Opinion delivered June 16, 1999

John P. Lewis, P.A., by: *John P. Lewis*; and *Steve Westerfield*, for appellant.

David H. White and *Brian W. Albright*, for appellee.

SAM BIRD, Judge. Appellant Rene Duchac appeals a decision of the Garland County Chancery Court granting the City of Hot Springs a permanent injunction against his use of the property at 605 Quapaw Street as a multi-family dwelling. Appellant contends that the court should not have granted the injunction because the property was a preexisting, nonconforming use when the zoning ordinance went into effect in 1963. Appellant also argues that the City should be barred from enforcing the zoning ordinance by estoppel and laches. The trial court held that the subject property was not a preexisting, nonconforming use. It also held that neither laches nor estoppel applied to the situation, and granted the injunction. We agree with the trial court and, therefore, affirm.

Dora Jane Ledgerwood Ellis, the daughter of C.H. Ledgerwood, who built the house in the 1920s, testified that it was converted from a one-family residence to a two-family residence sometime during the 1930s by turning a stairway around and

adding more bedrooms upstairs. During World War II, Ledgerwood rented the upstairs apartment to an army officer and his wife. After the war was over, the upstairs apartment remained empty, except for a while in 1945 when Ms. Ellis returned from college and lived upstairs, but the house was never converted back to a one-family home. Mrs. Ellis said she married in 1964 and moved out of the house. In 1966 the Ledgerwood family moved to a new house. Ms. Ellis said that at that time it was a single-family residence, and Ledgerwood sold the property to Zenonas Minginas sometime between 1966 and 1969.

June Smith, who lives next door to 605 Quapaw, testified that as soon as she learned that Duchac was using the property for apartments, probably around the mid-70s, she complained to the city, and has continued to complain through the years.

Tom Elgin, the Director of Planning and Development for the City of Hot Springs, testified that the first comprehensive zoning ordinance for the city was passed in 1963. It zoned the area in which 605 Quapaw is located as R-3, "Low Density Residential." An ordinance identical to the 1963 ordinance is still in effect. Nevertheless, he admitted that the house at 601 Quapaw, next door to 605, is a four-unit apartment house; 627 Quapaw is about a half block from 605 and is a six-unit apartment house; and diagonally across an alley to the rear of 605 is a three-unit apartment house. Furthermore, directly behind 605 is an automobile body-repair shop. Mr. Elgin did not know whether these other buildings had been non-conforming uses at the time the zoning was adopted, or whether variances had been granted for them.

Appellant testified that he bought the apartment house at 605 Quapaw in 1973 from Zenonas Minginas, and the house had a two-bedroom unit upstairs, a two-bedroom unit downstairs, a one-bedroom unit downstairs, and an efficiency apartment downstairs, which were all occupied. He said he would not have bought the property as a single-family dwelling. Duchac obtained a purchase-money mortgage characterizing the property as a hotel, and has never used it as a single-family unit. He said that he has always had 100% occupancy, that he lived there himself for a while, and that he later used part of the house as his CPA and Real

Estate office. Mr. Duchac also testified that each year since he purchased the property he has paid the City an "occupancy tax," and the City has never returned his money.

Over the years, Duchac said, the house has required maintenance to the plumbing, kitchens, bathrooms, and electrical system. If the City had informed him in 1970 that the house could not be used as an apartment building, he would not have purchased it, and if he had known "a couple of years later," he wouldn't have spent money on needed electrical and plumbing upkeep. He said it would cost him "a fortune" to turn the house back into a single-family dwelling. Stairwells, walls, and appliances would have to be moved, and it would be "totally cost prohibitive."

Appellant also testified that he had talked to Zenonas Minginas about the history of the house when he purchased it, but Minginas died around 1980, and appellant had no access to the records regarding Minginas's tenants. Appellant said he had been able to locate only one of the tenants who lived in the house when he purchased it. He complained that the delay by the City of almost thirty years had greatly diminished his witness list because so many who were familiar with the early history of the house had died or moved away.

Zenonas Minginas's son, John Minginas, testified for appellant by deposition, stating that his father purchased the property as an apartment building, moved into the house in January 1969, and it had three mailboxes in the carport, evidencing its use as a multi-family dwelling. At that time, the lower floor of the house had a large living room, a kitchen, a bathroom, a bedroom, and an intermediate room, which could be used for a bedroom. Zenonas Minginas subsequently divided the living room with partitions into two sleeping rooms and a bathroom, and the occupants shared the kitchen with the family living in the larger downstairs area. Upstairs there was a living room, kitchen, two bedrooms, and a bathroom. The only way to get upstairs was from the outside; there was no connection by which a person could go into the main house downstairs and get to the upstairs apartment. John Minginas insisted that his father purchased the house for use as rental property.

Appellant first argues that the trial court erred in granting the permanent injunction because the property was exempt from the 1963 zoning ordinance as a preexisting, nonconforming use. He relies on *Blundell v. City of West Helena*, 258 Ark. 123, 522 S.W.2d 661 (1975), where the court recognized:

> [Z]oning ordinances, being in derogation of the common law, must be strictly construed in favor of the property owner and . . . under our constitution, the right of private property is regarded as before and higher than constitutional sanction. Attempts to deprive the owner of a preexisting use have been regarded as unconstitutional as a taking of property without compensation or in violation of due process of law. . . . [W]e prefer what has been referred to as the "substantial use" test for determining whether the use of property is an existing use at the time of adoption of a zoning ordinance to the extent that the use may be continued thereafter.

258 Ark. at 130-31, 522 S.W.2d at 666 (citations omitted).

Appellant argues that, although the upstairs apartment was not occupied for several years after World War II, the character of the house as a multi-family dwelling was not changed. Therefore, when the ordinance was passed in 1963, the house was a nonconforming use.

The chancellor relied on *Anderson v. City of Paragould*, 16 Ark. App. 10, 695 S.W.2d 851 (1985). Anderson had lived in a mobile home on his lot when a zoning ordinance against trailers became effective, so his home qualified as a preexisting, nonconforming use. Appellant removed the mobile home from his lot and traveled for almost a year between 1983 and 1984. He returned to Paragould and sought a zoning variance to build an apartment building on the lot. When it was denied, Anderson moved another mobile home onto the lot. The Arkansas Supreme Court held that because the Paragould zoning ordinance contained a clause stating that a discontinuance of the preexisting, nonconforming use for over thirty days constituted an abandonment, Anderson lost the right to exercise the preexisting, nonconforming use. The court said, "Where the ordinance in question contains a discontinuance time limitation, courts have held that such nonexercise of the nonconforming use is sufficient, of itself,

to terminate the nonconforming use, regardless of intention to abandon." 16 Ark. App. at 12, 695 S.W.2d at 852.

Article 3-7 in the Hot Springs Zoning Code, provides:

> A nonconforming use of land or a nonconforming use in a structure designed for a conforming use shall not be restored to a nonconforming use after such nonconforming use has been discontinued for 12 months.

Based on this ordinance and the evidence before him, the chancellor held that the multi-family use of the property during World War II was discontinued for a sufficient period of time prior to the passage of the city zoning code in 1963 to constitute an abandonment.

In appellate review of ordinary equity cases there are two different components of the chancellor's ruling that are considered. The appellate court will not set aside a chancellor's finding of fact unless it is clearly erroneous. Ark. R. Civ. P. 52. This deference is granted because of the regard the appellate court has for the chancellor's opportunity to judge the credibility of the witnesses. *City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996). However, a chancellor's conclusion of law is not entitled to the same deference. If a chancellor erroneously applies the law and the appellant suffers prejudice, the erroneous ruling is reversed. Manifestly, a chancellor does not have a better opportunity to apply the law than does the appellate court. *Id.* The issues in this case turn on questions of fact rather than questions of law, and we find that the chancellor's conclusion that the nonconforming use of the building had been abandoned before the ordinance took effect is not clearly erroneous.

Ms. Ellis testified that she had lived in the house until 1964 and it was a single-family residence at that time. On cross-examination, Ms. Ellis was asked:

> Q. Now, if John Minginas testified that when they bought the property it was two living units downstairs and one living unit upstairs, would you know how that got to be that way?
>
> A. No, there were not two living areas downstairs because we lived there ourselves, period.

She also insisted that there was only one mailbox for the house, and on redirect examination said that when her family sold the property, it was a single-family residence. This testimony supports the chancellor's finding that the character of the house had returned to a single-family dwelling and existed in that form at the time the City zoning ordinance was passed in 1963.

Next, appellant argues that the City should be barred from obtaining or enforcing the injunction because it waited more than thirty-five years to challenge the multi-family use of the house. He contends that the equitable principles of estoppel and laches apply. Our supreme court has held that estoppel can be applied against a city. *See Miller v. City of Lake City*, 302 Ark. 267, 789 S.W.2d 440 (1990). In *City of Russellville v. Hodges*, 330 Ark. 716, 957 S.W.2d 690 (1997), our supreme court set out the elements of estoppel:

> 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 the 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. *State v. Wallace*, 328 Ark. 183, 941 S.W.2d 430 (1997); *Foote's Dixie Dandy, Inc. v. McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980). Additionally, we have specifically held that a sovereign is not bound by the unauthorized acts of its employees. *Arkansas State Highway Comm'n v. Townsend*, 313 Ark. 702, 858 S.W.2d 66 (1993); *Miller v. City of Lake City*, 302 Ark. 267, 789 S.W.2d 440 (1990); *Hankins v. City of Pine Bluff*, 217 Ark. 226, 229 S.W.2d 231 (1950). On appeal, we do not reverse a chancellor's findings of fact unless they are clearly against the preponderance of the evidence. *Thompson v. Potlatch Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996).

330 Ark. at 719, 957 S.W.2d at 691-92. The trial court also cited *Hope Educ. Ass'n v. Hope School Dist.*, 310 Ark. 768, 839 S.W.2d 526 (1992), which applied the same elements of estoppel, with a few wording changes, to a sovereign. In applying these elements of estoppel to the facts of this case, the chancellor found they were not all satisfied.

Appellant challenges that finding, arguing that all the elements of estoppel *were* present. The first element of estoppel is that the party to be estopped must know the facts. Appellant submits that the first element is satisfied since the City knew the zoning ordinances, (2) the City had received complaints about his use of the house as a multi-family dwelling, (3) he had paid occupation taxes on the nonconforming use since 1973, and the City never returned the money. In making his decision, the chancellor assumed that the City knew the facts.

According to appellant, the second element of estoppel, that the party to be estopped must intend that the conduct be relied on, is satisfied by the City billing and collecting occupational taxes, thereby acquiescing in appellant's use of the house as an apartment building. The Arkansas Supreme Court has held that estoppel may only be applied against the State when there has been an "affirmative misrepresentation by an agent or agency of the State." *Arkansas Dep't of Human Servs. v. Estate of Lewis*, 325 Ark. 20, 922 S.W.2d 712 (1996). *See also Foote's Dixie Dandy, Inc. v. McHenry, supra.* Estoppel should not be applied where there was no clear proof of an affirmative misrepresentation. *Everett, Director v. Jones*, 277 Ark. 162, 639 S.W.2d 739 (1982). These requirements are equally applicable to municipal corporations. *Miller v. City of Lake City*, 302 Ark. 267, 789 S.W.2d 440 (1990). In the instant case there is no allegation of any affirmative misrepresentation by any agent of the City. The chancellor was correct in not applying estoppel to the City because of the City's acquiescence in appellant's use of the house as an apartment for many years.

As to the third element of estoppel, the party asserting the estoppel must be ignorant of the facts, appellant argues that he was justifiably ignorant of the zoning violation because the house was divided into apartments that were fully occupied when he purchased it, and, in the thirty years he has owned the house, the City never informed him that he was violating a zoning ordinance. Again, appellant is not claiming an affirmative misrepresentation by an agent of the City, only acquiescence. The chancellor found that since the zoning ordinance was law, and one is presumed to know the law, appellant could not rely on his igno-

rance. It has long been held that every person is presumed to know the law and that ignorance of its mandates is no excuse. *Henderson v. Gladish*, 198 Ark. 217, 128 S.W.2d 257 (1939). *See also Hogg v. Jerry*, 299 Ark. 283, 773 S.W.2d 84 (1989); *Dunkin v. Citizens Bank of Jonesboro*, 291 Ark. 588, 727 S.W.2d 138 (1987).

Finally, appellant contends the fourth element of estoppel, that the party asserting the estoppel must rely on the other's conduct and be injured by that reliance, is satisfied because he relied on the conduct of the City to his detriment by expending large sums of money paying the taxes and in purchasing and maintaining the house as an apartment building. The chancellor found that the fourth element was not satisfied in that the City had done nothing appellant was justified in relying on. This conclusion was not clearly erroneous.

Appellant's final point is that the doctrine of laches should bar the city from enforcing the zoning ordinance against him. To apply laches there must be an unreasonable delay by the plaintiff, and the suffering of a detrimental change in position by the defendant. The doctrine of laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. *Self v. Self*, 319 Ark. 632, 893 S.W.2d 775 (1995); *Anadarko Petroleum v. Venable*, 312 Ark. 330, 850 S.W.2d 302 (1993). It is based on the assumption that the party to whom laches is imputed has knowledge of his rights and the opportunity to assert them, that by reason of his delay some adverse party has good reason to believe those rights are worthless or have been abandoned, and that because of a change of conditions during this delay it would be unjust to the latter to permit the former to assert his rights. *Self, supra*; *Briarwood Apartments v. Lieblong,* 12 Ark. App. 94, 671 S.W.2d 207 (1984).

Appellant contends that if the City had enforced the zoning ordinance against Minginas, appellant would not have bought the property as an investment in rental property, and he would not have spent so much money in maintaining and improving the property as a multi-family dwelling. In addition, he argues that because of the delay, many witnesses have died or memories have

faded and he was prejudiced by the lack of witnesses to prove his case.

We find appellant's arguments unpersuasive. The equitable doctrine of laches cannot be successfully invoked to defeat the right of a city to enforce its ordinances. *See Bushmiaer v. City of Little Rock*, 231 Ark. 848, 333 S.W.2d 236 (1960); *Thomas v. City of Little Rock,* 52 Ark. App. 24, 914 S.W.2d 328 (1996). *See also Township of Fairfield v. Likanchuk's, Inc.*, 274 N.J.Super. 320, 644 A.2d 120 (1994), in which the court held:

> A municipality's "prior tolerance of a use in violation of a zoning ordinance . . . will not estop the municipality from later enforcing the ordinance." Thus, a municipality's enforcement of its ordinance ordinarily "may not be prevented on grounds of estoppel merely because a suit to terminate the illegal use could have been commenced earlier." Further, the application of laches as a defense to a municipality's attempt to enforce its ordinance does not "comport with salutary public policy," and the doctrine should not be permitted to frustrate the enforcement of a valid zoning regulation "except in the clearest and most compelling circumstances." This is because the municipality represents "all the people of the municipality and the zoning ordinance is presumably for the benefit of the community as a whole."

644 A.2d at 127-28 (citations omitted).

Affirmed.

ROGERS and MEADS, JJ., agree.

Donnie R. NIECE *v.* DIRECTOR, Employment Security Department, and Dillard Department Stores

E 98-72 992 S.W.2d 169

Court of Appeals of Arkansas
Division II
Opinion delivered June 16, 1999

Kaplan, Brewer & Maxey, P.A., by: *Silas H. Brewer, Jr.*, for appellant.

Allan Pruitt, for appellees.

JUDITH ROGERS, Judge. This is an appeal from the Board of Review's decision finding that appellant intentionally violated the employer's drug policy and that such action was misconduct for the purposes of unemployment law. On appeal, appellant argues that there is no substantial evidence to support the Board's decision and that the employer failed to promptly provide medical treatment in accordance with the Arkansas Workers' Compensation Act. We agree with appellant's first point and reverse and remand for an award of benefits.

The record reveals that appellant was employed by Dillard's Department Stores in the shipping department. Appellant had worked there for a year and four months. Appellant's job entailed loading trucks and operating a sorter machine. On October 29, 1997, an hour before the end of his shift, appellant's toe got caught in a section of rollers on a conveyor line. Appellant reported to the assistant manager that he had injured his foot. The manager asked if he was all right, and appellant responded that he was okay, and he finished his shift. While at home that same eve-

ning, appellant's toe began swelling and hurting. Appellant's mother gave him a Tylenol 3 tablet. The Tylenol 3 was his mother's prescription medication. Appellant was unaware that the Tylenol 3 contained codeine. Appellant arrived at work early the next morning and informed the shipping manager that his toe was hurting worse and that he needed to see a doctor. Appellant did not perform any work activity that morning, but he was taken to the doctor. While at the doctor's office, appellant was drug tested. The drug test returned positive for codeine. Appellant was subsequently fired for violating the drug policy.

On appeal, appellant contends that his conduct was not an intentional disregard of the employer's interest and that the alleged rule violation relied on by the Board was different from the alleged rule violation for which he was terminated by Dillard. Appellees argue that appellant was aware of the company policy prohibiting employees from unauthorized use of prescription drugs, nonetheless, appellant took his mother's prescription medication intentionally disregarding the policy.

Our standard of review in employment security cases is well-settled. This court reviews the findings of fact of the Board of Review in the light most favorable to the prevailing party, only reversing where the findings are not supported by substantial evidence. *Dray v. Director*, 55 Ark. App. 66, 930 S.W.2d 390 (1996). Substantial evidence is such evidence that a reasonable mind would find adequate to support a conclusion. *Id.* The credibility of the witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review. *Anderson v. Director*, 59 Ark. App. 266, 957 S.W.2d 712 (1997). Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

The Board relied on the case of *George's Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995) to hold that appellant

intentionally violated a company policy when he took an unauthorized prescription drug that he knew violated company policy. We find *George's* distinguishable from the facts of this case. In *George's*, we only determined that a drug policy was not unreasonable when it promoted safety in the workplace. We then remanded the case back for a determination of whether the claimant had intentionally or deliberately violated the drug policy. In this case, the issue does not involve the legality of the policy, but rather, did appellant intentionally violate the drug policy. Because that issue was never reached in *George's*, the Board's reliance on *George's* was misplaced.

In determining whether appellant intentionally violated the drug policy in this case we look to Arkansas Code Annotated section 11-10-514(a) (Repl. 1996). It provides that an individual shall be disqualified for benefits if he is discharged for misconduct in connection with the work. "Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has the right to expect; and (4) disregard of the employee's duties and obligations to his employer. *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). There is an element of intent associated with a determination of misconduct. Mere good-faith errors in judgment or discretion and unsatisfactory conduct are not considered misconduct unless they are of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or intentional disregard of the employer's interest. *Id.* Whether an employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question for the Board to decide. *Id.*

Appellant testified that he was injured at work. He said that when he went home his toe began to hurt worse, and he asked his mother for pain medication. His mother tried to contact her doctor to see if appellant could take her Tylenol 3 prescription medication. However, the doctor could not be reached. Appellant testified that he did not know that Tylenol 3 contained codeine or

that it would show up on a drug test. He said that he only took the medication for his injury. The record indicates that appellant did not take the medication the next morning before he went to work to report that he needed to see a doctor. There is no evidence that appellant took the medication at any other time while working for Dillard's. In fact, the evidence shows that appellant never missed a day of work in a year and four months, that he was always on time, and that he was a good worker. Even Dillard's unemployment manager acknowledged that appellant was not a pharmacist and that he could not know what drugs were contained in a Tylenol 3.

Under some circumstances, people can make a decision that is not intentionally a disregard of the employer's interest but more a decision out of concern for their own health and well-being. This case is one of those circumstances that demonstrates a mere good-faith error in judgment that was not to such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or intentional disregard of the employer's interest. Appellant's work history with Dillard was exemplary. At the time that appellant was injured, he was not under the influence of any drugs or alcohol. It was not until his injury created the need for appellant to take pain medication that his mother provided him with her prescription Tylenol 3. Despite the fact that appellant knew he was not to take someone's prescription medication, the facts in this case lead to the logical conclusion that appellant made a good-faith error in judgment. Thus, we cannot say that reasonable minds could have reached the same conclusion as the Board. Because we reverse and remand this case to the Board for an award of benefits, we need not address appellant's second point on appeal.

MEADS and BIRD, JJ., agree.

Gerald Dean FOWLER *v.* STATE of Arkansas

CA CR 98-1020 992 S.W.2d 804

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 16, 1999

Brenton D. Bryant, for appellant.

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

WENDELL L. GRIFFEN, Judge. Gerald D. Fowler appeals his conviction of harassment in Washington County Circuit Court on May 14, 1998. Appellant argues that the trial court erred when it permitted the State to inquire during cross-examination into his and a witness's political beliefs and attendance at a meeting. We agree and reverse.

On October 9, 1997, the victim and her twelve-year-old daughter were driving home about 10:00 p.m. when they realized that they were being followed by the appellant. She was leaving work from an establishment called the Jones Center. The victim testified that appellant drove alongside her while she was stopped at a red light and subsequently began following her.

At the jury trial for harassment, the court allowed the prosecution to question appellant and one of his witnesses about 1) their attendance at meetings at the Jones Center and 2) appellant's political beliefs. Arguing appellant's credibility was at issue, the State's questions included:

1. What are those citizen's rights which you deal with . . . dealing just with the criminal justice system and the court system?

2. Do you feel that you've ever been abused by the government yourself?

3. Do you consider this to be a military court [and therefore does not have jurisdiction over you]?

Counsel for appellant objected to much of the line of questioning, arguing that it was not relevant to credibility or the issues in the case and that the State was attempting to prejudice the jury against the appellant. The trial court permitted the questioning. Appellant was convicted, sentenced to one year in the Washington County Jail, and fined $1000. Appellant argues that the line of

questioning was not permitted by Rule 608 of the Arkansas Rules of Evidence and was not relevant to the case. He contends that his political views were not probative of truthfulness or veracity. Furthermore, appellant argues that this line of questioning prejudiced his right to a fair trial by implying that he was inherently unreliable due to his beliefs and political association. The State argues that appellant's beliefs affected his credibility and whether or not he will testify truthfully in court. The State contends that appellant's beliefs go directly to whether or not he believes the court has authority over him.

Rule 608 of the Arkansas Rules of Evidence provides:

> *Evidence of character and conduct of witness.*
>
> (a) *Opinion and Reputation Evidence of Character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
>
> (1) *the evidence may refer only to character for truthfulness or untruthfulness*, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) *Specific Instances of Conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(Emphasis added.) The test of admissibility may be summarized in three steps: 1) the question must be asked in good faith; 2) its probative value must outweigh any prejudicial effect; 3) the prior conduct must relate to the witness' truthfulness. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983). The rule limits cross-examination to specific instances of conduct that are clearly probative of truthfulness or untruthfulness, as distinguished from conduct pro-

bative of dishonesty. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *Green v. State*, 59 Ark. App. 1, 953 S.W.2d 60 (1997).

In *United States v. Abel*, 469 U.S. 45 (1984), testimony regarding membership in a secret prison gang was held to be probative of bias and not unduly prejudicial. One of the organization's tenets required each member to perjure himself on other members' behalf. The court held that, not only did the membership in the gang "show potential bias in favor of the respondent; because of the tenets of the organization described, it might also impeach his veracity directly." *Id.* at 56. The Court held "no view as to whether the evidence of . . . membership . . . would be a specific instance of . . . conduct which could not be proven against him by extrinsic evidence except as otherwise provided in Rule 608(b)." *Id.*

Whether evidence is unduly prejudicial is determined under Rule 403 of the Arkansas Rules of Evidence, which provides:

> *Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.* Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This balancing is a matter left to the sound discretion of the trial judge, and his decision will not be reversed absent a manifest abuse of that discretion. *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996); *Weger v. State*, 315 Ark. 555, 869 S.W.2d 688 (1994).

In this case, it is not alleged that appellant's political activities and those of his witness condoned lying in furtherance of the organization's purpose. Nothing in the record suggested that members of the appellant's group would perjure themselves. What was sought at trial was the use of appellant's political associations to attack his credibility and cast doubt as to whether he would testify truthfully in a court with a "military" flag.

The conduct must be *clearly* probative of truthfulness. Appellant's belief regarding military courts and their jurisdiction is

not clearly probative of his truthfulness. To the contrary, appellant testified that the Washington County Circuit Court did have jurisdiction over his case, and his witness testified that he understood the oath and what it meant to testify truthfully. During the testimony, the State did not attempt to show that appellant's organization required him to lie if he was in the "wrong" court or a court without jurisdiction. The State's line of questioning was improper under Rule 608, as it was not clearly probative of the appellant's truthfulness. The line of questioning was used to persuade the jury that, because of his political beliefs and association, appellant was the type of person who would be guilty of harassment and should be behind bars. The law of evidence does not presume that participation in a group that holds unconventional views manifests a propensity for truthfulness or untruthfulness. Examination into such matters is proper only where such associations are probative of a witness's truthfulness or untruthfulness under Rule 608.

Reversed.

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

JENNINGS, J., dissents.

JOHN E. JENNINGS, Judge, dissenting. The majority reverses Mr. Fowler's conviction of misdemeanor harassment on the basis that the circuit judge erred in permitting certain questions by the State on cross-examination. I respectfully dissent.

I have no disagreement with the view that a defendant's political beliefs are, generally speaking, irrelevant in a criminal prosecution. But the question in the case at bar is whether this defendant's beliefs were relevant on the issue of his credibility. His credibility was crucial to the case because he testified at trial and not only denied harassing the complaining witness, but also relied on the defense of alibi.

Questions in the law of evidence differ from those involving substantive law. A question of substantive law may frequently be posed and answered in the abstract; issues involving the law of evidence must almost always be viewed in context. The trial court may have time to ponder questions of substantive law, but deci-

sions on the admission of evidence must be made on the spot. It is said that the admission of evidence is a matter that lies within the sound discretion of the trial court. *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998).

In the case at bar after the defendant had testified on direct, the State cross-examined:

> Q Let me ask you, do your meetings, do you have discussions or talk about or deal with government matters at your meetings?
>
> A No.
>
> MR. BRYANT: Objection, irrelevant, beyond the scope of direct examination.
>
> MR. FRANCO: I think if I'm allowed to flush this out I'll try to be as absolutely brief as possible but I think that I can get to a point that will deal directly with his credibility.
>
> THE COURT: Well, I think if this goes to credibility then I'll permit it for at least the time being. Overruled.
>
> CONTINUING CROSS-EXAMINATION BY MR. FRANCO:
>
> Q Do you deal with matters relating to the government?
>
> A No, sir, we deal with matters relating to constitutional documents.
>
> Q Okay, do these, do you have discussions regarding the authority that governments or more specifically courts have over you?
>
> A No, sir, we discuss citizen's rights.
>
> Q All right. In the realm of dealing with the court system, more specifically the criminal justice system?
>
> A Well, it's mainly the exercise of your rights, citizen's rights.
>
> Q What are those citizen's rights?
>
> A Well, that would be too much to enumerate.
>
> Q Please answer the question?

MR. BRYANT: Your Honor, it's beyond me how this can have anything to do with the credibility of a witness.

THE COURT: Well, again, Counsel, I have addressed the objection. I'm going to permit it up to a point so overruled. Now, you may proceed.

CONTINUING CROSS-EXAMINATION BY MR. FRANCO:

Q What are those citizen's rights which you deal with — I'll narrow it for you, dealing just with the criminal justice system and the court system?

A Well, we don't confine it to that.

Q I want — let's just confine the topic to that for purposes of your answering the question?

A Well, it's — you know and I don't know if I can quote it exactly, one of your founding fathers said, vigilance, and I can't quote it exactly but vigilance is the exercise of freedom to keep a nation's citizens free so it's to make people aware of what the constitution is for and how that it is to work as a restraint against governmental abuses.

Q What governmental abuses?

A Well, I don't know, I feel strange you'd ask me that question as if you don't think there's ever been any governmental abuses.

Q Do you feel that you've ever been abused by the government yourself?

A I feel like that there has been an excess of it by the government, that and of course they're discussing this every day in the newspapers and this is what the courts are for is to try to work out the differences of people's opinions as to what is correctly judicial and what is not.

Q That flag right there has gold stripes on it; is that correct?

MR. BRYANT: Objection, Your Honor, may I approach please?

THE COURT: You may.

MR. BRYANT: Your Honor, the only thing the Prosecutor is trying to do in this case is prejudice the Jury against my client because of his political beliefs. There's no way this has anything to do with the ability to tell the truth or not. This is an outrageous attempt on the Prosecutor's part to prejudice my client and I'd ask that he not be permitted to do that.

MR. FRANCO: Throughout the entire prosecution of this matter Mr. Fowler has objected to the flag with gold stripes on it and stated it's military and doesn't have the authority over him, it's my understanding from his statement. I think if that's the belief here today I think it goes to, directly to the fact of if he thinks they have authority.

THE COURT: Well, you can narrow your question down to that particular issue which goes to credibility. I'm going to permit it but we need to narrow the scope of the inquiry and get on with it. All right. You may proceed.

BY MR. FRANCO:

Q What's the significance of the gold stripes on that flag right there?

A It shows that it's a military flag.

Q In your opinion, and?

A According to the studies that we have had, that's correct.

Q All right. What's that mean in your opinion if it's a military flag?

A Well, if — now under, I'm quoting from the studies, all right.

Q Yes, sir, yes, sir?

A USC 1, I believe 4D, denotes the U.S. constitutional flag of America.

Q What type of flag is that supposed to be, what's the gold mean?

A It does not have a symbol on top.

Q The gold fringe means it's a military flag; is that correct?

A Yes, sir, according to army regulations, according to certain codes.

Q Is it your belief that if it's a military flag then there — isn't it true that you're — it's your belief that since we have military flag in the courtroom this is basically a military court and we don't have jurisdiction over you in this court, is that your belief?

A I understand that Reed verus Calvert says no U.S. citizen shall be tried in a military court.

Q Yes, sir?

A And President George Bush, and I don't remember the date right now, signed an executive order that all courts in the United States are military courts.

Q He did?

A He did.

Q Do you consider this to be a military court?

A I'm just telling you what the record is.

Q I'm asking do you consider this to be a military court?

A I don't know as I have an opinion. I'm telling you that's what I have read by executive order of a U.S. Supreme Court ruling.

Q One more question on this topic. Based upon your studies and the fact that's a military flag, you're not in the military; correct?

A Not now.

Q Do you feel that you are in the wrong court here today to be tried for the charges that have been brought against you?

A I'm here.

Q Do you feel by — based upon your belief and your study that —

A Let me ask — may I ask you a question?

THE COURT: Now wait a minute, wait a minute. This process is not going to work at all unless we follow some basic rules. Mr. Franco, you ask the questions and you respond to the questions if possible with either a yes or no and if you don't understand the question simply tell him and he will restate the question and maybe sometime before sunset this matter will come an end. Please try again to repeat the question and you just answer, you ask the question and you respond as briefly and succintly as you possibly can hopefully with a yes or no and then we'll move ahead.

BY MR. FRANCO:

Q Based upon your study and your understanding of this executive order, do you feel that you are in the proper court yourself for the charges that have been filed against you?

A To the best of my study until I'm shown differently or can be proved differently I'm a U.S. citizen in one of the fifty states, I'm under the U.S. Constitution of America as a free citizen, I'm not in the military and if it's correct according to the study that's a military flag, that flag denotes what court I'm under in this room.

Q So you, based upon your study you believe this to be a military court?

A According to George Bush.

Then, on redirect:

BY MR. BRYANT:

Q Gerald, are you nervous about being here today?

A I'm totally relaxed.

Q Even though you may have a disagreement about whether or not that particular flag is the proper flag to be displayed in a courtroom, do you fully accept — I mean what's your thoughts about this Court's jurisdiction over you, do you accept that?

A Yeah, I have accepted it.

Q And what are your thoughts about the role of the Jury here today?

A I think that's a great American way.

Nick Herrington was an alibi witness for the defendant. The following transpired during the State's cross-examination:

Q Your meetings out there, what type meeting is that?

MR. BRYANT: Object, Your Honor, beyond the scope of direct examination.

MR. FRANCO: He said he was at the meeting. I think he opened the door.

THE COURT: Well, I really fail to see how it's relevant to these proceedings, Counsel. If you can tie it into something, I'll permit a few questions.

MR. FRANCO: It's just like when we did Mr. Fowler, I'll get right to the point.

BY MR. FRANCO:

Q You notice the flag over there?

A Yes, sir.

Q What sticks out on that flag to you?

A A variety of things.

Q What about the gold fringe around the flag?

A Indicates military law.

Q What does that mean to you?

A It's not common law.

Q Okay, it's not common law?

A No, sir it's not.

Q The law that we're doing in court here today, the trial we have is a criminal trial?

A Yes, sir.

Q What type of law is this we're doing here today?

A That flag indicates military law.

Q In your opinion is this a military court?

A Not my opinion.

Q Whose opinion?

A Title 4, U.S. Code, Section 102, which defines the flag, Title 36, U.S. Code 71-73, which goes further into the flag, Army Regulation 840-10, that really gets into it, Chapter 8.

Q Do you believe that Mr. Fowler is in the right court today for the charges for, he's been charged with, a violation of state law —

MR. BRYANT: Your Honor, this is all very interesting.

THE COURT: Overruled, it goes to credibility. I'm going to permit it. Overruled.

BY MR. FRANCO:

Q You believe Mr. Fowler is in the correct court today based upon the flag that's here and he's charged with a crime under the laws of the State of Arkansas?

A How you define a crime —

Q The crime of harassment, he's charged with the crime of harassment?

A Well —

Q It's a yes or no question, do you believe he's in the right court?

A I don't know.

Q Do you — you're here as a witness in this court today and I think you took an oath, you were sworn in; is that correct?

A Yes, sir.

Q Does the fact that you're under that flag, you don't — let me back up just a second, you believe that that's the wrong flag to be in this courtroom, correct?

A We don't have a complete set of flags here, let's put it that way.

Q What other flag is missing then if that flag is flying?

A The American flag of peace means Old Glory is present, do you see it?

Q So we have the right flag?

A You don't have a complete set.

Q Based upon that do you believe that you're bound by the authority of this court here today?

A I'm a witness here.

Q Well, do you believe based upon your belief that Mr. Fowler is bound by the authority of this court?

A Yes, he's got an attorney.

Q No, let me restate my question. Do you believe that Mr. Fowler is bound by the authority of this court, that he comes under the authority of this court based upon what you have talked about, the flag and stuff —

MR. BRYANT: Your Honor, how is the witness supposed to testify as to what Mr. Fowler believes? I believe that's improper.

THE COURT: That wasn't the question. The question was does this witness believe that Mr. Fowler is bound by the authority of this court, which I assume goes to his belief in this system which to some extent has something to do with his credibility. I think if he can narrow the issue to one of credibility I'm going to permit the inquiry and please, let's move along.

MR. FRANCO: That's the last question I have, Your Honor, and that's exactly what I'm asking about.

BY MR. FRANCO:

A If he didn't believe he was bound he wouldn't be here.

Then, on redirect:

BY MR. BRYANT:

Q Mr. Herrington, understand what it means to take an oath to tell the truth?

A Yes, sir.

Q Are you bound by that oath here today?

A Yes, sir.

Generally speaking, whether evidence is admissible depends upon whether it is likely, all things considered, to advance the search for the truth. *Gist v. Meredith Marine Sales & Serv.*, 272 Ark. 489, 615 S.W.2d 365 (1981); Ark. R. Evid. 102. Also as a general rule, all relevant evidence is admissible. Ark. R. Evid. 402.

The credibility of any witness is always at issue and always important. This is why our courts have held that the bias of a witness is not a collateral matter. *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978); *Hackett v. State*, 2 Ark. App. 228, 619 S.W.2d 687 (1981). In *Koch v. Koch Industries, Inc.*, 2 F. Supp.2d 1385 (D. Kan 1998), the court said:

> Although not specifically mentioned in the Rules, proof of bias, that is, any evidence of a relationship, circumstance or motivation which might lead a witness to slant, unconsciously or otherwise, his testimony is almost always relevant. A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony. Courts generally are liberal in admitting evidence of bias because a jury must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness to determine whether a modification of testimony reasonably could be expected as a probable human reaction. Proof of a witness's motivation or potential bias is critical when the witness is a party and key witness to the alleged events. The range of evidence that may be elicited for the purpose of establishing bias of a witness is quite broad. (Quotation marks and citations omitted.)

Id. at 1389.

Here the State successfully elicited from Mr. Fowler his view that the flag in the courtroom was a military flag; that *Reed v. Calvert* says that no United States citizen shall be tried in a military court; and that President Bush signed an executive order that all courts in the United States are military courts. From Mr. Herrington the State elicited his view that the flag in the trial court

was not "common law" but indicated military law; that the United States Code stated that the trial court was a military court; and that Herrington was uncertain that Mr. Fowler was in the right court. It is true, as the majority says, that the State did not obtain an admission from either witness that he was prepared to lie because he was in the wrong courtroom. Nevertheless, the evidence elicited was circumstantial evidence bearing on the witnesses' credibility.

> The man who believes that he is under no legal or moral obligation at all times and under all circumstances to tell the truth under the sanction of a oath has destroyed the only test by which he can claim credit at the hands of men. Such evidence is not establishing a bad character from particular facts.

Wigmore, *Evidence* § 957 (Chadbourn Rev. 1979) quoting from *Anonymous*, 19 SCL (1 Hill) 251, 252 (1833). Any material fact may be established by circumstantial evidence. *Pitts v. Greene, Administrator*, 238 Ark. 438, 382 S.W.2d 904 (1964). The fact that evidence may be of only slight relevance is not a basis for its exclusion. *See Dooley v. Cecil Edwards Const. Co.*, 13 Ark. App. 170, 681 S.W.2d 399 (1984).

The importance of cross-examination as an engine for truth is well known. While the State is not entitled to the benefit of the confrontation clause, like any other litigant it is entitled to the right of cross-examination. The cross-examiner is given wide latitude, particularly in matters relating to the witness's credibility. *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (1979); *Shaver v. State*, 37 Ark. App. 124, 826 S.W.2d 300 (1992). A broad view of cross-examination is especially important where it might reveal bias on the part of a key witness. *Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986). The trial judge has considerable discretion in determining the scope of cross-examination. *Boreck v. State*, 277 Ark. 72, 639 S.W.2d 352 (1982). In *Davis v. Alaska*, 415 U.S. 308 (1974), Chief Justice Burger, speaking for the Court, said:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness.
>
> . . .
>
> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.

Id. at 316 (citation omitted).

And in *State v. Elijah*, 289 N.W. 575 (Minn. 1940), the Minnesota Supreme Court said:

> Cross-examination is an agency for the development of truth in judicial inquiries. Its chief purpose is to enable the trier of fact to determine what evidence is credible and what is not. For that purpose it is important to show the relation of the witness to the cause and the parties, his bias or interest or any other fact which may bear on his truthfulness.
>
> . . .
>
> Cross-examination to show the bias, prejudice, interest or disposition of the witness to tell the truth is a matter of right, the exercise of which is indispensable to show the truth. The authorities cited *supra* that a party has a right to show the bias or interest of a witness hold without exception that the denial of the right is prejudicial and error.
>
> . . .
>
> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from the denial of the opportunity to place the wit-

> ness in its proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.

Id. at 578-79 (citations omitted).

I am not insensitive to the view that one's political beliefs are entitled to protection from unwarranted inquiry. Nevertheless, the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations. *Dawson v. Delaware*, 503 U.S. 159 (1992). If one's political beliefs are relevant, evidence concerning them is admissible. *United States v. Myers*, 410 F.2d 693 (2nd Cir. 1969). *See also, McKnight v. State*, 874 S.W.2d 745 (Tex. App. 1994).

Although the majority mentions Rules 403, it does not decide the case on that basis. Indeed, it could not because the Rule 403 weighing issue was neither raised nor ruled upon at trial. *See Hill v. State,* 325 Ark. 419, 931 S.W.2d 64 (1996). Nor is the issue raised on appeal.

The court instead decides the case on the basis of Rule 608. This is simply not a Rule 608 case. The State was not attempting to impeach the witnesses' credibility by proving specific instances of conduct — it was trying to establish that the defendant and his witness did not believe the Washington County Circuit Court had authority to try the case and thus cast doubt upon their obligation to tell the truth under oath. *Rhodes v. State* and *Green v. State*, cited by the majority, are not applicable here.

While the majority mentions *United States v. Abel*, 469 U.S. 45 (1984), it does not take to heart its lessons. In *Abel*, the Ninth Circuit Court of Appeals had held that a suggestion of perjury, based upon a group tenet, was impermissible. The Circuit Court said:

> Neither should the government be allowed to impeach on the grounds of mere membership, since membership, without more, has no probative value. It establishes nothing about the individual's own actions, beliefs, or veracity.

The United States Supreme Court, in a unanimous opinion, reversed. The Court recognized that the Federal Rules of Evidence (like the Arkansas Rules of Evidence) do not specifically deal with impeachment for "bias" and that this is a separate matter from impeachment by conduct under Rule 608. The Court found, however, that the right to impeach on this basis survived the adoption of the Federal Rules. The Court recognized the importance of cross-examination on "matters affecting the credibility of the witness." It said:

> Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.

Abel, 469 U.S. at 52. The Court rejected the appellant's 608(b) argument.

The majority concludes that the State's "line of questioning was used to persuade the jury that, because of his political beliefs and association, appellant was the type of person who would be guilty of harassment and should be behind bars." While there is some chance that the majority may be right, I see no reason to doubt the prosecutor's statement to the trial court that he believed that the line of questioning went to the credibility of the witnesses.

To sum up, my conclusions are: (1) that the credibility of the defendant and his alibi witness was central to the resolution of the case; (2) that the questioning was relevant on the issue of the witnesses' credibility; (3) that the trial court was obliged to allow considerable leeway on cross-examination; (4) that there is no per se bar regarding inquiry into one's political beliefs; (5) that Rule 608 has no bearing on the case; (6) that the trial court had considerable discretion in permitting the inquiry; and (7) that appellant has demonstrated no abuse of that discretion. Therefore, I respectfully dissent.

Linda S. COCKRELL *v.* DIRECTOR, Arkansas Employment Security Department

E 99-68 992 S.W.2d 181

Court of Appeals of Arkansas
Opinion delivered June 16, 1999

Appellant, pro se.

Phylliss Edwards, for appellee.

PER CURIAM. Linda S. Cockrell has asked this court to reconsider our denial of her motion for belated appeal of a decision denying her unemployment benefits. Her appeal from the Board of Review was required to have been filed with this court within twenty days, or no later than Thursday, March 18, 1999, but was not received by the Clerk until Monday, March 22, 1999. Mrs. Cockrell, who lives in Fort Smith, provided a copy of a postmarked envelope proving that she mailed her appeal from there on the twentieth day.

In her motion, she expresses the belief that she has been treated unfairly and that we have denied her appeal because we don't want to "fool with it." With respect to the members of this court, nothing could be further from the truth.

This court has no authority to extend the deadline for filing a petition for review from a decision by the Board of Review, *see Wooten v. Daniels*, 271 Ark. 131, 607 S.W.2d 96 (1980), or indeed for any appeal. The timely filing of a notice of appeal is necessary for this court to have jurisdiction of a case on appeal. *EARP v. Benton Fire Dep't.*, 52 Ark. App. 66, 914 S.W.2d 781 (1996). This court is often required to review petitions for belated appeal from people who, like Ms. Cockrell, have been denied unemployment benefits. Many of these appeals have been filed on the twenty-first day, or only one day late. The claimants are seldom represented by an attorney. We take no pleasure in closing our door to these claimants, and we often do so with great reluctance and only after much discussion. Indeed, we grant these motions if at all possible. For example, where the claimant has shown by a postmarked envelope that the Board of Review's decision was mailed later than the date appearing on the decision, we have allowed the appeal to go forward if timely filed within twenty days of the actual mailing.

Many of these requests for belated appeal are handwritten and tell of the dire financial condition of the unemployed workers and their families. Without regard to the merits of these appeals, it is not a pleasant duty for us to deny these claimants their day in court.

We agree with Ms. Cockrell, however, that the appeals process can and should be made fairer to these litigants in one respect; the notice that is sent to them by the Board of Review should be revised to clarify what is meant by the term "filed." Appeals from both the agency determination and from the appeal tribunal to the Board of Review are also required to be "filed" within twenty days. However, they are considered timely, when mailed, if *postmarked* on the twentieth day. Arkansas Code Annotated section 11-10-524 (Supp. 1997) provides that such appeals, "If mailed, . . . shall be considered *to have been filed* as of the date of the postmark on the envelope." Appeals to the Board of Review are governed by Ark. Code Ann. § 11-10-525, which refers back to section 524 on the matter of timeliness.

However, this rule changes with the final appeal to this court; we cannot accept appeals that are postmarked timely but not received within twenty days. In this regard, the notice to claimants accompanying the Board of Review's decision states in pertinent part, "The decision will become final unless, WITHIN TWENTY (20) CALENDAR DAYS OF THE DAY THE DECISION WAS MAILED, a petition for review . . . is filed with the Arkansas Court of Appeals." Although the word "filed" is a term whose meaning would clearly be understood by an attorney, there is nothing in the Board's notice to put the claimants, unrepresented by counsel, on notice that the rules for "filing" have suddenly changed, and that the postmark on their appeal no longer has any legal significance.

We suggest that the following language be added, also in bold type, to the notice currently used by the Board of Review:

> YOUR PETITION CANNOT BE CONSIDERED UNLESS IT IS *ACTUALLY RECEIVED* BY THE COURT OF APPEALS ON OR BEFORE THE 20TH DAY AFTER THE MAILING DATE SHOWN ON THE LAST PAGE OF THE ENCLOSED DECISION.

If this suggestion were taken, perhaps this court would have fewer occasions to deny these belated appeals, and we would feel a little less discomfort when we are required to do so.

Motion denied.

Michael KANNING and Cheryl Kanning *v.*
ALLSTATE INSURANCE COMPANIES

CA 98-1194 992 S.W.2d 831

Court of Appeals of Arkansas
Division IV
Opinion delivered June 23, 1999

McKinnon Law Firm, by: *Laura J. McKinnon*, for appellants.

Benson, Robinson & Wood, P.L.C., by: *Brian Wood* and *Joe Benson*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, Michael Kanning, was injured on May 29, 1994, when his automobile was struck from behind by another vehicle. The accident was caused by the negligence of the driver of the other vehicle. Appellants[1] ultimately settled with the negligent driver's insurance carrier, Preferred Risk, for its policy limits of $50,000. Appellants had their own policy of insurance with appellee Allstate covering three separate vehicles; each vehicle had underinsured motorists coverage in the amount of $50,000. Having sustained damages in excess of the $50,000 limit of the negligent driver's policy, appellants made demand upon Allstate for payment of $150,000. Appellants' demand for $150,000 was based on their theory that they were entitled to the underinsured motorists coverage limits of $50,000 for each of the three vehicles covered by the policy because the policy language prohibiting the stacking of the underinsured motorists coverage was ambiguous. Allstate refused the demand, asserting that the policy prohibited stacking the underinsured motorists coverage of the three vehicles. Appellants filed suit, alleging that Allstate had breached the insurance contract by rejecting their claim for underinsured motorists coverage benefits. The trial court ruled that the language of the insurance policy was not ambiguous and that the anti-stacking provisions effectively limited Allstate's liability to the $50,000 in underinsured motorists coverage applicable to the insured vehicle involved in the accident. From that decision, comes this appeal.

For reversal, appellants contend that the trial judge erred in not allowing stacking of the underinsured motorists coverage. We find no error, and we affirm.

Arkansas Code Annotated Section 23-89-209 (Supp. 1997) provides, in pertinent part, that:

> (a)(1) No private passenger automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicles in this state shall be delivered or issued in this state or issued as to any private passenger automobile principally garaged in this state unless the insured has the opportunity, which

[1] Michael Kanning's claim was based on his bodily injuries. The claim of his wife, Cheryl Kanning, was based on loss of consortium and services.

> he may reject in writing, to purchase underinsured motorist coverage.
>
> * * * *
>
> (3) The coverage shall enable the insured or the insured's legal representative to recover from the insurer the amount of damages for bodily injuries to or death of an insured which the insured is legally entitled to recover from the owner or operator of another motor vehicle whenever the liability insurance limits of such other owner or operator are less than the amount of the damages incurred by the insured.

This statute mandates that a minimum of $25,000 underinsured coverage be offered for each automobile. *Ross v. United Services Automobile Association*, 320 Ark. 604, 899 S.W.2d 53 (1995). Although stacking of these coverages is not prohibited by the statute, it may be precluded by an applicable anti-stacking clause in the policy. *See Ross v. United Services Automobile Association, supra*; *State Farm Fire & Casualty Co. v. Amos*, 32 Ark. App. 164, 798 S.W.2d 440 (1990). Therefore, the key question in the present case is whether the policy effectively prohibited the stacking of underinsured motorists coverage.

Appellants contend that the present case is indistinguishable from *Ross v. United Services Automobile Association, supra*, where it was held that the insured in that case was permitted to stack the underinsured motorists coverage for each insured automobile. That holding, however, was premised on the supreme court's conclusion that the policy in question contained no effective anti-stacking provision. Although the insurer in *Ross* had included an anti-stacking clause in the policy, that clause was held to be ineffective under the circumstances of *Ross* because it merely prohibited "the stacking of *policies*, and not the stacking of *cars* within the policy." 320 Ark. at 610, 899 S.W.2d at 56 (emphasis in the original).

The automobile policy in the case at bar included a declarations page listing three specific automobiles, including the automobile involved in the accident, and stating that the limit for underinsured motorist bodily injury was $50,000 for each person. The policy provided, in pertinent part, that:

Combining Limits Of Two Or More Autos Prohibited
If *you* have two or more *autos* insured in *your* name and one of these *autos* is involved in an accident, only the coverage limits shown on the declarations page for that *auto* will apply. When *you* have two or more *autos* insured in *your* name and none of them is involved in the accident, *you* may choose any single *auto* shown on the declarations page and the coverage limits applicable to that *auto* will apply.

The limits available for any other *auto* covered by the policy will not be added to the coverage for the involved or chosen *auto*.

* * * *

Part V — Uninsured Motorists Insurance —Coverage SS
Underinsured Motorists Insurance — Coverage SU

* * * *

If a limit of liability is shown on *your* declarations page for Coverage SU, *we* will pay all damages that an insured person is legally entitled to recover from the owner or operator of an underinsured auto because of *bodily injury* sustained by an insured person.

* * * *

Limits of Liability

1. The coverage limit shown on the declarations page for:
   a. "each person" is the maximum that *we* will pay for all damages arising out of *bodily injury* to one person in any one *motor vehicle* accident, including all damages sustained by anyone else as result of that *bodily injury*.

* * * *

2. These limits are the maximum *Allstate* will pay for any one *motor vehicle* accident regardless of the number of:
   a. claims made;
   b. vehicles or persons shown on the declarations page;
   c. vehicles involved in the accident.

[redacted] Appellant argues that these provisions are ambiguous, and that the policy should therefore be construed against the insurer. We do not agree. The initial determination of the existence of an ambiguity rests with the court and, when a contract is

unambiguous, its construction is a question of law for the court. *Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998). 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. *Boatmen's Arkansas, Inc. v. Farmer*, 66 Ark. App. 240, 989 S.W.2d 557 (1999). Unlike the policy at issue in *Ross, supra*, the policy in the case at bar plainly and expressly prohibits "the stacking of *cars* within the policy." *Id.* at 610. We think that the only reasonable construction of the terms of the policy in the present case is that it prohibits the stacking of underinsured motorists coverage of the three insured vehicles, and we hold that the trial court did not err in so ruling.

Appellant also argues that, ambiguous or not, policy language purporting to disallow stacking is contrary to public policy and should not be enforced. We do not reach the merits of this argument because appellant's abstract does not show that the public-policy issue was raised below or ruled on by the trial court. It is well settled that the appellant bears the burden of producing an abstract sufficient for appellate review, and where the abstract does not reflect that the argument was made in the trial court, we will not reach the merits of the argument on appeal. *K.M. v. State*, 335 Ark. 85, 983 S.W.2d 93 (1998); *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999).

Affirmed.

ROAF and HART, JJ., agree.

Robert BRANDON and Carl Brooks *v.*
ARKANSAS PUBLIC SERVICE COMMISSION

CA 97-1177 992 S.W.2d 834

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 23, 1999

[Petition for rehearing denied October 6, 1999.*]

* GRIFFEN, J., would grant.

The Evans Law Firm, by: *Marshall Dale Evans*, for appellants.

Larry E. Crane, for appellee Arkansas Public Service Commission.

Everett & Mars, by: *Thomas A. Mars*, for appellee Arkansas Western Gas Company.

JUDITH ROGERS, Judge. Appellants challenge Order No. 4 entered by the Arkansas Public Service Commission in which the Commission denied their request to act on behalf of other unnamed ratepayers and held that it lacked authority to award their counsel attorneys' fees under the common-fund doctrine. Appellants petitioned for rehearing on these issues, but the Commission denied their petition in Order No. 5.

On December 3, 1993, appellants, Robert Brandon and Carl Brooks, on behalf of themselves and "all ratepayers similarly situated," filed a complaint with the Arkansas Public Service Commission, requesting that it order Arkansas Western Gas Company (AWG) to refund to its Arkansas ratepayers the rates it collected in violation of the "least-cost gas purchasing statute," Arkansas Code Annotated section 23-15-103 (1987). Appellants alleged that, in an order entered in another docket, the Commission had held that the gas price charged by AWG to its customers violated section 23-15-103's requirement to purchase gas from the "lowest or most advantageous market" but that no request for a refund had been made to the Commission. Appellants, who alleged that they had been customers of AWG during the period in question, requested that the Commission make findings of facts and conclusions of law regarding AWG's alleged violations, order AWG to make a monetary refund, award appellants the costs of their action pursuant to

Arkansas Code Annotated section 23-2-428(b) (1987), and award them their attorneys' fees under the "common fund" doctrine. In response, AWG denied that appellants were entitled to the relief they requested. AWG filed two motions with the Commission. One motion asked the Commission to determine its jurisdiction to award appellants' counsel attorneys' fees under the common-fund doctrine. The other asked the Commission to determine appellants' authority to act on behalf of other ratepayers.

In Order No. 4, the Commission denied appellants permission to act on behalf of other unnamed ratepayers. In doing so, the Commission discussed its authority under Ark. Code Ann. § 23-3-119 (1987), noting that, as a creature of the legislature, it must act within the power conferred upon it by legislative act and that it had held on two prior occasions that it lacked jurisdiction to entertain a class action. The Commission concluded that, although section 23-3-119 gives it authority to adjudicate individual disputes between consumers and the public utilities which serve them, the statute does not give it authority to adjudicate class actions.

We first address appellants' contention that the Commission erred in finding that it lacked authority to hear class actions. In making this determination, the Commission focused on the phrase "individual disputes" used in section 23-3-119(f)(1) and cited its decisions in *Bryant v. Southwestern Bell Telephone Co.*, Docket No. 94-283-C, Order No. 2, and *Latin v. Southwestern Bell Telephone Co.*, 126 PUR 4th 302 (Ark. P.S.C. 1991). Appellants contend, however, that the Commission has always had jurisdiction over complaints between ratepayers and regulated utilities, which includes the authority to decide disputes of a class nature, and that the passage of section 23-3-119 expanded the Commission's jurisdiction to include individual disputes between consumers and utilities and did not limit its existing authority.

The first rule in considering the meaning of a statute is to construe it just as it reads, giving words their ordinary and usually accepted meaning in common language. *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994). Section 23-3-119 is part of

Act 758 of 1985 that was passed by the legislature to expand the jurisdiction of the Commission. Section 23-3-119(f) provides:

> (f)(1) It is the specific intent of the General Assembly in enacting the 1985 amendment to this section to vest in the Arkansas Public Service Commission the authority to adjudicate individual disputes between consumers and the public utilities which serve them when those disputes involve public rights which the commission is charged by law to administer.
>
> (2) Public rights which the commission may adjudicate are those arising from the public utility statutes enacted by the General Assembly and the lawful rules, regulations, and orders entered by the commission in the execution of the statutes. The commission's jurisdiction to adjudicate public rights does not and cannot, however, extend to disputes in which the right asserted is a private right found in the common law of contracts, torts, or property.
>
> (3) The commission's quasi-judicial jurisdiction to adjudicate public rights and claims in individual cases is in addition to the commission's traditional legislative authority to act generally and prospectively in the interest of the public. The quasi-judicial commission authority recognized in this section is a legitimate function and does not, in the judgment of the General Assembly, constitute an unlawful delegation of judicial authority under either the Arkansas Constitution or the United States Constitution.

In its decision in *Latin v. Southwestern Bell Telephone Company, supra*, the Commission acknowledged that the language of section 23-3-119 was unclear and that various words or phrases used in section 23-3-119 support a legislative intent either to authorize or to preclude class actions before the Commission. When a statute is ambiguous, the court must give effect to the legislative intent. *ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997). To determine the intent of the legislature, the court must look to the whole act and, as far as practicable, give effect to every part, reconciling provisions to make them consistent, harmonious, and sensible. *Omega Tube & Conduit Corp. v. Maples*, 312 Ark. 489, 850 S.W.2d 317 (1993). The language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and

other appropriate means that throw light on the subject are used by the court in an attempt to construe legislative intent. *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). While the title of an act is not part of the law, it may be referred to in order to help ascertain the intent of the General Assembly. *Routh Wrecker Serv., Inc. v. Wins*, 312 Ark. 123, 847 S.W.2d 707 (1993).

The title of Act 758, which is codified at section 23-3-119, describes the legislative purpose behind the Act:

> AN ACT to Amend Section 17 of Act 324 of 1935, as Amended, [Ark. Stats. 73-216] to Confer upon the Arkansas Public Service Commission Authority to Hear Complaints Brought by any Consumer(s), or Representative thereof, of an Arkansas Public Utility Against Said Utility; to Conduct Public Hearings and Make Determinations Regarding Alleged Violations of any Law or Regulation Administered Under the Jurisdiction of the Commission; to Mandate Refunds or Other Relief to an Injured Party as Deemed Appropriate by the Commission; and for Other Purposes.

The emergency clause further provides:

> It is hereby found and determined by the General Assembly that the authority of the Public Service Commission to enforce the laws which it is charged to administer has been interpreted on occasion not to include quasi-judicial authority to vindicate public rights. This interpretation has resulted in delay of justice in the courts, and may as a practical matter have denied justice to ratepayers and utilities. . . .

■ ■ Act 758 clearly demonstrates a legislative intent to place primary jurisdiction over consumer disputes in the Commission, *see Ozarks Electric Cooperative Corporation v. Harrelson*, 301 Ark. 123, 782 S.W.2d 570 (1990), and we disagree that the use of the word "individual" in section 23-3-119(f) was intended by the legislature to deny the Commission the authority to hear consumer disputes brought in a representative capacity. Although a statute should be construed so that no word is void, superfluous, or insignificant, and meaning and effect must be given to every word contain therein, if possible, *see Locke v. Cook*, 245 Ark. 787, 434 S.W.2d 598 (1968), we will not interpret a statute so strictly

as to reach an absurd conclusion that is contrary to legislative intent. *Jackson v. State*, 336 Ark. 530, 986 S.W.2d 405 (1999).

■ We conclude that section 23-3-119 does not prevent the Commission from hearing class actions. We now must ascertain whether the authority to hear class actions is included within the Commission's "traditional legislative authority to act generally and prospectively in the interest of the public." Ark. Code Ann. § 23-2-301 (1987). The issue of whether the Commission has been granted authority to hear class actions has never been directly addressed by the legislature or the Arkansas appellate courts; however, several supreme court decisions have held that the Commission is the proper forum for actions brought by a class.

In *General Telephone Co. of the Southwest v. Lowe*, 263 Ark. 727, 569 S.W.2d 71 (1978), the appellee brought a class suit in the Miller County Chancery Court to enjoin the enforcement of a rate increase in Texarkana, Arkansas. The chancellor enjoined the rate increase, but on appeal, the supreme court held that the chancellor erred in deciding the case on its merits. The supreme court held that the appellee had a complete remedy by application to the commission:

> A court of equity does not have concurrent jurisdiction with the Public Service Commission in public utility litigation when there is a clear, adequate, and complete remedy by an application to the Commission. *Commercial Printing Co. v. Ark. Power & Light Co.*, 250 Ark. 461, 466 S.W.2d 261 (1971); *McGehee v. Mid South Gas Co.*, 235 Ark. 50, 357 S.W.2d 282 (1962). Here the telephone company had such a remedy. The Commission unquestionably has jurisdiction to fix telephone rates in Texarkana, Arkansas. In doing so it may pass upon questions of law that are germane and incidental to its legislative act or ratemaking. *Southwestern Gas & Elec. Co. v. City of Hatfield*, 219 Ark. 515, 243 S.W.2d 378 (1951). Therefore, the Public Service Commission is the proper tribunal to decide in the first instance the effect of Act 164 upon telephone rates in Texarkana, Arkansas.

General Tel. Co. v. Lowe, 263 Ark. at 730, 569 S.W.2d at 73.

In *Oklahoma Gas and Electric Co. v. Lankford*, 278 Ark. 595, 648 S.W.2d 65 (1983), the appellant sought to prohibit the Sebastian County Circuit Court from exercising jurisdiction over a class

action suit for declaratory judgment filed by the appellees, customers and ratepayers of the appellant. The appellees had requested that the trial court declare unconstitutional a statute that allowed a utility to collect a requested rate increase under bond. The appellant argued that the appellees' petition should have been presented to the commission, because it had exclusive jurisdiction over matters pertaining to utility rates. The supreme court agreed and granted the appellant's requested writ of prohibition:

> [Appellees] had a full, adequate, and complete remedy by intervention in the proceedings before the PSC. At that time the PSC could have ruled on the constitutionality of Ark. Stat. Ann. § 73-217 and the other issues which [appellees] are now raising. The PSC, in exercising its exclusive jurisdiction over rate setting, can also pass upon questions of law that are germane and incidental to its legislative acts.

Id. at 597-98, 648 S.W.2d at 66 (citations omitted). The *Lankford* decision was further discussed by the supreme court in *Lincoln v. Arkansas Public Service Commission*, 313 Ark. 295, 854 S.W.2d 330 (1993):

> In *Lankford,* this court granted a writ prohibiting a circuit court from exercising jurisdiction over a class action ratepayers' suit. The class sought, among "other ancillary" matters, a declaration that part of the statute allowing a utility to collect a rate increase under bond was unconstitutional. This court granted the writ of prohibition because the class had a full, adequate, and complete remedy at the administrative level, but it failed to exhaust that administrative remedy before seeking judicial relief in the circuit court. The class could have intervened in the proceedings before the PSC wherein the utility requested the challenged rate increase and presented all of its claims there rather than in circuit court . . . .

Lincoln v. Arkansas Pub. Serv. Comm'n, 313 Ark. at 298, 854 S.W.2d at 331.

[redacted] *Lowe* and *Lankford* were both handed down by the supreme court before the passage of Act 758. In construing a statute, this court will presume that the General Assembly, in enacting it, possessed the full knowledge of the constitutional scope of its powers, full knowledge of prior legislation on the same subject,

and full knowledge of judicial decisions under preexisting law. *See Robert D. Holloway, Inc. v. Pine Ridge Add'n Residential Property Owners,* 332 Ark. 450, 966 S.W.2d 241 (1998).

Cullum v. Seagull Mid-South, Inc., 322 Ark. 190, 907 S.W.2d 741 (1995), was decided by the supreme court after the passage of Act 758. In that case, class representatives, Bill Cullum and Darnell Cullum, on behalf of a class of Arkla, Inc., ratepayers appealed from an order dismissing their civil-law causes of action for lack of subject matter jurisdiction. In their appeal, they asked the supreme court to focus on the common-law civil redress in tort and not the ratemaking authority of the Commission. The supreme court responded:

> The General Assembly has vested the PSC with the sole and exclusive jurisdiction and authority to determine rates to be charged by public utilities. Ark. Code Ann. § 23-4-201(a)(1) (1987). It is further clear that this jurisdiction extends over rate matters and disputes involving public rights between consumers and public utilities but not to private rights found in tort. Ark. Code Ann. § 23-3-119(a), (d), (f)(1) and (2) (1987); *see Ozark Elec. Coop. Corp. v. Harrelson*, 301 Ark. 123, 782 S.W.2d 570 (1990). Hence, to the extent that this matter involves a dispute over rates charged by Arkla, its resolution falls within the purview and jurisdiction of the PSC.

Id. at 194, 907 S.W.2d at 743.

We recognize that the Commission is a creature of the legislature and must act within the power conferred upon it by legislative act. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980). We note, however, that the legislature has chosen not to limit the Commission's jurisdiction to the powers expressly set out in the public utility statutes. Arkansas Code Annotated section 23-2-301 (1987) also defines the Commission's authority, and it provides:

> The commission is vested with the power and jurisdiction, and it is made its duty, to supervise and regulate every public utility defined in section 23-1-101 and to do all things, whether specifically designated in this act, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

Especially in proceedings before the Commission where the actions of a utility are likely to affect numerous ratepayers, it is only logical to conclude that the legislature intended to give the Commission the authority to hear class actions where it may be "necessary and expedient" in the exercise of its power and jurisdiction or in the discharge of its duty. In his administrative law treatise, Professor Schwartz discusses the importance of class actions in administrative settings:

> In consumer cases . . . the plaintiff is one among many affected by the agency action; his suit, if successful, vindicates not only his personal interest but, even more so, the collective interest of all other consumers. The same is true in the environmental cases discussed in the preceding two sections. Not surprisingly, therefore, consumer and environmental plaintiffs have made use of the class action as a vehicle for challenging agency action. The potential of the class action in administrative law has been pointed out by Justice Douglas: "in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. Some may be environmentalists who have no photographic development plant about to be ruined because of air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation. Or the unnamed individual may be only a ratepayer being excessively charged by a utility." [Dissenting opinion in *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 185-86 (1974).]
>
> The class action as a vehicle for securing judicial review has been recognized in cases dealing with challenges to utility rates, actions affecting welfare payments and public housing, and environmental actions . . . .

Bernard Schwartz, *Administrative Law* § 8.21 at 480-81 (2d ed. 1984). To hold that the Commission is without authority to hear class actions ignores the legislature's express grant to the Commission "to do all things, whether specifically designated in the act . . . ." Section 23-2-301.

Although the Commission is correct in its assertion that Arkansas Rule of Civil Procedure 23, which provides for class actions, does not govern proceedings before the Commission, we do not agree that the Commission cannot apply it where it "may be necessary or expedient" in the exercise of its power and jurisdiction to regulate every public utility. *See* section 23-2-301. Furthermore, this court has become more inclined to apply rules of civil procedure to administrative actions. *See Bryant v. Arkansas Public Service Commission*, 53 Ark. App. 114, 919 S.W.2d 522 (1996), where this court noted that Rule 10.02(c) of the Commission Rules of Practice and Procedure is a reflection of the clear standard adopted in Arkansas courts that requires fact pleading and cited Rules 8(a)(1) and 12(b)(6) of the Arkansas Rules of Civil Procedure. *See also Second Injury Fund v. Mid-State Construction Company*, 16 Ark. App. 169, 698 S.W.2d 804 (1985), where this court held that, although the Arkansas Rules of Civil Procedure are not binding in workers' compensation cases, Rule 20 of the Arkansas Rules of Civil Procedure would seem to provide appropriate guidance in Second Injury Fund cases.

We also disagree with the Commission's holding that *Bryant v. Southwestern Bell Telephone Co., supra*, and *Latin v. Southwestern Bell, supra*, control our decision here. In *Bryant*, the Commission dismissed a class action complaint brought by the Attorney General. The Commission had held that the complaint failed to state a cause of action and that it lacked jurisdiction to hear a class action. The Attorney General appealed the Commission's decision in *Bryant v. Arkansas Public Service Commission, supra*, and while this court affirmed the Commission's holding that the complaint failed to state a cause of action, we did not render a decision on the class action issue. In *Latin*, the complainants attempted to bring a class action suit before the Commission, arguing that Southwestern Bell was wrongfully charging them and other first-time customers living in Arkansas Village a one-time excess construction charge as a precondition to the receipt of telephone service. The Commission held that, although it had subject-matter jurisdiction over the proceeding pursuant to section 23-3-119, it lacked jurisdiction and authority to permit it to proceed as a class action. No party appealed the Commission's decision, and it is not controlling here.

Nor are we persuaded by AWG's citations to decisions of the Michigan Public Service Commission.

In conclusion, we hold that the legislature's grant of authority to the Commission is clearly broad enough to allow it to hear a complaint brought as a class action. We are cognizant of the fact that this decision may to some degree be regarded as precedent, but the topic behind it is not novel. It comports with judicial economy and balances consumers' ability to seek review with the utilities' ability to alter rates. The legislative intent bolsters this idea, and the economy of scale that is evident in utility rate-making is furthered by this decision.

We reverse and remand on this issue with directions to the Commission to determine whether appellants' action meets all of the prerequisites and necessary criteria as may be established by the Commission to qualify as a maintainable class action. In doing so, we emphasize that we are not holding by this opinion that the Commission must allow appellants' complaint to proceed as a class action. Our holding is expressly limited to our finding that the Commission has the authority to hear a class action. Whether appellants' action qualifies for class certification is left to the broad discretion of the Commission.

We do not, however, agree with appellants' second point that the Commission erred in holding that it did not have power to award them attorneys' fees from a common fund created by commission-ordered refunds. Appellants acknowledge that the American and Arkansas rule is that attorneys' fees are not chargeable as costs in litigation unless specifically permitted by statute. *See City of Hot Springs v. Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986). Nevertheless, they contend that Arkansas has firmly adopted the "common fund" doctrine, which permits recovery of attorneys' fees when a class action results in the recovery of a common fund.

The supreme court discussed the common-fund doctrine in *Bradshaw v. Bank of Little Rock*, 76 Ark. 501, 504, 89 S.W. 316, 317 (1905): "[W]hen many persons have a common interest in a fund, and one of them for the benefit of all brings a suit for its preservation, and retains counsel at his own cost, a court

of equity will order a reasonable amount to be paid to him out of the funds in the hands of the receiver in reimbursement of his outlay." (quoting *Davis v. Bay State League*, 158 Mass. 434, 33 N.E. 434 (1893)). *See also Marlin v. Marsh & Marsh*, 189 Ark. 1157, 76 S.W.2d 965 (1934); *Valley Oil Co. v. Ready*, 131 Ark. 531, 199 S.W. 915 (1917). In *Bradshaw v. Bank of Little Rock*, the supreme court awarded attorney's fees from a common fund, holding that it was just and equitable that the cost of securing the receiver, including reasonable attorney's fees, should be borne by all the creditors, in proportion to the amount realized by them. A court of equity is not incompetent to grant an award of costs and attorney's fees to a taxpayer out of a common fund established because of his efforts in a taxpayer suit on behalf of himself and other taxpayers to recover misappropriated county funds. *See Crittenden County v. Williford,* 283 Ark. 289, 675 S.W.2d 631 (1984). Appellants argue that, because they brought suit against AWG on behalf of themselves and all others similarly situated to establish a fund for the amount that AWG overcharged its ratepayers, it follows that they are entitled to attorneys' fees from the common fund if their litigation is successful. They contend that their case is analogous to *Powell v. Henry,* 267 Ark. 484, 592 S.W.2d 107 (1980).

In *Powell*, the appellees successfully brought an action against the appellants (the mayor and aldermen of North Little Rock and the manager of the North Little Rock Electric Department), alleging that the city of North Little Rock improperly charged their electrical customers $639,266. The chancery court granted the appellees judgment and later modified its decree to require the city to bear all costs of the refund. The chancellor also awarded the appellees attorneys' fees of $95,884. On appeal, the appellants argued that the appellees' attorneys must recover on their contract with the appellees and could not recover in *quantum meruit* and that a reasonable amount of attorneys' fees should not exceed five percent of the total recovery of the taxpayer action. In affirming the award, the supreme court noted that the action was a class action, which resulted in the recovery of a substantial amount which constituted a common fund, and that the allowance of attorneys' fees from a common fund established or augmented

through the efforts of the attorneys to whom the fee is allowed is a well-recognized practice and is proper. In addressing the amount of the fee, the supreme court held:

> [W]e are unable to say that there was any abuse of discretion in the allowance of attorneys' fees in this case, which we should have to do in order to reverse or modify that award. An important factor in our consideration of the fee allowance in this case is the realization that inadequate compensation will cause attorneys who are competent to handle this type of litigation to shun it, or if they accept it, fail to devote sufficient time to adequately prepare or present the case. This is an appropriate consideration in matters of this sort. *Old Republic Insurance Co. v. Alexander*, 245 Ark. 1029, 436 S.W.2d 829. The individual rate payer ordinarily cannot afford to employ counsel because attorneys' fees and other expenses could be expected to exceed his prospective recovery. If attorneys do avoid employment such as that accepted by the attorneys in this case because they cannot expect to be adequately compensated, even if they are successful, there would be few cases where excessive charges would ever be refunded. The fact that no one who is the beneficiary of the recovery is complaining about the award is not without significance. The standing of appellants in this matter is not clear, even though the abstract of the record does not reveal that it was ever challenged in the trial court.

Powell, supra, at 491, 592 S.W.2d at 111.

Appellants contend that, because the facts in *Powell* are analogous to their suit, in that they both involve an action on behalf of ratepayers seeking refunds of overpayments, it follows that they are also entitled to attorneys' fees. They note that, prior to the adoption of the statute granting to the Commission primary jurisdiction in suits against utilities, the original forum for adjudication against public utilities was in the courts. They also emphasize that, in those actions, the courts would have had equitable jurisdiction to award attorneys' fees pursuant to the common-fund doctrine. They further note that the legislature has vested the Commission with quasi-judicial jurisdiction to adjudicate public rights and claims, *see* section 23-3-119(f)(3), and that the Commission has been granted broad powers by the legislature "to do all things . . . that may be necessary or expedient in the exercise of such power

and jurisdiction" in regulating public utilities. Section 23-2-301. They conclude that, because the Commission has been given quasi-judicial discretion and has replaced courts in proceedings against public utilities, the Commission has the same equitable power to award attorneys' fees.

In response to appellants' arguments, the Commission points out that the common-fund doctrine is an equitable remedy, *see Bradshaw, supra*, that it has no applicability to a Commission proceeding, and that the supreme court has held that attorneys' fees may not be paid out of a refund due ratepayers. *See City of Fort Smith v. Southwestern Bell Tel. Co.*, 220 Ark. 70, 247 S.W.2d 474 (1952). In that case, Southwestern Bell filed a petition for a rate increase with the Commission. Pursuant to statute, the Commission suspended Southwestern Bell's rate schedules and its proposed rates were put into effect after it filed a bond with the Commission to insure any refunds that were ordered. The appellants, ten cities that were served by Southwestern Bell, objected to the increase. After Bell's petition was granted and the appellants' petition for rehearing was denied, they filed a petition for review in circuit court as prescribed by Ark. Stat. Ann. § 73-233. The circuit court denied their petition, and they appealed to the supreme court. The supreme court remanded the case to the circuit court to remand to the Commission with directions to reduce Southwestern Bell's rate increase by approximately $400,000 per year and order refunds to be made by Southwestern Bell. The appellants then petitioned the supreme court for rehearing, requesting attorneys' fees. The supreme court responded:

> The second point presented by the Cities [appellants] is whether an attorneys' fee may be paid, to the attorneys for the Cities, out of the amount to be refunded to the subscribers. We hold that such attorneys' fee cannot be so paid. The refunds belong to the subscribers, and not to the Cities; and there is nothing in this record to show that the subscribers have agreed for a fee to be paid the attorneys for the Cities. We find no statutory authority for the request by the Cities. In *Miller v. Ft. Smith*, case (*Peavy* [*sic*] *v. Pulaski County*, 103 Ark. 601, 148 S.W. 491):

> Statutes regulating costs in litigation and fees of officers are to be strictly construed, "and no officer is entitled to fees, taxed as costs in cases unless there is a statute authorizing it."
>
> Even though the attorneys for the Cities have rendered valuable services, we cannot order them to be paid out of the money due the subscribers. We must presume that if the attorneys are special counsel, they have contracts for their fees; or if they are elected city attorneys, that they are cognizant of the provisions of section 19-912, section 19-1015 and section 19-1025 Ark. Stats. Therefore, we deny the second portion of the Cities' request.

City of Fort Smith, supra, at 92-93, 247 S.W.2d at 486.

We agree with appellants that *City of Fort Smith* is not controlling here. Although the supreme court held in that case that attorneys' fees cannot be paid from rate refunds, it is unclear to us from the opinion whether the court was basing its decision on its finding that there was no evidence that the ratepayers agreed to the fees or because the attorneys requesting the fees were the cities' attorneys, who serve the public and, therefore, "must be content with the compensation provided by the plain letter of the law.'" *See Peay v. Pulaski County*, 103 Ark. 601, 610, 148 S.W. 491, 494 (1912) (quoting *Fanning v. State*, 47 Ark. 422, 2 S.W. 70 (1886)). Nevertheless, we must agree with the Commission that it is without authority to award attorneys' fees under the common-fund doctrine because it is clear to us that the legislature has considered and declined to authorize the Commission to award attorneys' fees.

Subsection (d) of section 23-3-119 makes no provision for attorneys' fees, although it does specifically provide the Commission with authority to "mandate monetary refunds and billing credits. . . ." In Act 758 of 1985, the legislature broadened the Commission's powers to hear ratepayer complaints. However, the legislature declined to extend these powers to allow attorneys' fees to be awarded. House Bill 393, which, as amended, became Act 758, originally provided:

> (d) The Commission may, in its discretion, award costs, fees, expenses, and attorneys fees, or any combination thereof, in the following manner:

> (1) To the defendant utility, if the Commission finds that the complaint was brought maliciously or frivolously.
>
> (2) To the complainant, if the Commission finds that the defendant acted in bad faith, in violation of any statute, law, rule, regulation, or Commission order, to the detriment of the complainant.

Section (d) of Bill 393 was later amended to read:

> (d) The Commission shall then have the authority, upon timely notice, to conduct investigations and public hearings and to mandate monetary refunds, billing credits, or order appropriate prospective relief as authorized or required by law, rule, regulation, or order. The jurisdiction of the Commission in such disputes is primary, and shall be exhausted before a court of law or equity may assume jurisdiction. Provided, that the Commission shall not have the authority to order payment of damages, or to adjudicate disputes in which the right asserted is a private right found in the common law of contracts, torts, or property.

This amendment, which became part of Act 758, deleted the attorneys' fee provision. The deletion of the attorneys' fee provision supports the Commission's holding that the legislature intended not to confer upon the Commission the power to award attorneys' fees. An administrative interpretation is to be regarded as highly persuasive. *Omega Tube & Conduit, supra.* The manner in which a law has been interpreted by executive and administrative officers is to be given consideration and will not be disregarded unless it is clearly wrong. *Id.* For this same reason, we do not find appellants' reliance on decisions from other jurisdictions persuasive.

Although logical and equitable reasons are advanced here for payment of attorneys' fees under the common-fund doctrine, our statutory scheme and the holdings of the supreme court that fees are only allowed in specific situations constrain us from making new law in these circumstances. We recognize that, by this holding, ratepayers will have a difficult, if not impossible, task of funding legal counsel to represent them in actions against utilities. We are unable to broaden the law to extend attorneys' fees to these circumstances, as this is a legislative function.

We reverse and remand on appellants' first point and affirm the Commission's decision on appellants' second point.

Affirmed in part; reversed and remanded in part.

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

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I would have been happy to reverse the Public Service Commission's decision on appellant's second point. However, I am forced to conclude, as Judge Rogers has written in the majority opinion, that the Arkansas General Assembly apparently decided not to confer the power to award attorneys' fees to the Commission when it enacted Act 758 of 1985. I cannot ignore the plain fact that the General Assembly deleted language in House Bill 393 that would have authorized the Commission to award attorneys' fees when it enacted Act 758.

Nevertheless, I am convinced that the Commission's power to regulate public utilities will only be enhanced if the legislature authorizes it to award attorneys' fees in appropriate cases. The ordinary ratepayer will almost always have too small a pecuniary interest at stake to justify the significant cost of challenging an allegedly excessive utility rate. Yet, such challenges, when successful, produce benefits to a range of ratepayers and serve the public interest in fair utility rates. Unless the legislature confers the power to award attorneys' fees, it is obvious that potential challenges to allegedly excessive utility rates will go unasserted.

Bill HOOKS *v.* GAYLORD CONTAINER CORPORATION

CA 98-1176 992 S.W.2d 844

Court of Appeals of Arkansas
Division II
Opinion delivered June 23, 1999

Kaplan, Brewer & Maxey, P.A., by: *Silas H. Brewer, Jr.*, for appellant.

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

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that appellant failed to prove that he sustained any hearing loss during the course and scope of his employment with appellee. On appeal, appellant argues that there is no substantial evidence to support the Commission's denial of benefits. We disagree and affirm.

We note that this case is a companion case with four other appeals involving the same appellee and the same core issues. This opinion will serve to address those issues in common with all of the companion cases. Consequently, the other four appellate decisions will reference this opinion while setting forth each one's own particular facts.

In this case, the record reveals that appellant was born on June 26, 1943, and is a high school graduate. Appellant began working for the Pine Bluff Paper Mill on December 10, 1962. The paper mill was owned by Dierks Manufacturing Company at

that time. Appellant worked in the millwright's area in the maintenance department with the classification of journeyman three. Appellant was assigned to the millwright department in 1967, and has continued in that same area until the present. Appellant worked in the paper machine area which was one of the noisiest areas in the mill. At one point in time, appellant used cotton balls as hearing protection. The mill was purchased by Weyerhaeuser, and Weyerhaeuser furnished hearing protection devices and administered hearing tests once a year. Appellant was informed by Weyerhaeuser that he had some hearing loss. Documents introduced into the record indicated that appellant had suffered measurable hearing loss, particularly in the higher frequency levels for both ears three years before appellee purchased the mill. Appellee also performed hearing tests when it purchased the mill in December 1985. According to appellant, appellee would usually report a small amount of hearing loss in appellant's ears or that his hearing had not changed from the previous year.

Appellant had never been in the military, but he had hunted squirrel and deer for twenty-five years. Appellant used a .22 rifle and a 30.06 rifle.

On appeal, appellant argues that there is no substantial evidence to support the Commission's decision denying benefits for job-related hearing loss. Appellant specifically challenges the Commission's reliance on Dr. Joseph Sataloff's opinion over other expert witnesses' opinions.

Doctor Sataloff is an otologist who has practiced for forty-five to fifty years, and his credentials are outstanding. He is board-certified in ear, nose, and throat; is a senior professor of otology at Thomas Jefferson University; has published three to four books in the area of occupational hearing loss; has published two books on hearing loss in general; has textbooks that are used in every medical school in the country; has consulted with the Surgeon General of the Navy; was a member of the committee that wrote the OSHA noise regulations in the early 1970s for the Secretary of Labor; was the chairman of the committee of the AMA for hearing impairment; and consults for a variety of companies to measure noise levels.

Dr. Sataloff testified that as we get older, hearing gets damaged and gets damaged in a certain way. He also said that hearing gets damaged by noise in a different way. Dr. Sataloff testified that:

> One of the criteria that the American Academy of occupational medicine addresses is the length of industrial exposure, stating that it will usually reach maximum level in 10-15 years. Many of us in the field have looked at hundreds of thousands, probably millions of audiograms, and have found that after a person works 10 or 15 years, it's generally 12 years, in a noisy environment, the amount of hearing loss he sustains from a loud job reaches a maximum and does not continue to get worse from noise exposure. It gets worse as he gets older and from other causes. But it stays the same after that. The maximum amount of hearing loss that's caused can pretty well be determined after a person is 10 to 12 years on his job. Of course, if he gets another job that's louder, that's different. But if he works in a very noisy job, kind of like a textile mill operator, and has a hearing loss, then that noise he no longer hears because he's hard of hearing and it doesn't do him any further damage.
>
> If employees worked for previous owners of the facility now owned by Gaylord for as much as 20 years prior to January 1986 when Gaylord began operations, and if their jobs with Gaylord are essentially the same as their previous jobs for other owners, the amount of hearing loss they had when they left their previous jobs would be the maximum amount that's produced certainly in 20 years.

Dr. Michael Winston did not agree with Dr. Sataloff's theory. He believed that appellant's hearing loss was aggravated or exacerbated by noise exposure after 1986 when appellee owned the plant.

Appellant worked in the plant since 1962, and appellee did not purchase the plant until December 1985. So, appellant was exposed to high levels of noise for twenty-three years before appellee purchased the plant. According to Dr. Sataloff, appellant had already reached maximum loss in hearing due to noise exposure. He also concluded that there were other causes that could reduce appellant's level of hearing.

Because the Commission chose to place such great weight with Dr. Sataloff, it found that:

> Dr. Winston has not offered any evidence to explain why he disagrees with [Dr. Sataloff's finding]. While critical of the American Occupational Medical Association Noise and Hearing Conservation Committee, Dr. Winston admitted that he has undertaken no statistical analysis of the criteria with regard to the 10 to 15 year rule for maximum hearing loss for occupational induced hearing loss and even admitted that such theory "may be statistically accurate."
>
> After considering the qualifications of Dr. Sataloff and Dr. Winston, we find that greater weight should be placed upon Dr. Sataloff's testimony with regard to whether a person reaches a point of maximum loss after 15 years of exposure. Dr. Sataloff is a preeminent medical doctor specializing in the field of hearing loss. . . . According to Dr. Sataloff, there is not enough scientific evidence to support the theory of additional hearing loss after 15 years.

The Commission determined based on this evidence that appellant did not sustain a compensable injury while working for appellee.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). In cases where a claim is denied because a claimant failed to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Bates v. Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998). The question is not whether the evidence would have supported findings contrary to those made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclu-

sion if we sat as the trier of fact or heard the case *de novo*. *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997).

We recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Service Chevrolet, supra.* 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. *Oak Grove Lumber Co., supra.* Based on our standard of review and the record before us, we cannot say that there is no substantial basis for the Commission's denial of benefits, or the Commission's reliance on Dr. Sataloff's opinion.

Appellant also argues that the Commission overlooked or disregarded evidence that strongly indicates that operations at Gaylord were expanded and noise levels increased which could have caused appellant additional hearing loss. We disagree.

The record indicates that the Commission did not disregard any evidence. The Commission found that based on expert testimony there was no evidence that appellant was exposed to any greater degree of noise after appellee purchased the plant. In support of the Commission's finding, the abstract reveals that appellant was exposed to lesser noise levels after appellee purchased the plant. Gaylord provided better ear protection, and Dr. Thomas Rimmer studied both employment situations before appellee purchased the plant and after it was purchased, and he found that noise levels in the 1970s was 97 decibels, whereas, in the 1990s the average range was 95 decibels. Based on the record, we cannot say that the Commission disregarded evidence.

It also appears that appellant contends that the alleged increased noise levels while working for appellee aggravated his preexisting hearing loss. Based on our support of the Commission's decision that the noise levels had not increased, but actually decreased, we find no merit in appellant's contention.

Affirmed.

BIRD and MEADS, JJ., agree.

HOPE LIVESTOCK AUCTION COMPANY *v.*
Johnny KNIGHTON and CNA Insurance Company

CA 98-1510 992 S.W.2d 826

Court of Appeals of Arkansas
Division IV
Opinion delivered June 23, 1999

Howell, Trice, & Hope, P.A., by: *Jason D. Files*, for appellant.

Wright & Burke, by: *William Randall Wright*, for appellee Johnny Knighton.

Dunn, Nutter, Morgan & Shaw, by: *Nelson V. Shaw*, for appellee CNA Insurance Company.

MARGARET MEADS, Judge. This is the second appeal in this workers' compensation case. In the first appeal, because the Commission conducted an extrajudicial review of documentation not introduced into evidence, this court reversed and remanded the case to the Commission to make further findings. *See Hope Livestock Auction Co. v. Knighton*, 62 Ark. App. 74, 966 S.W.2d 943 (1998). On remand, the Commission found that appellee Johnny Knighton had met his burden of proof, that the statutory requirements of Ark. Code Ann. § 11-9-113 (Repl. 1996) had been satisfied, and that Knighton was entitled to disability benefits for his Bipolar I Disorder. Appellant appeals, arguing that there is not substantial evidence to support the Commission's findings (1) that Knighton's alleged mental condition is compensable; (2) that Knighton is entitled to additional temporary total disability benefits; and (3) that Knighton's subsequent November 1995 aggravation was temporary in effect. We disagree; therefore, we affirm the decision of the Commission.

Johnny Knighton worked full time for appellant Hope Livestock Auction from 1978 until July 3, 1996. Rockwood Insurance Company was appellant's workers' compensation carrier until it went into receivership in 1991, at which time the Arkansas Property and Casualty Guaranty Fund took over the defense of any claims against Rockwood. Appellee CNA Insurance Company provided appellant's workers' compensation insurance from January 1, 1995, until December 31, 1995.

Knighton suffered several compensable work-related injuries during his employment with appellant. The first was an injury to one of his knees in 1981 when a horse fell on him, necessitating surgery. He also suffered back injuries in 1985 and 1986. Each of

the back injuries required surgery, which was performed by Dr. George Bohmfalk. In 1990, Knighton was experiencing nerve damage in his hip and lower back as a result of his previous injuries, as well as numbness in his right shin. Dr. Bohmfalk performed yet a third back surgery, for which appellant paid. After the third surgery, Knighton continued to work for appellant, although Dr. Bohmfalk instructed him to stop riding horses and roping, and to scale back his activities at work.

In 1991, Knighton was treated at the Baptist Medical Center pain clinic for continuing back pain, and he was given medication to combat depression. He was also seen at a headache clinic in Houston, where a psychiatrist diagnosed him as having manic-depressive illness and placed him on Lithium. Dr. Edward Tobey, his treating psychiatrist since 1994, later amended the manic-depressive diagnosis to Bipolar I Disorder.

Knighton sustained another accident in November 1995, when a cow knocked him against a fence and stepped on his back and legs. He testified that he was "stove up" and in "absolute agony" due to the pain from this incident and that he consulted Dr. Bohmfalk after the accident. Dr. Bohmfalk told him that he was just shaken up. Knighton said that he suffered no new back or leg problems, missed no work, and was over the incident in about two days. In its first decision, filed July 24, 1997, the Commission determined that Knighton's bipolar disorder was a compensable injury under Ark. Code Ann. § 11-9-113 because it was caused by his compensable 1990 injury, although it had not manifested itself or been diagnosed until 1994.

In reaching its decision, the Commission consulted information not contained in the record, specifically the most current issue of the Diagnostic and Statistical Manual of Mental Disorders (DSM), in determining that Knighton had satisfied the requirements of the statute. We reversed and remanded that decision, because the extrajudicial review of documentation not introduced into evidence was error. *Hope Livestock Auction Co. v. Knighton, supra.*

On remand, the Commission ordered the administrative law judge (ALJ) to supplement the record with pertinent sections of

the DSM. On August 24, 1998, pursuant to the Commission's order, the ALJ supplemented the record, incorporating by reference the pertinent provisions of the DSM-IV concerning Bipolar I Disorder. In its October 6, 1998, opinion, the Commission again determined that appellee's diagnosis met the criteria established in the DSM-IV and that his mental condition was compensable.

Appellant does not contest the diagnosis of appellee's mental disorder as Bipolar I, but argues only that there was not substantial evidence that the diagnosis met the criteria established in the most current issue of the DSM. We disagree. In support of its finding that Knighton's diagnosis met the DSM criteria, the Commission relied on Dr. Tobey's progress notes and cited the portions of his deposition in which he opined that Knighton was suffering from Bipolar I Disorder, which he described as follows:

> Bipolar I is classic manic-depressive illness with cyclic mood swings, a severe depressive illness, depressive described as feeling of dysphoria, low motivation, lack of energy, could have either sleeping too much or sleeping too little, appetite changes, weight changes, problems with attention or concentration which are significant enough to either cause social, functional, or interpersonal impairment. The duration has to be of at least two weeks of duration. In manic-depressive illness you add on manic symptoms, which are severe difficulty with insomnia, racing thoughts, racing speech, increased kinetic activity or psychomotor activity, restlessness, pacing, it can have excessive spending, impulsiveness that happens with people. They also can get grandiose, think that they are smarter than they are or they can do more things than their capabilities are. And again, it's significant enough to cause social, occupational, and interpersonal impairment. Bipolar II Disorder is probably a lesser disorder where there's cyclic mood swings downward and depressive illness, and little peaks of manic symptoms but not to the near severity or the significant impairment seen with Bipolar I Disorder.

■ In reviewing the Commission's decision on a question of fact, we will affirm the Commission if its decision is supported by substantial evidence; substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Branscum v. RNR Constr. Co.*, 60 Ark. App. 116, 959

S.W.2d 429 (1998). The evidence is viewed in the light most favorable to the findings of the Commission and is given its strongest probative value in favor of the Commission's decision. *Barrett v. Arkansas Rehabilitation Servs.*, 10 Ark. App. 102, 661 S.W.2d 439 (1983). The question is not whether the appellate court might have reached a different conclusion from the one found by the Commission if it were reviewing the case *de novo*, or even whether the evidence would have supported a contrary finding. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). The Commission's decision 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. *Johnson v. Democrat Printing and Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138 (1997).

The question whether the diagnosis of a condition meets the criteria established in the DSM must ordinarily be one of fact, and the claimant has the burden of proof on this issue by a preponderance of the evidence. *Branscum v. RNR Constr. Co., supra.* The Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force; it must use its experience and expertise in translating expert medical testimony into findings of fact. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). It is the Commission's responsibility to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted; when it does so, its findings have the force and effect of a jury verdict. *Id.*

Arkansas Code Annotated section 11-9-113(a)(2) provides:

> No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

While a bare diagnosis, without an explanation of the characteristics of the mental illness, might not be sufficient to meet the requirements of section 11-9-113(a)(2), here Dr. Tobey, in both his deposition and progress notes, described Knighton's Bipolar I

Disorder in such detail that the Commission could easily make the finding that the diagnosis met the DSM-IV criteria. Although it would be preferable in cases of mental injury or illness for a psychiatrist or psychologist to correlate the basis of his opinion to the DSM criteria, we recognize the Commission's expertise and ability to translate medical testimony into findings of fact. We cannot say that the Commission's finding that Knighton's Bipolar I Disorder was a compensable work-related injury is not supported by substantial evidence.

Appellant next contends that Knighton is not entitled to temporary total disability benefits. In its brief, appellant cites *Arkansas State Hwy. and Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981), for the proposition that in order for a claimant to be entitled to temporary total disability benefits, he must show (1) that he remains in his healing period, and (2) that he is totally incapacitated to earn wages. Appellant argues that Knighton did not prove either of these requirements; therefore, he is not entitled to temporary total disability benefits. We do not agree.

Arkansas Code Annotated section 11-9-113(b)(1) provides, "Notwithstanding any other provision of this chapter, where a claim is by reason of mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits." The term "healing period" is noticeably absent from this section. "Disability" is defined as "incapacity because of a compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(9) (Supp. 1997). With respect to the inability to earn wages, there was testimony from Knighton, his wife, Dr. Bohmfalk, and Dr. Tobey of Knighton's problems being around people and functioning in society. For example, in one of his manic phases, Knighton did not sleep for eighteen days and had to be admitted to the hospital and sedated. Once the Commission is presented with medical evidence of physical impairment and functional limitations, it must use its superior knowledge of industrial demands, limitations, and requirements to determine how a disability will affect the injured worker's ability to obtain or hold a job. *Ark. State Hwy. Dept. v. Breshears, supra.* There is substantial evidence to support

the Commission's award of twenty-six weeks of disability benefits pursuant to Ark. Code Ann. § 11-9-113(b)(1).

Appellant's last argument is that there is insufficient evidence to support the Commission's finding that Knighton's November 1995 injury was a temporary subsequent aggravation. We disagree. An aggravation is a new injury resulting from an independent incident. *Farmland Ins. Co. v DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A temporary aggravation of a preexisting condition is a compensable injury. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996). When an accidental injury aggravates a prior one, the one in whose employ the second injury occurs is liable for all of the consequences naturally flowing from that incident; and it is only when the employee suffers merely a recurrence of a former injury without an intervening cause that the employer at the time of the initial injury is liable for the recurring disability. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

In this case, although the employer remained the same, the workers' compensation carrier changed. There is no question that there was an independent intervening cause for the November 1995 injury, and it is not disputed that appellee CNA is liable for all of the consequences naturally flowing from that incident, *i.e.*, Dr. Bohmfalk's bill for the office visit and any medication associated with that injury. However, there is no evidence in the record that this injury permanently aggravated Knighton's preexisting conditions. Knighton testified that he did not miss a day of work due to the November 1995 accident, and he suffered no lasting physical repercussions from the incident. Moreover, Dr. Bohmfalk testified that Knighton had no lasting effects from that accident. In short, there is nothing in the evidence to show that the November 1995 injury was anything other than a temporary aggravation, for which CNA is liable. Because the November 1995 accident was merely a temporary aggravation, Arkansas Property and Casualty Guaranty Fund remains liable for Knighton's preexisting conditions.

Affirmed.

ROBBINS, C.J., and NEAL, J., agree.

Larry HAMILTON *v.* Walter E. "Sonny" SIMPSON

CA 98-971 993 S.W.2d 501

Court of Appeals of Arkansas
Division II
Opinion delivered June 30, 1999
[Petition for rehearing denied August 25, 1999.]

Appellant, pro se.

Karla M. Burnett, Pulaski County Att'y, and *Amanda Mankin*, Ass't County Att'y, for appellee.

JUDITH ROGERS, Judge. This is an appeal from an order dismissing appellant's complaint and denying an award of attorney's fees and costs. On appeal, appellant argues that the trial

court erred in dismissing his complaint and finding that he had not substantially prevailed on any issue, and that the court erred in failing to award an attorney's fee and costs. We affirm.

On Friday, April 18, 1997, appellant, acting *pro se*, filed a request with appellee, the Director of Administrative Services for Pulaski County, for information under the Freedom of Information Act (FOIA) pertaining to the Multi-Purpose Civic Center. The record indicates that appellant was informed that the information would have to be located. Despite appellee's response, appellant filed this case in circuit court on the following Monday, April 21, 1997. A hearing was held on May 1, 1997. Appellee informed the trial court that he had never withheld documents from appellant but that time was needed to retrieve the remaining documents that appellant requested. Subsequently, the documents were voluntarily provided to appellant without a court order. Appellant in the meantime filed a motion for attorney's fees and costs. The court dismissed appellant's complaint and denied appellant's motion noting that appellant had not substantially prevailed on any issue and was proceeding *pro se*; thus, appellant was not entitled to an attorney's fee and costs.

On appeal, appellant argues that the trial court erred in dismissing his complaint and in finding that he had not substantially prevailed on any issue. Appellant contends that he prevailed because after he filed the suit, he was subsequently allowed to review documents he had requested; thus, he should be allowed attorney's fees and costs. Although we are aware that the purpose of the FOIA is to protect the public's right to know and that courts should follow the spirit and letter of the law, we cannot agree that under the facts of this case that appellant was denied access to the records he requested.

■ Attorney's fees are awarded only when expressly provided for by a statute or rule. *Security Pac. Hous. Servs., Inc. v. Friddle*, 315 Ark. 178, 185, 866 S.W.2d 375, 379 (1993). The Arkansas Freedom of Information Act provides in pertinent part:

> In any action to enforce the rights granted by this chapter, or in any appeal therefrom, the court shall assess against the defendant reasonable attorney's fees and other litigation expenses reasonably

> incurred by a plaintiff who has substantially prevailed unless the court finds that the position of the defendant was substantially justified or that other circumstances make the award of these expenses unjust. . . .

Ark. Code Ann. § 25-19-107(d) (Repl. 1996).

The trial court need not make a fee award in every Freedom of Information Act case; indeed, the purpose of the fee-shifting provision is to assess fees and costs where public officials have acted arbitrarily or in bad faith in withholding records. *Burke v. Strange*, 335 Ark. 328, 983 S.W.2d 389 (1998); *Depoyster v. Cole*, 298 Ark. 203, 208-09, 766 S.W.2d 606, 609 (1989)(citing Watkins, *Recent Developments Under the Arkansas Freedom of Information Act*, 1987 ARK. L. NOTES 59, 64). The decision whether to award a fee in such cases is a decision within the trial court's discretion. *Security Pac. Housing Servs., Inc. v. Friddle*, 315 Ark. 178, 866 S.W.2d 375 (1993). An award of attorney's fees will not be set aside absent an abuse of discretion by the trial court. *Chrisco v. Sun Indus.*, 304 Ark. 227, 800 S.W.2d 717 (1990).

The record reflects that appellant made a verbal request for documents to Joy Pensinger, appellee's administrative assistant, on April 14, 1997. Appellant was to retrieve the information on April 16, but the information was not available due to confusion concerning what documents appellant had requested. Appellant wrote down the information he requested and discussed this with Ms. Pensinger. According to appellant's complaint, Ms. Pensinger said she would start retrieving the information. On the morning of April 18, appellant called appellee in reference to the information he had requested and whether appellant could come pick up the information. According to appellant, appellee told him that some of the information he requested may be confidential and privileged, and appellee would have to get the County Attorney's approval. With regard to other information that had been requested, appellee allegedly could not give a time when it would be available. That afternoon, appellant filed his FOIA request.

The record, on the other hand, also indicates that appellant was never denied access to documents he requested. In fact, the record reveals that appellee voluntarily provided the requested

documents when he became aware of the documents' location and status.

Another important point which must be addressed is that appellant filed this suit one business day after filing his FOIA request. Arkansas Code Annotated section 25-19-105(e) provides:

> (e) If a public record is in active use or storage and, therefore, not available at the time a citizen asks to examine it, the custodian shall certify this fact in writing to the applicant and set a date and hour within three (3) working days, at which time the record will be available for the exercise of the right given by this chapter.

The record reveals that appellant never allowed appellee the requisite number of working days or a reasonable amount of time to process his request before filing this lawsuit. Consequently, we find that appellant's complaint was filed prematurely. Based on the record, we cannot say that the trial court abused its discretion in denying appellant's request for attorney's fees and costs.

Appellant also argues that the trial court erred in finding that appellee was not the custodian of the requested records and not the proper party defendant. Because we find that the court did not abuse its discretion in denying attorney's fees and costs nor err in dismissing the complaint, we need not address this issue.[1] We note, however, that the courts should zealously protect the rights of the people and encourage those individuals who seek to pursue those rights under the FOIA, and that government should not impede this process.

Affirmed.

HART and GRIFFEN, JJ., agree.

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[1] We would note that appellee did find and provide the requested information from a department that is under his supervision. In fact, the office where the records were located was down the hall from appellee's office.

AT&T COMMUNICATIONS of the SOUTHWEST, INC. *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 98-517 994 S.W.2d 494

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered July 7, 1999
[Petition for rehearing denied August 25, 1999.]

Wright, Lindsey & Jennings LLP, by: *N.M. Norton* and *J. Mark Davis*, for appellant.

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

George Hopkins; and *Williams & Anderson LLP*, by: *Leon Holmes*, for appellees/cross-appellants Central Arkansas Telephone Cooperative, Inc.; Lavaca Telephone Company, Inc.; Magazine

Telephone Company, Inc.; Northern Arkansas Telephone Company, Inc.; Southwest Arkansas Telephone Company, Inc.; Walnut Hill Telephone Company, Inc.

Chisenhall, Nestrud & Julian, P.A., by: *Lawrence E. Chisenhall, Jr.*, and *Michael T. Jackson*, for appellees Arkansas Telephone Company, Inc.; Century Telephone of Arkansas, Inc.; Century Telephone of Mountain Home, Inc.; Century Telephone of Redfield, Inc.; Century Telephone of South Arkansas, Inc.; Cleveland County Telephone Company; Decatur Telephone Company; Mountain View Telephone Company; Prairie Grove Telephone Company; E. Ritter Telephone Company; South Arkansas Telephone Company; Tri-County Telephone Company; Yelcot Telephone Company; Yell County Telephone Company.

Timothy S. Pickering, for appellee Southwestern Bell Telephone Company.

Stephen B. Rowell; and *Friday, Eldredge & Clark*, by: *Kevin A. Crass*, for appellees Alltel Arkansas, Inc.; Alltel Mobile Communications, Inc.; and Alltel Communications, Inc.

JOHN F. STROUD, JR., Judge. This appeal results from Arkansas Public Service Commission Order No. 12, which concerns reimbursement funding from the Arkansas Universal Services Fund. The Administrator of the fund determined that twenty-one rural phone companies who requested reimbursement funding should receive a total amount of $9.7 million on an annual basis from the fund. Appellant, AT&T Communications of the Southwest, Inc. (AT&T), and several telecommunications providers requested that the Commission reconsider the Administrator's determination. After a public hearing held in response to their requests, the Commission handed down Order No. 12. On appeal, AT&T argues three points for reversal, contending the Commission's order is unlawful because: (1) it is inconsistent with the Constitution of the State of Arkansas; (2) it relies on a statute that is preempted by federal law; and (3) it is inconsistent with applicable state statutes and not supported by substantial evidence. Appellees Central Arkansas Telephone Cooperative, Inc.; Lavaca Telephone Company, Inc.; Magazine Telephone Company, Inc.; Northern Arkansas Telephone Company, Inc.; Southwest Arkan-

sas Telephone Cooperative, Inc.; and Walnut Hill Telephone Company, Inc. (hereinafter referred to collectively as Cross-Appellants), contend on cross-appeal that the Commission erred in changing the dates of the base year for purposes of calculating their AUSF reimbursement. We find no error to any of these points and affirm.

The Arkansas Universal Service Fund (AUSF) was established by Act 77 of 1997, the Telecommunications Regulatory Reform Act of 1997, in order to promote and assure the availability of universal service at rates that are reasonable and affordable and to provide for reasonably comparable services and rates between rural and urban areas. Section 4 of the Act, codified at Arkansas Code Annotated section 23-17-404 (Supp. 1997), provides for the administration and the funding of the AUSF. The AUSF is funded from a charge levied on all telecommunications providers in the state in proportion to each provider's intrastate retail telecommunications service revenues. Section 23-17-404(e) sets out the instructions and guidelines that the Commission shall adhere to in establishing and implementing the AUSF, and subsection (1) states that "AUSF funding shall be provided directly to eligible telecommunications carriers."

As a result of the passage of Act 77, twenty-one rural telecommunications providers (hereinafter referred to as the Requesting-ILECs[1]) sent requests to the AUSF Administrator for reimbursements from the fund totaling $9.8 million. On December 8, 1997, the AUSF Administrator filed its report with the Commission, recommending that the Requesting-ILECs receive $9.7 million annually from the fund. Various objections and motions for reconsideration were filed by different parties, including Alltel Arkansas, Inc., Alltel Mobile Communications, Inc., and Alltel Communications, Inc. (hereinafter collectively referred to as Alltel); Southwestern Bell Telephone Company; and AT&T. In response to these various motions, the Commission set a public hearing to consider the Administrator's reimbursement determi-

[1] ILEC — Incumbent local exchange carrier is a telecommunications provider of basic local exchange service and switched-access service who was providing service on February 8, 1996. *See* Ark. Code Ann. § 23-17-403(16) and (18) (Supp. 1997).

nations. Thereafter, the Commission entered Order No. 12, which in part modified some of the Administrator's determinations, and, on April 2, 1998, in Order No. 13, the Commission denied AT&T's and the Cross-Appellants' petitions for rehearing of Order No. 12.

Before discussing the merits of the parties' appeals, we will discuss the contents of Order No. 12. The Order consists of twenty pages. In the first few pages of the Order, the Commission discusses the procedure it followed in considering the Administrator's determination. The Commission then discusses the specific objections filed by various parties to the Administrator's determination. The Order concludes with the Commission ordering seven specific changes to the Administrator's determination:

> 1. That the Administrator shall true-up the reimbursement requests of the Requesting ILECs based upon AITP revenues using a test year ending September 30, 1997, by no later than July 1, 1998, and adjust the Requesting ILECs reimbursement requests accordingly:
>
> 2. That the Century Companies shall on or before February 19, 1998, file with the AUSF Administrator a revised request for AUSF reimbursement reflecting that the Century Companies are toll providers and submit all workpapers supporting the revised request;
>
> 3. That the TDS Companies shall submit revised AUSF reimbursement requests to the AUSF Administrator on or before February 19, 1998, as reflected in Mr. Zeiler's testimony on behalf of the TDS Companies;
>
> 4. That SWATC shall submit a revised reimbursement request to the AUSF Administrator on or before February 19, 1998, accurately reflecting SWATC's revenues for the test year ending December 31, 1996;
>
> 5. That E. Ritter and Tri-County shall submit supporting documentation to the AUSF Administrator on or before February 19, 1998, sufficient to allow the Administrator to determine the accuracy of the request for Operator Service Expenses increases and lost revenues resulting from reduced NECA interstate average schedule settlements;

6. That NATCO, SWATC, Walnut Hill and Yell County shall on or before February 19, 1998, submit to the AUSF Administrator revised AUSF reimbursement requests to account for the FCC's adjustment of the corporate operations expense and if such revised requests are not made on or before February 19, 1998, the AUSF Administrator shall revise the reimbursement amounts of NATCO, SWATC, Walnut Hill and Yell County accordingly; and

7. That the AUSF Administrator shall file all supporting workpapers with the requests for reimbursement filed in accordance with AUSF Rule 5.02(B).

We are troubled that, from our reading of Order No. 12, we are unable to determine whether the Commission approved the other portions of the Administrator's determination. Arkansas Code Annotated section 23-2-423(a)(1) (Supp. 1997) provides that "[a]ny party to a proceeding before the commission aggrieved by an order issued by the commission in the proceeding may obtain a review of the order in the Court of Appeals. . . ." Nevertheless, because of the apparent lack of finality of at least some portions of Order No. 12, it is impossible for us to determine in several instances, as discussed later in this opinion, whether the party appealing a ruling has been aggrieved by it. Where error is alleged, prejudice must be shown; it is well settled that this court will not render an advisory opinion. *Central Ark. Tel. Coop., Inc. v. Arkansas Pub. Serv. Comm'n*, 61 Ark. App. 147, 965 S.W.2d 790 (1998).

AT&T's Point No. 1: Order No. 12 is unlawful because it relies upon Arkansas Code Annotated sections 23-17-404 and 23-17-404(e)(4)(B), which are inconsistent with Article 2, section 19, of, and Amendment 14 to, the Arkansas Constitution.

AT&T first argues that, because sections 23-17-404(e)(4)(A) and (B) entitle the Requesting-ILECs to receive an annuity forever once the Administrator or Commission approves reimbursement funding from the AUSF, they create a perpetuity in violation of Article 2, section 19, of the Arkansas Constitution. This section provides that "[p]erpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed. . . ."

In Order No. 12, the Commission admitted that there is nothing in Act 77 that allows it to terminate or alter AUSF funding which meets the criteria established by section 23-17-404(e)(4). The Commission refused, however, to address whether this section was unconstitutional, holding: "Were the Commission to find this section of Act 77 to be in violation of the State Constitution and grant the relief requested by [AT&T,] it would have the effect of nullifying an entitlement program created by the General Assembly to subsidize the operations of the ILECs. This exceeds the scope of the Commission's jurisdiction." On appeal to this court, AT&T asks us to declare sections 23-17-404(e)(4)(A) and (B) void.

Because AT&T has not appealed the Commission's holding that it lacked jurisdiction to declare a portion of Act 77 unconstitutional, we do not address that issue. In its reply brief, AT&T agrees that the Commission lacks jurisdiction to decide its constitutional claims but contends that the Commission's jurisdiction is not relevant. It argues that Arkansas Code Annotated section 23-2-423(c)(4) (Supp. 1997) gives this court jurisdiction to decide its constitutional arguments on their merits although those issues were not reached by the Commission. Relying on this section, it contends that it need only register its constitutional objections with the Commission in order for this court to have jurisdiction to decide its argument. We disagree.

Section 23-2-423(c)(4) provides:

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

Although this section provides that this court must determine whether a commission order or decision violates any constitutional rights of the petitioner, it requires us to do so in the context of determining whether the commission has regularly pursued its authority. AT&T has not argued that the Commission has failed

to regularly pursue its authority; in fact it agrees with the Commission's holding that it lacked jurisdiction to decide its constitutional claims. We therefore cannot agree that under these facts this statute gives us jurisdiction to address the merits of AT&T's constitutional claims.

Given AT&T's decision not to appeal the Commission's jurisdictional ruling, its only recourse is to seek a declaratory judgment on its constitutional claims in circuit court. *See Lincoln v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 27, 842 S.W.2d 51 (1992), *aff'd*, 313 Ark. 295, 854 S.W.2d 330 (1993), where this court held that a Commission denial of jurisdiction over whether a statute unconstitutionally infringed on the Arkansas Constitution did not deny the appellant a remedy because he could challenge the constitutionality of the statute in a declaratory judgment action. In pointing out this remedy, however, we are not expressing an opinion concerning whether the circuit court properly has jurisdiction of AT&T's constitutional arguments, as that is a matter for the circuit court to determine in the first instance. *Accord General Tel. Co. of the S.W. v. Lowe*, 263 Ark. 727, 569 S.W.2d 71 (1978).

For its second argument under this point, AT&T claims that Arkansas Code Annotated sections 23-17-404(e)(4)(A) and (B) also violate Amendment 14 to the Arkansas Constitution. For the reasons we set out in response to AT&T's first constitutional argument, we are also unable to address this argument. Furthermore, we agree with appellees that this argument was not sufficiently raised before the Commission. This argument was first mentioned by AT&T in its response to Alltel's and Southwestern Bell's motions for reconsideration, where it said that "[t]his unique privilege conferred upon certain corporations by Act 77 may also run afoul of Art. 2, section 17 and Amendment 14 of the State Constitution as special and preferential legislation." AT&T did not cite any authority for its argument or make a convincing argument in support of it. There is no record that AT&T pursued this argument at the hearing. However, in its application for rehearing, it stated that, for purposes of its appeal, it was renewing its claim that the Administrator's AUSF Reimbursement Determination must be rejected because the entire AUSF entitlement regime

enacted by the General Assembly violates Article 2, sections 17 and 19, of the Arkansas Constitution and Amendment 14 to the Arkansas Constitution. Although the Commission referenced AT&T's statement in Order No. 12, the Commission made no attempt to address it.

■ ■ We hold that AT&T's scant references to an Amendment 14 violation were insufficient to bring this argument before the Commission and before this court. The appellate court will not address issues on appeal that were not raised below. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996). As with a trial court, the Commission must be presented with a constitutional issue before an appellate court will consider it on appeal; a constitutional issue will not be addressed if it was not brought to the trial court's attention for a ruling during trial or at some point prior to the entry of final judgment. *See Stewart v. Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992). A fleeting reference to a constitutional argument without any citation of authority, argument, or even any reference to the basis for the reference is insufficient to present the issue to the chancellor for ruling. *Id; accord Brumley v. Naples*, 320 Ark. 310, 896 S.W.2d 860 (1995). Furthermore, Arkansas Code Annotated section 23-2-422(b) (Supp. 1997) requires that "[t]he application for rehearing shall set forth specifically the grounds upon which the application is based." Section 23-2-423(c)(2) states that "[n]o objection to any order of the commission shall be considered by the Court of Appeals unless the objection shall have been urged before the commission in the application for rehearing."

AT&T's Point No. 2: Order No. 12 is unlawful because it relies in part upon Arkansas Code Annotated section 23-17-404(e)(4)(A), which is preempted in part by federal law.

AT&T contends for its second point on appeal that the Commission's allowance of the claims of four of the Requesting-ILECs for reimbursement from the AUSF for their "Corporate Operations Expense" violates federal law. AT&T alleges that the Federal Communications Commission has imposed a cap of 115% on Corporate Operations Expense and that four of the Requesting-ILECs who were affected by this cap included their excess

Corporate Operations Expense in their requests for reimbursement. Although AT&T admits that section 23-17-404(e)(4)(A) requires the Commission to either increase the rates for basic local exchange service or increase the incumbent local exchange carrier's recovery from the AUSF or a combination thereof to replace these lost revenues, it contends that the allowance of these claims at the state level frustrates the federal effort "to ensure that carriers use universal service support to offer better service to their customers. . .," *see In the Matter of Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcf 1, 8930 (1997), and violates section 254(f) of the Telecommunications Act of 1996. That section provides:

> A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

47 U.S.C.A. § 254(f). AT&T concludes that, because the claims allowed by section 23-17-404(e)(4)(A) are directly inconsistent with the federal Telecommunications Act, the Arkansas statute is preempted by federal law.

■ We do not address this argument because AT&T has not shown that it has been aggrieved by Order No. 12. In its brief to this court, AT&T does not specify the four ILECs whose claims it alleges are preempted by federal legislation. Assuming that they are the four ILECs specified by the Commission in Order No. 12, we note that their claims have not been finalized. Order No. 12 directs these ILECs to revise their requests, and there is no further order in the record that shows they were awarded reimbursement after their claims were revised. Because AT&T has not shown that the Commission has allowed these claims, any opinion that this

court might give addressing AT&T's arguments regarding these claims would be advisory. Appellate courts do not render advisory opinions. *See Central Ark. Tel. Coop., supra.*

As part of this same point, AT&T also argues that sections 23-17-404(e)(4)(A) and (B) conflict with 47 U.S.C. § 254(f) because these sections are not imposed on a competitively neutral basis. This argument was not made in AT&T's application for rehearing and therefore has not been preserved for appeal. Section 23-2-423(c)(2) provides that no objection to any order of the commission shall be considered by this court unless the objection shall have been urged before the commission in the application for rehearing.

AT&T's Point No. 3: Order No. 12 is unlawful because it is inconsistent with applicable state statutes and not supported by substantial evidence.

A significant portion of the Requesting-ILECs' claims for reimbursement from the AUSF concerns reimbursement for revenues that the ILECs no longer receive from the Arkansas IntraLATA Toll Pool (AITP or Toll Pool). Section 23-17-404(e)(4)(B) provides that "[a]ny rural telephone company . . . that, as a result of changes caused by new or existing federal or state regulatory or statutory directives, experiences a change in . . . net revenue received from the . . . Arkansas IntraLATA Toll Pool, shall be allowed to recover such reductions from the AUSF. . . ." AT&T contends that the Commission erred as a matter of law in construing this section to allow the AUSF Administrator to reimburse the Requesting-ILECs for their claims for loss of Toll Pool revenue because their Toll Pool reductions are not the "result of changes caused by new or existing federal or state regulatory or statutory directives," as required by section 23-17-404(e)(4)(B).

In Order No. 12, the Commission addressed AT&T's argument:

> The AT&T witness testified that $9 million of the $9.7 million of approved AUSF support is related to the dissolution of the AITP. AT&T contends that the "voluntary dissolution of the AITP is not a result of changes caused by new or existing, federal

> or state regulatory or statutory directives; therefore, any related revenue losses or expenses increases from this action would not be legally eligible for reimbursement with AUSF support under Act 77." T. 151.
>
> The Requesting ILECs contend that either Act 77 caused the voluntary dissolution of the AITP or the Commission's Order No. 9 in Docket 96—428—U caused the AITP to be dissolved and therefore, their losses are recoverable from the AUSF under Sec. 4(e)(4) of Act 77. The Commission's Order No. 9 in Docket No. 96-428-U did not dissolve the AITP nor did the Order direct any ILEC to cease participation in the AITP. To the extent that Act 77 allows the ILECs to elect alternative regulation and this election triggered the applicability of Sec. 11(f) of Act 77 to AITP participation, Act 77 is the statutory basis for the ILECs' dissolution of the AITP and for the Requesting ILECs' AUSF recovery. Further, Sec. 4 of Act 77 demonstrates a clear legislative intent to subsidize the operation of ILECs through an AUSF supported by all telecommunications customers in the state. Therefore, in keeping with the spirit and intent of Sec. 4 of Act 77, the Commission rejects AT&T's contention that the AITP revenue losses and expenses of the Requesting ILECs are not recoverable from the AUSF.

AT&T, however, focuses on a statement made by the Commission in Order No. 12 that "[t]he losses from the AITP for which the Requesting-ILECs seek reimbursement were occasioned by the voluntary dissolution of the AITP on October 1, 1997," in support of its contention that there is no new or existing federal or state regulatory or statutory directive that caused the Toll Pool to end as required by section 23-17-404(e)(4)(B) for AUSF reimbursement.

We agree that AT&T is placing too strict a construction on the word "directives" used in section 23-17-404(e)(4)(B). Although a statute should be construed so that no word is void, superfluous, or insignificant, and meaning and effect must be given to every word contained therein, if possible, *see Locke v. Cook*, 245 Ark. 787, 434 S.W.2d 598 (1968), it has also been held that the court will not interpret a statute so strictly as to reach an absurd conclusion that is contrary to legislative intent. *Jackson v. State*, 336 Ark. 530, 986 S.W.2d 405 (1999). The first

rule in considering the meaning of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994). When a statute is ambiguous, we must give effect to the legislative intent. *ACW, Inc. v Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997). As a guide in ascertaining legislative intent, the appellate court examines the history of the statutes involved, as well as the contemporaneous conditions at the time of their enactment, the consequences of interpretation, and all other matters of common knowledge within the court's jurisdiction. *Vanderpool v. Fidelity & Casualty Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997); *City of Little Rock v. AT&T Communications of the S.W., Inc.*, 318 Ark. 616, 888 S.W.2d 290 (1994). The interpretation given a statute by the agency charged with its execution is highly persuasive, and while not conclusive, neither should it be overturned unless it is clearly wrong. *See Pledger v. Boyd*, 304 Ark. 91, 799 S.W.2d 807 (1990).

The Commission interpreted section 4 of Act 77 to allow the Requesting-ILECs to recover from the AUSF their revenue losses that resulted from the dissolution of AITP. We cannot say that its interpretation is clearly wrong. In *Central Arkansas Telephone Cooperative, Inc. v. Arkansas Public Service Commission*, 61 Ark. App. 147, 965 S.W.2d 790 (1998), this court discussed the creation and purpose of the AITP.

> The Arkansas IntraLATA Toll Pool (the Toll Pool) was established by the Commission Order No. 7 in Docket No. 83-042-U to allow local exchange carriers (LECs) to recover their costs of providing intraLATA toll service. Participation in the Toll Pool was required by Order No. 7, and the Toll Pool agreement provided that all LECs would charge their customers uniform rates for intraLATA toll calls and contribute these revenues to the Toll Pool. The Toll Pool then redistributed the revenues to the LECs based on their individual needs, causing some LECs to contribute more to the Toll Pool than their actual expenditures and some LECs to receive more in reimbursements than their contributions to the Toll Pool.

Id. at 148-49, 965 S.W.2d at 791. After the enactment of Act 77, the Commission in Order No. 9 of Docket No. 96-428-U held

that the passage of Act 77 made participation in the Toll Pool voluntary and, by operation of law, vacated Order No. 7 of Docket No. 83-042-U, which had created the Toll Pool. The Commission declined to address AT&T's argument that the Toll Pool should be abolished because of the passage of Act 77. Instead, the Commission agreed with Alltel's argument:

> [T]he Commission finds that ALLTEL is correct in stating "the Toll Pool *became* voluntary with the passage of Act 77" and pursuant to Act 77 "the Commission lacks jurisdiction to require participation in the Toll Pool or to establish the intraLATA toll rates charged" by electing ILECs. Therefore, the Commission finds that by operation of law Order No. 7 in Docket No. 83-042-U was vacated effective February 4, 1997, upon enactment of Act 77. AT&T's request to abolish the AITP need not be addressed since the Commission order requiring participation in the AITP was vacated by operation of law. . . .

Id. at 152, 965 S.W.2d at 793.[2]

Although AT&T argues here that Act 77 did not cause the Toll Pool reductions, we agree with the Commission's finding that it was the statutory basis for the ILECs' dissolution of the AITP. It is undisputed that, after the enactment of Act 77, Southwestern Bell, Alltel, GTE, and other LECs left the Toll Pool. Furthermore, it is clear that the legislature intended for the Requesting-ILECs to be reimbursed from the AUSF for the losses they suffered as a result of Act 77. Section 4(e) of Act 77 provides that "[t]he Commission shall not, *prior to the implementation and availability of funds from the AUSF*, require any local exchange carrier . . . to reduce its net revenue received from the Arkansas IntraLATA Toll Pool (AITP)." (Emphasis added.)

We find no merit to AT&T's argument that Act 77 cannot be considered as a "new" or "existing" directive, because those terms only include statutes that existed before or after the passage of Act 77. As the Commission correctly points out, com-

[2] Although the appellants, eight ILECs, appealed that ruling in *Central Arkansas Telephone, supra*, this court declined to address it, because the appellants had not presented any evidence that they had suffered any prejudice as a result of the Commission's holding and, therefore, the court's opinion would be purely advisory.

mon sense dictates that a statute is either new or existing. If the legislature had intended that no provision of Act 77 could be considered a directive that triggered AUSF funding, it could have included such language.

For its final argument, AT&T contends that the evidence submitted to and relied on by the AUSF Administrator is insufficient to support its determination because it does not meet the criteria of section 23-17-404(e)(4)(C), and even if it does meet the criteria of that section, it does not constitute substantial evidence upon which the Commission could base Order No. 12. This section provides:

> In connection with the receipt of AUSF funds for these changes referred to in subdivisions (e)(4)(A) or (B) of this section, such shall not be conditioned upon any rate case or earnings investigation by the commission. The AUSF administrator shall verify the calculations and accuracy of the net revenue reductions, based on a comparison between (i) the total annual revenues received from these sources by the eligible telecommunications carrier during the most recent twelve (12) months preceding the required regulatory or statutory changes, and (ii) a reasonable projection of total test-year annual revenue after such changes are implemented.

AT&T first argues that, because none of the forms submitted to the AUSF Administrator contained a projection of total test year annual revenue, they do not meet the criteria of this section. We do not address this argument, however, because it is being raised for the first time on appeal. *See Bryant, supra*, 54 Ark. App. at 174, 924 S.W.2d at 482.

AT&T also argues that the Commission lacked substantial evidence to approve the Administrator's determination. It contends that the only information the Administrator considered in verifying the calculations and accuracy of the claimed revenue reductions were the fill-in forms and "form" correspondence submitted by the Requesting-ILECs. AT&T contends that these forms were not sufficiently detailed and did not contain back-up workpapers or other meaningful underlying data to demonstrate the existence, calculation, or validity of the requested AUSF reimbursements. At the hearing, AT&T witness Michael Pauls testi-

fied regarding the lack of documentation supporting the ILECs' reimbursement requests for reductions in intraLATA long-distance billing, pool cash flow changes, access expense and revenue changes, long distance minutes, and lost AUSF funding. Pauls argued that, without verification of the source data underlying the Administrator's determination, it was not possible for anyone to reasonably determine the appropriate level of AUSF support.

In response, the Commission argues that the forms, which were submitted under oath, do in fact constitute substantial evidence supporting the Administrator's determination and that the Commission was not required to accept the testimony of Pauls. *See Bryant v. Arkansas Pub. Serv. Comm'n,* 57 Ark. App. 73, 941 S.W.2d 452 (1997). It further argues that, because AT&T has not abstracted the forms that were submitted by the requesting-ILECs to the Administrator, this court cannot determine what information was included and omitted. When an exhibit is necessary to an understanding of the testimony about an issue, but is not included in the abstract, the issue may be summarily affirmed. *Fulkerson v. Calhoun,* 58 Ark. App. 63, 946 S.W.2d 714 (1997).

We agree that the abstract presented by AT&T is not sufficient to demonstrate that the evidence before the Commission did not constitute substantial evidence. Without an abstract of the information that was provided to the Administrator, it is not possible for us to determine whether the Commission erred in not finding that the evidence was insufficient to allow the Administrator to verify the "calculations and accuracy" as required by section 23-17-404(e)(4)(C). Furthermore, we also point out that AT&T's argument in its Application for Rehearing that "the AUSF Administrator could not and did not verify the calculations and accuracy of the alleged net revenue reduction in view of the time within which the Administrator made its reimbursement determination and the quality of supporting documentation . . . ," was not sufficient to "set forth specifically the grounds upon which the application is based" as required by section 23-2-422(b). AT&T failed to reference for the Commission and this court specific instances in individual ILECs' requests where it contends that the documentation was insufficient for the Administrator to verify the accuracy and calculations of the requests. Although Pauls testified

generally about insufficient documentation, there is no abstracted testimony where he specified a particular ILEC's request that lacked such information. The Commission in Order No. 12 directed several ILECs to revise their requests, and it also ordered the AUSF to file supporting workpapers. We are unable to determine from AT&T's brief whether Order No. 12 addresses the lack of documentation about which AT&T complains on appeal.

Cross-Appeal

Cross-Appellants contend that the Commission erred in interpreting Act 77 to make the twelve months ending September 30, 1997, the base test year for purposes of calculating AUSF support. The AUSF Administrator, in making its AUSF reimbursement determinations, used a test year which consisted of the twelve-month period ending December 31, 1996. In Order No. 12, the Commission directed the Administrator to true-up the reimbursement requests based upon revenues using a test year ending September 30, 1997, and adjust the Requesting-ILECs reimbursement requests accordingly.

Section 23-17-404(e)(4)(C) requires the AUSF Administrator to verify the calculations and accuracy of the net revenue reductions submitted by the ILECs, based on a comparison between (i) the total annual revenues received from these sources by the eligible telecommunications carrier during the most recent twelve (12) months preceding the required regulatory or statutory changes, and (ii) a reasonable projection of total test-year annual revenue after such changes are implemented. Cross-Appellants contend that, because the new regulatory directives, including the reductions in Toll Pool revenues, began taking effect after February 4, 1997, when Act 77 was enacted, the "most recent twelve (12) months preceding the required regulatory or statutory changes. . . ." was the December 31, 1996, period that was used by the Administrator. By having the base year end after the enactment of Act 77, Cross-Appellants contend that the Toll Pool participants have the opportunity to manipulate the funding formula, which would be contrary to the legislative intent to create a test year that is unaffected by Act 77's regulatory changes.

Although we agree with Cross-Appellants' statement of legislative intent as to the test year, we do not agree that the Commission's revised September 30, 1997, test year conflicts with that intent. Order No. 12, which required the true-up reflecting a test-year ending September 30, 1997, was entered February 4, 1998, after any manipulation to the September 30, 1997, test year could occur. Furthermore, the Toll Pool is no longer operational, and therefore, there is no future possibility of manipulation of the Toll Pool. The Commission in Order No. 12 explained in detail its reasons for using a September 30, 1997, test year to true-up the reimbursement requests:

> AITP reports for the twelve (12) month period ending September 30, 1997, will more accurately meet the requirement in Act 77 of a test year reflecting the most recent twelve months preceding the "regulatory changes." The election of alternative regulation pursuant to Act 77 by the majority of ILECs changed the AITP from a mandatory pool to a voluntary pool. See Act 77, section 11(f). The ILECs continued to voluntarily maintain uniform toll rates and voluntarily continued participation in the AITP until October 1, 1997, when the larger ILECs withdrew from the AITP. T. 64. The losses from the AITP for which the Requesting ILECs seek reimbursement were occasioned by the voluntary dissolution of the AITP on October 1, 1997. The most recent test year preceding the voluntary dissolution of the AITP would be the twelve months ending September 30, 1997, when those reports are finalized. The Administrator is hereby directed to true-up reimbursement requests based upon AITP revenues using a test year ending September 30, 1997, by no later July 1, 1998, and adjust the Requesting ILECs reimbursement requests accordingly.

Order No. 12 at 5-7. Section 23-17-404(e)(4)(C) requires that the Administrator use revenue figures during the *"most recent"* twelve (12) months preceding the required regulatory or statutory changes. We agree that the language of subsection (i) supports the Commission's decision to use the September 30, 1997, test year.

Affirmed on direct appeal and cross-appeal.

PITTMAN, HART, BIRD, MEADS, and ROAF, JJ., agree.

Vernon WOODALL *v.* HUNNICUTT CONSTRUCTION

CA 98-1519 994 S.W.2d 490

Court of Appeals of Arkansas
Division II
Opinion delivered July 7, 1999

Daniel E. Wren, for appellant.

Michael E. Ryburn, for appellee.

WENDELL L. GRIFFEN, Judge.

WENDELL L. GRIFFEN, Judge. Vernon Woodall appeals the Workers' Compensation Commission's denial of benefits to him, arguing on appeal that (1) there is no substantial evidence to support the Commission's decision and (2) the fact that appellant's co-worker was not injured is not evidence of appellant's impairment. We agree with appellant's arguments and reverse and remand for an award of benefits.

On June 5, 1997, while assisting in the construction of a roof, appellant fell when a scaffold collapsed. Appellant, a thirty-seven-year-old carpenter, sustained bilateral calcaneal fractures to both of his heels as a result of the fall. When appellant went to the emergency room for treatment, his urine sample was tested for the presence of illegal drugs. That screen showed the presence of

cocaine metabolites. At the hearing on December 16, 1997, appellant admitted that he smoked a rock of crack cocaine at approximately 6 p.m. the night before the accident.

Appellant testified that he and his co-worker, James Summerhill, were in the process of framing a house on June 5, 1997. According to appellant's testimony, he told Summerhill to put together scaffolding so that they could "fly the ridge" and proceed in putting the roof together. Appellant testified that he did not check the scaffolding to make sure Summerhill had built it strong enough to support appellant's weight because Summerhill has "always built good scaffolding and we never had . . . problems." Summerhill testified that he had nailed down one side of the scaffolding to the wall but not the other side when appellant said it would be all right. At that point, appellant and Summerhill proceeded to "fly the ridge." Summerhill testified that, in his opinion, he felt it was safe to do. When the board that the two workers were standing on fell off the scaffolding, appellant fell down to the ground, but Summerhill, being on the other side of the board, was thrown up eleven feet. Summerhill was thrown to the ceiling, where he landed uninjured.

In reversing the Administrative Law Judge's finding that appellant had rebutted the presumption set out in Arkansas Code Annotated § 11-9-102(5)(B)(iv) (Repl. 1996), the Commission found that, on *de novo* review of the testimony, it believed that appellant failed to prove by a preponderance of the credible evidence that his accident and injury were not substantially occasioned by the use of cocaine. The Commission stated that the greater weight of the credible evidence established that appellant's accident was attributable to his impaired judgment. The Commission opined that appellant's "actions of climbing up on the scaffolding which was not nailed down on his end was a sheer disregard for his own personal safety which strongly suggests impairment resulting from drug use."

Arkansas Code Annotated section 11-9-102(5)(B)(iv)(b) provides that "The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or acci-

dent was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders." Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996). Further, when reviewing findings of fact made by the Workers' Compensation Commission, we must affirm if the Commission's decision is supported by substantial evidence. *Id.*

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 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. *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 dif-

ferent conclusion if we sat as the trier of fact or heard the case de novo. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988).

In *Hubley v. Best Western-Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996), we reversed the Workers' Compensation Commission, holding that the Commission's analysis was "both factually inaccurate and logically flawed." *Id.* at 230, 916 S.W.2d at 145. In *Hubley*, the Commission chose to believe the testimony of two dentists but to discount the testimony of another dentist, deeming the testimony of the third dentist lacking in probative weight because he was a dentist and not a medical doctor. We held that when the Commission discounted the third dentist's testimony but believed the other two dentists' testimony, it employed the "sort of arbitrary reasoning that the substantial evidence rule was never intended to insulate from judicial review." *Id.* at 231, 916 S.W.2d at 146. We find a similar situation here. The Commission chose to discount the testimony of appellant and found his actions lacking in presence of mind and judgment while praising the presence of mind and judgment of appellant's co-worker. Both workers, however, got on the faulty scaffolding knowing it was not nailed down on both sides. Summerhill was not under the influence of drugs or alcohol at the time. The Commission's conclusion — that appellant's decision to get on the scaffolding was so illogical that it must have been made as a result of the influence of the drugs that appellant took the prior evening — is based on inconsistent logic. Therefore, we must reverse.

In *Weaver v. Whitaker Furniture Co., Inc.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996), we affirmed the Workers' Compensation Commission's denial of benefits to the claimant, holding that he did not overcome the statutory rebuttable presumption that his injury was substantially occasioned by the use of illegal drugs. In *Weaver*, the claimant was injured when he stepped from a forklift and fell. In a drug test performed that day when Weaver went to the doctor for medical assistance, the presence of cannabinoids was found in his blood. A co-worker testified that he had slipped on the forklift, which leaked brake fluid, two or three times. The co-worker also testified that there was brake fluid on the concrete floor where Weaver slipped. In affirming the Commission's find-

ing that Weaver had not overcome the presumption that his injury was substantially occasioned by the use of drugs, we noted that there was substantial evidence to support the denial of benefits. We noted that the Commission weighed Weaver's evidence, including his testimony that he had not used marijuana in three years, against the medical testimony indicating that Weaver had used marijuana shortly before his accident at work. We can distinguish *Weaver* from the case at bar in two ways. First, Woodall's testimony concerning the drugs found in his body was forthright and not in contradiction with the medical evidence, unlike that of the claimant in *Weaver.* Second, Woodall's co-worker Summerhill's testimony was more pertinent to the accident at work than the co-worker's testimony in *Weaver.* Summerhill was involved in the accident in question, but the co-worker in *Weaver* was not. The *Weaver* co-worker merely stated that in times past, he had slipped in the same way that Weaver did.

The fact that Summerhill climbed on the scaffolding that he knew was not nailed down on both sides demonstrates that Summerhill and appellant exercised the same judgment. That the Commission chose to find that appellant's judgment was impaired by the use of drugs while finding that Summerhill displayed "presence of mind" and "quick judgment" in keeping himself from harm when the scaffolding collapsed is, we believe, indicative of inconsistent logic. Both workers climbed on the scaffolding. Both worked there until it collapsed. It may be reasonably concluded that neither worker exercised good judgment or that both co-workers exercised poor judgment. But it cannot be fairly concluded, consistent with logic, that appellant's behavior in stepping onto the scaffolding that Summerhill constructed was so different in fact or in its effects as to be distinguishable from Summerhill's judgment. Thus, the Commission erred when it inconsistently reasoned appellant's injury to be substantially occasioned from illegal drug use based on conduct that it commended when engaged in by Summerhill, a co-employee not shown to have taken illegal drugs, who acted the same way.

Reversed and remanded.

ROGERS and HART, JJ., agree.

Malika L. GRAY *v.* Winfred T. GRAY

CA 98-483 994 S.W.2d 506

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered July 7, 1999

Ogles Law Firm, P.A., by: *John Ogles*, for appellant.

Price Law Firm, by: *Robert J. Price*, for appellees.

MARGARET MEADS, Judge. This is a second appeal disputing the amount the chancellor set for child support. The parties were divorced in 1991, and appellant was awarded custody of the parties' three children, with appellee paying monthly child support in the amount of $1,075. On December 1, 1994, appellant petitioned for an increase in child support. After a hearing, appellee's child-support obligation was increased to $3,054.46 per month. Appellee filed a motion to reconsider, and after a February 13, 1996, hearing the chancellor reduced child support to $2,418.56 per month. Appellant filed another motion to reconsider, which was deemed denied; she then appealed the issue of child support, among other things, to this court.

In *Stepp v. Gray*, 58 Ark. App. 229, 947 S.W.2d 798 (1997), appellant argued that the chancellor erred in calculating child support because he excluded from appellee's income the full amount of depreciation on rental properties which appellee claimed on his federal income tax return. We agreed and remanded the case to the chancellor for further consideration of the depreciation-deduction issue, stating "we leave it to the discretion of the chancellor to determine whether further evidence is needed to arrive at the amount of the depreciation deduction to be considered as income to Gray." *Id.* at 237.

On remand, the chancellor conducted hearings on September 17, 1997, and October 9, 1997. Relying upon appellee's testimony that twenty percent of his depreciable rental property was in fact appreciating in value, the chancellor found that twenty percent of reported depreciation should be included in computing appellee's income for child support purposes. In addition, the chancellor determined that for the period preceding October 1, 1997, appellee's monthly child-support obligation would be thirty-two percent of his monthly income; thereafter, due to new child support guidelines effective October 1, 1997, appellee's monthly child-support obligation would be twenty-five percent of his monthly income, with the appropriate allowances for medical, dental, tax payments, and two-week support abatement, as well as

a credit against child support for any capital-gains tax. Appellant now argues two points on appeal, contending the chancellor erred (1) in calculating appellee's child-support obligation, and (2) in using the Supreme Court per curiam order of 1997 to set child support and finding that any applicable capital gains tax would be credited against child support. Appellee cross-appeals, contending that none of the depreciation should be includable in his income for purposes of computing child support.

Chancery cases are reviewed *de novo* on the record, and the chancellor's findings are not reversed unless they are clearly against the preponderance of the evidence or are clearly erroneous, *Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996); the review can be based upon a complete and independent review of the record. *Rockefeller v. Rockefeller*, 335 Ark. 145, 980 S.W.2d 255 (1998). The amount of child support lies within the sound discretion of the chancellor and will not be disturbed on appeal absent a showing of abuse of discretion. *Halter v. Halter*, 60 Ark. App. 189, 959 S.W.2d 761 (1998).

For her first point, appellant argues that all of the depreciation deduction which appellee claimed on his income-tax returns should be added back to his income for purposes of computing child support, and that the chancellor erred in including only twenty percent of the deduction. She further contends that Administrative Order No. 10 provides that child support shall be calculated on last year's federal and state income tax returns, quarterly estimates, and the net worth approach, and "does not mention static, depreciating and appreciating property to determine income." She also points out that the court could not determine from the evidence presented which properties were "staying static," which were depreciating, and which were appreciating.

During the hearings on remand, the chancellor expressed his understanding that *Stepp v. Gray, supra*, required him to review the depreciation deduction which appellee claimed on his tax returns and to determine the amount to be considered as income for child support purposes. However, the chancellor also expressed some confusion as to deducting the principal payments on appellee's rental properties from overall depreciation; this confusion appears

to be based upon the following sentence in *Stepp v. Gray*: "It also appears from the evidence presented concerning [appellee's] mortgage payments that he would have approximately $20,000 in disposable income remaining from the depreciation deduction even if he is credited with the amount of principal paid on the rental properties." *Id.* at 237. The chancellor further stated his understanding that, pursuant to *Stepp v. Gray*, a portion of the depreciation deduction *had to be* added back to appellee's income to arrive at his actual income. Accordingly, the chancellor found that $34,861 in depreciation was an allowable deduction from appellee's income, but that twenty per cent of that figure represented the amount of appellee's rental property that was appreciating in value. Therefore, the chancellor concluded that twenty percent of $34,861 should be added back to appellee's income for the purpose of computing child support.

The chancellor based his findings on the unrebutted testimony of appellee and his accountant with regard to the rental properties, the essence of which was that two duplexes and two other properties were appreciating in value and that the others were either static or depreciating in value. From our review of the record, we cannot say that the chancellor's decision to include twenty percent of the depreciation deduction in appellee's income for purposes of determining child support was an abuse of discretion.

Under this point, appellant also argues that evidence introduced at a hearing on November 20, 1997,[1] specifically appellee's personal financial statements, reflect that appellee's testimony at the September 17 hearing regarding the value of his rental property was not truthful. The short answer to this argument is that this evidence was not before the chancellor when he announced his ruling on the depreciation issue. The evidence which was before the chancellor when he made his ruling supports his decision to include only twenty percent of the deprecia-

[1] A hearing was apparently conducted in this case on November 20, 1997, on appellee's motion to reduce child support. The court's ruling on that motion is not at issue in this appeal.

tion deduction in appellee's income for purposes of child support. *See Wing v. Wing*, 12 Ark. App. 84, 671 S.W.2d 204 (1984).

In his cross-appeal on this point, appellee argues that none of the depreciation deduction should be included in the income figure used to compute his child-support obligation, and he cites several cases from other states in which straight-line depreciation, which he used, was not considered in determining child support. While appellee's argument is well-taken, we are not convinced, nor does appellee argue, that it is necessary to adopt a bright-line rule that support payors who utilize the straight-line method of depreciation will never have depreciation considered as a component when setting child support. Each case must be examined on its own set of facts. In the present case, in determining child support, the chancellor added back to appellee's income the depreciation on those properties that appellee testified were appreciating in value, but not on the properties which appellee testified were staying static or depreciating. Based upon the testimony, we cannot say the chancellor abused his discretion in reaching this decision.

In order to eliminate any confusion resulting from *Stepp v. Gray, supra*, we take this opportunity to clarify our court's position on the depreciation-deduction issue. We note that *Administrative Order 10: Arkansas Child Support Guidelines*, 331 Ark. 581, includes the following provision:

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

The guidelines do not mandate that the court include or exclude a payor's depreciation deduction, nor do we make that requirement. Rather, we believe that depreciation is a factor that should be considered, just as property and life-style are considered, on a case-by-case basis.

For her second point, appellant argues that the chancellor erred in using Administrative Order No. 10 to set child support and in finding that any applicable capital gains tax would

be credited against child support. We disagree. In *Heflin v. Bell, supra*, we held that a statute or per curiam order of the Arkansas Supreme Court that is in effect at the time of the hearing on a request for modification of child support is the applicable law pertaining to the modification. *Id.* at 204. At the time of the final hearing in this matter, *Administrative Order 10: Arkansas Child Support Guidelines, supra*, had been adopted, effective October 1, 1997. Therefore, the chancellor was correct in applying Administrative Order No. 10 for the amount of child support to be paid after October 1, 1997, and in applying the previous guidelines (*In re: Guidelines for Child Support*, 314 Ark. 644, 863 S.W.2d (1993)) for child support owed for the period prior to October 1, 1997. The 1993 guidelines provide that when the payor's income exceeds the chart, a payor with three dependents will pay thirty-two percent of his income for child support; Administrative Order No. 10 reduced that percentage to twenty-five percent. The chancellor's application of the proper law was not in error.

Nor do we find that the chancellor erred in allowing appellee credit for any applicable capital gains tax. For purposes of determining appellee's rental income, both the 1993 Guidelines and Administrative Order No. 10 allow self-employed payors to calculate child support based upon the previous year's federal and state income tax returns, and to allow deductions for state and federal income tax. Tax on capital gains is a component of both federal and state income tax returns, and appellee's 1994 federal tax return indicates that he paid $26,478 in capital gains tax. Moreover, the abstract does not indicate that appellant's counsel objected to proof of the capital gains tax paid by appellee, either at the time it was introduced or when the issue was discussed at the October 9 hearing. As appellee points out, Ark. R. Civ. P. 15(b) allows amendment of the pleadings to conform to the evidence when issues not raised in the pleadings are tried by express or implied consent. With no objection from appellant, the chancellor could properly consider this evidence.

Affirmed.

STROUD, and HART, JJ., agree.

GRIFFEN, ROGERS, and BIRD, JJ., concur.

SAM BIRD, Judge, concurring. I concur in the result reached by the majority because this case is controlled by the law of the case.[1] I believe, however, that this court's earlier decision in *Stepp v. Gray*, 58 Ark. App. 229, 947 S.W.2d 798 (1997), and the majority opinion in the case at bar are incorrect insofar as they instruct the chancellor to consider appellee's depreciation deduction as income for child-support purposes.

Under Section II of *Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. 581, income is defined as "*any form of payment*, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, worker's compensation, disability, payments pursuant to a disability or retirement program, and interest, less proper deductions for: 1. Federal and state income tax. . . ." (Emphasis added.) In the first place, even applying a most liberal interpretation, I am unable to construe a depreciation deduction to be a "form of payment" within the meaning of the foregoing definition. Secondly, the foregoing definition of income expressly excludes "proper deductions" for federal and state income taxes. If the supreme court had intended for the chancellors to disregard the Internal Revenue Code and determine that legally permissible depreciation deductions under that Code may not be considered in determining the amount of income taxes that can be properly deducted for the purpose of determining income, I believe it would have said so in its administrative order. In my view, the allowance of a depreciation deduction on one's income-tax return merely reduces the taxpayer's income-tax liability, and is not *income* as that term is defined in *Administrative Order No. 10*.

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[1] The doctrine of the law of the case prevents an issue raised in a prior appeal from being raised in a subsequent appeal. *Vandiver v. Banks*, 331 Ark. 386, 962 S.W.2d 349 (1998). The doctrine provides that a decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review. *Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998). On the second appeal, the decision of the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented. *Griffin v. First Nat'l Bank*, 318 Ark. 848, 888 S.W.2d 306 (1994); *Mercantile First Nat'l Bank v. Lee*, 31 Ark. App. 169, 790 S.W.2d 916 (1990).

As the majority notes, Section III of *Administrative Order No. 10*, dealing with the calculation of support for nonsalaried payors, provides:

> For self-employed payors, support shall be based on last year's federal and state income tax returns and the quarterly estimates for the current year. Also the court shall consider the amount the payor is capable of earning or a net worth approach based on property, life-style, etc.

To me, this section sets forth clearly that in calculating the amount of the child-support obligation of a self-employed person, the court is *required* to determine the amount of the payor's income by referring to the payor's federal and state income-tax returns, (and to consider the amount the payor is capable of earning or use a net-worth approach). Both the federal and state income-tax codes allow taxpayers to exclude (*i.e.*, deduct) from taxable income the amount by which certain property depreciates over its useful life.[2] Also, since quarterly estimates of income taxes are based on a percentage of the taxpayer's income-tax liability for the preceding year, they necessarily reflect the taxpayer's tax liability *after* the deductions allowed by federal and state tax codes.[3] I am unable to interpret Section III to mean that all or part of a taxpayer's depreciation deduction on his tax returns is to be considered as income for purposes of calculating child support.

Depreciation is the presumptive amount of the decline in the value of certain types of property over the passage of time as a result of exhaustion, wear, tear, and obsolescence.[4] Whether the presumed amount of the property's decline in value is valid cannot be determined until the property is sold. When the sale occurs, if the price received for the property is equal to or less than its depreciated value, the taxpayer has received no income from the

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[2] Under the federal tax code, a depreciation deduction is allowed for "the exhaustion, wear and tear (including a reasonable allowance for obsolescence) . . . of property held for production of income." 26 U.S.C. § 167 (1994). The terms of the Internal Revenue Code regarding depreciation have been adopted by reference in the Arkansas Income Tax Act for the purpose of computing Arkansas income-tax liability. Ark. Code Ann. § 26-51-428 (Repl. 1997).

[3] See generally 26 U.S.C. § 6654(d) (1994).

[4] 26 U.S.C. § 167.

sale. On the other hand, if the sale price exceeds the depreciated value of the property, at that point the taxpayer will have received income, and that amount of income should be considered in calculating any child-support obligation he or she may have at that time.[5] By including the depreciation deduction as income for the purpose of calculating child support, the child-support obligor will be required to pay support on income that may never be received, and the child-support recipient will be receiving the benefit of a profit on the obligor's investment before it can be determined that there will be any profit.

I am not aware of any authority by which an obligation to pay child support in the present is to be calculated based on income that a child-support obligor may realize in the future from investments. Is the child-support recipient going to be required to refund all or part of the money he or she received if it is ultimately determined that the price received for the property when it is sold does not exceed its depreciated value?

I have one other concern with the majority opinion. Although it recognizes that our opinion in *Stepp v. Gray, supra,* caused confusion to the chancellor when he was required, on remand, to consider whether and how much of appellant's depreciation deduction to include in income, the majority opinion in the case at bar provides no guidance that will eliminate that confusion in other cases involving the same issue. Much like the opinion in *Stepp*, the majority in the case at bar simply informs the chancellors that "depreciation is a factor that should be considered, just as property and lifestyle are considered, on a case-by-case basis."[6] The majority provides no hint as to what criteria the chancellor is to consider in making the determination of whether

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[5] Of course, any "profit" from the sale, for purposes of calculating child support, would have to be reduced by the amount of the income taxes that the federal and state taxing authorities will "recapture" as a result of the sale of residential rental property for a sum that is greater than its depreciated basis. 26 U.S.C. § 1250 (1994); Ark. Code Ann. § 26-51-411 (Repl. 1997).

[6] It should be noted that "property and lifestyle" are specifically mentioned in *Administrative Order No. 10* as factors that may be properly considered in determining the support obligation of self-employed payors on a net worth approach, whereas, there is no mention that consideration should be given to the payor's depreciation deduction.

all or some portion of the depreciation deduction should be considered as income. If only part of the deduction is to be included, there is no guidance offered as to how chancellors should determine what portion to include. I find it ironic that chancellors are mandated by *Administrative Order No. 10* to set child support according to the sums specified in the Family Support Chart, unless a variance from the chart is justified by specific written findings, yet in cases involving a depreciation deduction, the amount of income derived by the chancellor to begin with, from which the presumptive amount of support set forth in the chart is determined, can be fixed by the chancellor without any guidance from the administrative order or the appellate court as to what factors should be considered in determining whether and how much of the depreciation deduction should be deemed income.

I also disagree with parts of Judge Rogers's concurring opinion. In it, Judge Rogers expresses her concern "about depreciation being manipulated by the noncustodial parent," even though there was no suggestion by either of the accountants who testified in this case, nor a contention by the appellant, that appellee had "manipulated" any information on his tax returns to create an inaccurate picture of his income.[7] Obviously, if a child-support payor's income-tax returns were shown to be fraudulent or erroneous, the court could look to the correct information and make the necessary calculations to determine the appropriate amount of child support. But, in the absence of fraud or error in the tax returns or quarterly estimates, it seems to me that the amount of child support to be paid by the self-employed should be calculated based on the income shown on tax returns and quarterly estimates, as required by *Administrative Order No. 10.*

I am also puzzled by Judge Rogers's suggestion in her concurring opinion that one's child-support obligation can be reduced in instances of real-estate transactions where one has no investment in the property but can receive cash flow. If this is a

[7] According to appellant, he was utilizing a "straight-line" depreciation schedule, approved by Internal Revenue Code (26 U.S.C. 167), over a period of "twenty-seven and a half or twenty-eight and a half years." Under 26 U.S.C. § 168(d) (1994), the minimum term of depreciation for "section 1250 property" (residential rental property) is 27.5 years.

suggestion that the depreciation deduction should be included as income in calculating child support where the asset was purchased with borrowed money, but should not be included as income where the obligor has fully paid for an investment asset with his or her own money, I see no validity to that distinction. Appellee is obligated to pay these debts whether or not he ever makes any money on his investment. Furthermore, there is no suggestion by the evidence in this case that appellee had no investment in the property or was receiving the benefit of a significant positive cash flow. To the contrary, although we can not tell from the abstract the total amount appellee paid for the rental properties that are the subject of his depreciation deduction, we can tell that as of December 31, 1994, he owed a balance of $605,000 on promissory notes that were secured by real-estate mortgages on his rental property, and that in 1994, alone, he reduced that indebtedness by more than $32,000 while realizing rental income of only $15,731. Under these circumstances, I cannot agree that appellee has no investment in the property, or that he benefitted from a significant cash flow. In fact, these figures would indicate that, for 1994, a negative cash flow resulted.

As I stated at the outset, unfortunately this case must be affirmed because of the requirement that we apply the doctrine of the law of the case. However, I hope that when future cases are considered that involve the issue of whether a depreciation deduction should be treated as income for purposes of calculating child support, our mistake will be corrected. I commend and join with the majority judges in their concern that the children of our state be appropriately and adequately supported by their noncustodial parents. However, I am also concerned that the effect of this court's decisions in the *Stepp* case and the case at bar is to assess child support against income that has not yet been realized, and, therefore, to impose an inequitable assessment of child support against the investor, as compared to the noncustodial parent who chooses not to invest.

GRIFFEN, J., joins in this concurring opinion.

JUDITH ROGERS, Judge, concurring. I concur because I believe that the law of the case is determinative of our deci-

sion. I do agree that depreciation is a factor to be considered in computing income for child-support purposes. I write separately to note my concerns about depreciation being manipulated by the noncustodial parent, and to emphasize that there are many problems involved in employing reasonable and appropriate depreciation.

The reduction of income by depreciation is often inappropriate when considering child support, as this reduces the amount paid for child support without regard to cash income available to the payor from rental or income-producing property. Essentially, it is an issue of the appropriate income to be used in determining the obligation of child support. The Arkansas statute tracks the Internal Revenue Code for purposes of taxable income. However, in real estate transactions a person can have no investment in the property and can receive significant cash flow, which is usually the determining factor from a financial viewpoint in the property value and income.

In the instant case, it would not be proper to deduct the total amount of depreciation from appellee's income because the depreciation relates to a long-term reserve for replacement that may take thirty years, which is well beyond the minority of the child. Some consideration should be given for reasonable depreciation to the extent that it reflects mortgage amortization or financing under the circumstances. In addition, it should be noted that appellee does not have any cash investment of his own in the real estate and therefore, even though for tax purposes he is entitled to a deduction for depreciation, he has no real out-of-pocket expenses in that regard. Therefore, there are funds available to appellee that should be utilized in the calculation of his child-support obligation.

I also want to reiterate that the support guidelines are just that — guidelines — and that flexibility is delegated to the trial judge who, in utilizing his or her considerable discretion in these cases, can and should consider the economic impact and funds actually available to the payor.

OFFICE of CHILD SUPPORT ENFORCEMENT *v.*
Gary LONGNECKER

CA 98-1291 997 S.W.2d 445

Court of Appeals of Arkansas
Division I
Opinion delivered September 1, 1999

John C. Wisner, III, Attorney Supervisor, for appellant.

Dennis R. Molock, for appellee.

SAM BIRD, Judge. The State of Arkansas Office of Child Support Enforcement, as Intervenor in a case between Brenda and Gary Longnecker, appeals a decision requiring Gary Longnecker to pay child support based solely on his primary employment as a fireman. The chancellor stated in a letter opinion:

> As I read the current law, support should be based upon Mr. Longnecker's regular employment at the fire department only. It would be inequitable, at least, and should be against public policy to base support on additional part time work, especially considering that his regular work week is fifty-six hours.

Appellee Gary Longnecker has, during the pendency of this action (1994-98), received income from three sources: the Stuttgart Fire Department, Riceland Builders (his father's construction

company), and the National Guard. Appellant argues that all Longnecker's income from any source must be considered to arrive at the proper amount of support.

Appellee counters that the chancellor was aware of all his sources of income, that he considered all the evidence, that he referred to the child-support chart, and that he provided written explanation as to why he did not apply all of appellee's income to the chart. Thus, according to appellee, the chancellor precisely followed the procedure set out in Administrative Order of the Supreme Court Number 10—Child Support Guidelines, 331 Ark. 581 (1998), and, therefore, his decision should be affirmed. We do not agree with appellee's contention, and we reverse and remand.

Appellee and his former wife, Brenda Longnecker, had two children: Rachel, DOB 9/23/79, and Hunter, DOB 4/22/85. When they divorced in 1994, Ms. Longnecker was awarded custody of both children. At that time child support was set at $125 a week. In May 1996, by agreement of the parties and the court, Hunter went to live with his father, and child support was abated. In October 1996, Ms. Longnecker sought return of custody and resumption of child support because Hunter had moved back into her home and wished to remain there. At that time appellee was ordered to pay $98 per week child support based on his fireman's income and his income from the National Guard. The chancellor apparently had been informed that Longnecker was no longer working for his father at Riceland Builders.

On September 23, 1997, Rachel reached the age of eighteen and sometime between her graduation from high school and her birthday, she married. At that time, the amount of child support appellee was required to pay was reduced to that for one child. The trial judge informed the parties that he would consider only appellee's salary as a fireman in computing the proper amount of child support. Counsel for Child Support Enforcement objected,

arguing that all of appellee's income from all sources should be considered. The objection was overruled.

■ ■ Although chancery cases are reviewed *de novo* on the record, the appellate court will not reverse unless the chancellor's findings are clearly against the preponderance of the evidence or are clearly erroneous. *Mixon v. Mixon*, 65 Ark. App. 240, 987 S.W.2d 284 (1999); *Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996). Ordinarily, the amount of child support lies within the discretion of the chancellor, and his findings will not be disturbed on appeal absent an abuse of discretion. *Halter v. Halter*, 60 Ark. App. 189, 959 S.W.2d 761 (1998); *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996); *Belue v. Belue*, 38 Ark. App. 81, 828 S.W.2d 855 (1992). Thus the question before us is whether the chancellor's ruling constitutes an abuse of discretion.

■ ■ In setting the amount of child support that a noncustodial parent must pay, reference to the most recent child-support chart, 331 Ark. 581, is mandatory. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). Before a chancellor can refer to the child-support chart, the payor's income must be determined. *Woodson v. Johnson*, 63 Ark. App. 192, 975 S.W.2d 880 (1998). Arkansas Code Annotated section 9-14-201 (Repl. 1998) defines income:

> (7) As used in this title, and for all child support purposes, "income" means any periodic form of payment due to an individual, *regardless of source, including wages, salaries*, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest. The definition of "income" may be expanded by the Arkansas Supreme Court from time to time in the Guidelines for Child Support Enforcement. (Emphasis added.)

Administrative Order Number 10—Child Support Guidelines, Section II, Definition of Income (1999), provides:

> Income means any form of payment, periodic or otherwise, due to an individual, *regardless of source, including wages, salaries*,

> commissions, bonuses, worker's compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions for:
>
> 1. Federal and state income tax;
>
> 2. Withholding for Social Security (FICA), Medicare, and railroad retirement;
>
> 3. Medical insurance paid for dependant [sic] children, and
>
> 4. Presently paid support for other dependents by Court order.

331 Ark. at 582-83. (Emphasis added.)

In the supreme court's per curiam *In Re: Guidelines for Child Support Enforcement*, 301 Ark. 627, 784 S.W.2d 589 (1990), the court stated many factors that may be considered in determining the appropriate amount of child support to be paid. They include, but are not limited to, clothing, accustomed standard of living, recreation, educational expenses, and "other income or assets available to support the child from whatever source." 301 Ark. at 629, 784 S.W.2d at 591.

In *Black v. Black*, 306 Ark. 209, 812 S.W.2d 480 (1991), the Arkansas Supreme Court stated that its per curiam listed examples of other matters in addition to the support chart that could have a "strong bearing" in determining the amount of child support. 306 Ark. at 214, 812 S.W.2d at 482.

In *Belue, supra*, we reviewed the decision of a chancellor who had included as income for purposes of setting child support the father's disability pension from the Veterans' Administration, which was his only source of income. The chancellor stated:

> [I]t is my firm belief that the Supreme Court never intended to exempt income received from VA benefits, . . . to be exempt [*sic*] from being calculated in child support payments. I can see no reason why Mr. Belue should live on a very substantial income and not support his child, even if the *technical definition of income* does not include that income which he receives.

We held that the chancellor's action was not error, stating, "The language 'other income or assets available to support the child from whatever source' contained in the per curiam shows the committee's intent to expand, not restrict, the sources of funds to be considered in setting child support. *See* 301 Ark. at 629, 784 S.W.2d 588." 38 Ark. App. at 85, 828 S.W.2d at 857.

Thus, it is clear that all sources of a payor's income are to be included in arriving at the sum of money upon which the amount of child support is to be derived from the Family Support Chart, and the chancellor's decision to exclude some of the appellee's income was an abuse of discretion.

On *de novo* review of a fully developed chancery record, we may enter the order that the chancellor should have entered, or we may remand if we think justice will be better served. *Reaves v. Reaves*, 63 Ark. App. 187, 975 S.W.2d 878 (1998). However, in the instant case, we are reluctant to set the amount of child support to be paid by appellee because it does not appear that the record has been sufficiently developed as to whether any factors exist that might justify a departure from the presumptive amount of child support calculated pursuant to the Family Support Chart. Therefore, we think that the better course in this instance is to remand for the chancellor to redetermine the amount of appellee's income in a manner consistent with this opinion, to afford the parties an opportunity to present evidence as to the existence of factors that might justify a departure from the presumptive amount of child support specified by the Chart, and, if it is determined that the amount specified in the Chart is unjust or inappropriate, to permit the chancellor to make the written findings required by Administrative Order Number 10.

Reversed and remanded.

PITTMAN and ROAF, JJ., agree.

Dwayne SMITH and Rebecca Smith *v.*
Otis PARKER, Pauline Parker, and J-Dog, Inc.

CA 98-1316 998 S.W.2d 1

Court of Appeals of Arkansas
Division II
Opinion delivered September 1, 1999

Bailey, Trimble, Lowe, Sellars & Thomas, by: *Rick Sellars*, for appellants.

Kelly & Huckabee, by: *Jerry Kelly*, for appellees.

JUDITH ROGERS, Judge. This appeal concerns a farm lease entered into between appellee J-Dog, Inc., and Billy Jim Smith, the father of appellant Dwayne Smith. The issues on

appeal are whether the lease is enforceable against appellants, who were deeded part of the subject property after the execution of the lease, and whether the lease has priority over an easement owned by appellants. The chancellor ruled against appellants on both questions. We find no error and affirm.

Billy Jim Smith and Lillie Rose Smith were the owners of 160 acres of land in Lonoke County. Their home was located on a forty-acre tract on the north side of a county road. Mr. Smith farmed the land until approximately 1987. In that year, he entered into a crop-share lease with a Mr. Underwood. The lease was in force, on a year-to-year basis, through 1992. Beginning in 1993 and ending in 1995, Mr. Smith entered into a series of yearly leases with appellee J-Dog, Inc. Rent was payable on a crop-share basis, seventy-five percent to J-Dog and twenty-five percent to Mr. Smith. On February 28, 1996, Mr. Smith and J-Dog entered into the lease that is the subject of this case. The lease was for the same land and for the same crop-share percentages as the prior leases, but the term of the lease was seven years rather than one year. The lease was not signed by Mr. Smith's wife, Lillie Rose Smith. However, she became aware of the lease several days after it was executed.

On April 11, 1997, the Smiths deeded forty acres of the leased property to Circle S Farms, a partnership comprised of their four sons, including appellant Dwayne Smith. They also deeded a separate tract of land to Dwayne and his wife, Rebecca. That conveyance included a twenty-foot easement across the leased property. On April 14, 1997, Circle S sent a letter to Jacques Parker of J-Dog, Inc., informing him that the lease "has been assigned to Circle S Farms, a partnership, who is now the owner of the farm."

On June 28, 1997, Circle S Farms and Lillie Rose Smith attempted to terminate the lease that had been entered into between J-Dog and Billy Jim Smith. They sent separate letters to Jacques Parker asserting that they were not parties to the lease. The final paragraph of each letter read: "Your rights, if any, are hereby terminated as of December 31, 1997 and you are hereby

notified to quit and remove yourself from the property at that time."

On July 25, 1997, as part of a boundary-dispute action that is not relevant to this case, appellants and Circle S Farms filed a third-party complaint against J-Dog asking that the 1996 multi-year lease be declared null and void. They alleged that the lease was invalid because it was not signed by Lillie Rose Smith and that, because the lease was not recorded, it did not have priority over Dwayne and Rebecca Smith's easement.

After a hearing, the chancellor ruled that the doctrine of estoppel precluded appellants from arguing that the lease was void for want of Mrs. Smith's signature. He also found that, even though the lease was not recorded, Dwayne and Rebecca had actual knowledge of the lease at the time they acquired their easement. Therefore, J-Dog's rights under the lease were superior to their rights under the easement. It is from these findings that appellants bring their appeal.

Chancery cases are reviewed *de novo* on appeal. *Lammey v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998). However, a chancellor's findings will not be reversed unless they are clearly erroneous. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

We first address appellants' contention that the 1996 deed was void because it was not signed by Lillie Rose Smith. Ordinarily, an instrument affecting the homestead[1] of a married person is invalid unless the person's spouse joins in the instrument. Ark. Code Ann. § 18-12-403 (Supp. 1997). Therefore, when a husband leases homestead property without his wife's joining in the execution of the lease, the lease is void. *Mid-Continent Petroleum Corp. v. Smith*, 186 Ark. 838, 56 S.W.2d 420 (1933); *George v. George*, 267 Ark. 823, 591 S.W.2d 655 (Ark. App. 1979).

[1] There was no argument below, nor is there an argument on appeal, that the leased property did not contain the homestead of Mr. and Mrs. Smith.

However, despite the dictates of Ark. Code Ann. § 18-12-403, a spouse may be estopped to deny the validity of an instrument in which he or she did not join. *See Edwards v. Jones*, 197 Ark. 229, 123 S.W.2d 286 (1938). *See also First Fed. Sav. of Ark. v. Beard*, 108 B.R. 212 (Bankr. W.D. Ark. 1989).

■ We agree with the chancellor that the doctrine of estoppel precludes the application of section 18-12-403 in this case. The doctrine of estoppel is applicable when the following four elements are present: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel had a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *Wells v. Everett*, 5 Ark. App. 303, 635 S.W.2d 294 (1982). At trial, Lillie Rose Smith testified that she had been aware since the days of the Underwood leases that her husband had leased their land for farming purposes. She knew about the one-year leases between her husband and J-Dog in 1993, 1994, and 1995, and accepted the monetary benefits of those leases. Regarding the 1996 lease, she was aware of its existence several days after it was executed. She expressed no objection to J-Dog that her name was not on the lease. She testified that she drove her husband to the USDA office "a lot" to transact business with regard to the lease. Additionally, she and her husband received the monetary benefits of the lease in 1996.

■ Under these circumstances, we cannot say that the chancellor's application of the estoppel doctrine was clearly erroneous. Mrs. Smith was aware of the lease's existence prior to her conveyance of the leased property to her sons. She had acquiesced for many years in her husband's unilateral lease of their property. She received the benefits of the leases, including the 1996 lease, without objection to the lessee. Further, there was evidence that J-Dog, in reliance on the long-term nature of the lease, expended funds on pipe and irrigation equipment. Based upon the forgoing, we affirm the chancellor's finding on this point.

■ ■ The next issue concerns the effect of the lease on appellants' easement across the leased property. At the time appel-

lants took title to their property in April 1997, the lease between Billy Jim Smith and J-Dog, Inc., had not been recorded. Generally, no instrument in writing which may affect title to real property shall be valid against a subsequent purchaser of the property unless the instrument is filed for record in the county where the real estate is situated. *See* Ark. Code Ann. § 14-15-404(b) (Repl. 1998). However, the instrument is valid if the subsequent purchaser had actual notice of it. *Killam v. Texas Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990); *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983). Whether one buying land had notice of another's interest in the land is a question of fact. *McGill v. Grigsby*, 205 Ark. 349, 168 S.W.2d 809 (1943). We will not reverse a chancellor's finding of fact regarding whether a party is an innocent purchaser without notice unless that finding is clearly erroneous. *Malone v. Hines*, 36 Ark. App. 254, 822 S.W.2d 394 (1992).

The chancellor's finding on this issue is not clearly erroneous. A subsequent purchaser will be deemed to have actual notice of a prior interest in the property if he is aware of such facts and circumstances as would put a person of ordinary intelligence and prudence on such inquiry that, if diligently pursued, would lead to knowledge of these prior interests. *Killam v. Texas Oil & Gas Corp., supra.* In the case at bar, appellants were aware, prior to acquiring title, that J-Dog was farming the property in 1997 and that he had been farming it for many years prior to that. James Gary Smith, appellant Dwayne Smith's brother and the managing partner of Circle S, testified that he became aware of the 1996 lease several days after it was executed. Further, on April 14, 1997, the same day their deeds were recorded, the partners of Circle S, including Dwayne Smith, wrote to J-Dog to advise that the partnership had been assigned the lease. Finally, the partnership received monetary benefits from the lease in 1997. These facts show not only actual notice of the lease but ratification of it. *See generally Harrison v. United Farm Agency*, 222 Ark. 530, 262 S.W.2d 293 (1953).

Affirmed.

HART and GRIFFEN, JJ., agree.

Clayron Gene RASBERRY *v.* Pamela Rasberry IVORY, *et al.*

CA 98-1509 998 S.W.2d 431

Court of Appeals of Arkansas
Division I
Opinion delivered September 8, 1999

Melvin E. Petty, for appellant.

Baim, Gunti, Mouser. Robinson & Havner, by: *Kenneth B. Baim* and *Kyle Havner*, for appellees.

JOHN MAUZY PITTMAN, Judge. Appellant is the illegitimate son of Willie Rasberry, who died intestate in 1988. He was survived by his widow, Mary Rasberry; by his daughter, Pamela Rasberry Ivory; and by the appellant, his illegitimate son. At the time of his death, Willie Rasberry owned three parcels of real estate in Jefferson County, Arkansas. In July 1997, appellant and Pamela Rasberry Ivory executed a deed by which they relinquished any claim to the homestead of Mary Rasberry. In September 1997, Mary Rasberry and Pamela Rasberry executed a deed granting the remaining parcels of real estate owned by Willie Rasberry at his death to Betty and Charles Wesson. On May 12, 1998, appellant filed a petition alleging that he was an heir of Willie Rasberry and seeking partition of the three parcels of land. Appellees filed a motion for summary judgment asserting that appellant's claim was barred because he failed to assert a claim against the estate within 180 days of the decedent's death as required by Ark. Code Ann. § 28-9-209(d) (1987). Appellant admitted that he failed to assert his claim within 180 days of his father's death but argued that his untimeliness was excused because the appellees always recognized him as the son of Willie Rasberry and were therefore estopped to deny his parentage. The trial judge granted appellees' motion for summary judgment, finding that appellant was not ignorant of the fact of his illegitimacy

and therefore could not claim estoppel. From that decision, comes this appeal.

For reversal, appellant contends that the chancellor erred in ruling that appellees were not estopped from invoking Ark. Code Ann. § 28-9-209. We find no error, and we affirm.

■ ■ Arkansas Code Annotated § 28-9-209(d) (1987) deals with the effect of a child's legitimacy on his ability to inherit, and provides that:

> (d) An illegitimate child or his descendants may inherit real or personal property in the same manner as a legitimate child from the child's mother or her blood kindred. The child may inherit real or personal property from his father or from his father's blood kindred provided that at least one (1) of the following conditions is satisfied *and an action is commenced or claim asserted against the estate of the father in a court of competent jurisdiction within one hundred eighty (180) days of the death of the father:*
>
> (1) That a court of competent jurisdiction has established the paternity of the child or has determined the legitimacy of the child pursuant to subsections (a), (b), or (c) of this section; or
>
> (2) That the man has made a written acknowledgment that he is the father of the child; or
>
> (3) That the man's name appears with his written consent on the birth certificate as the father of the child; or
>
> (4) That the mother and father intermarry prior to the birth of the child; or
>
> (5) That the mother and putative father attempted to marry each other prior to the birth of the child by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or
>
> (6) That the putative father is obligated to support the child under a written voluntary promise or by court order.

(Emphasis supplied.) This statute creates a right unknown at common law, and the right is created for only the 180 days; *i.e.*, the 180-day period is a condition qualifying the right of action, and not a mere limitation on the remedy. *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988). As the United States Supreme

Court said in *Walsh v. Mayer*, 111 U.S. 31, 37 (1884), "[t]he provisions requiring it to be asserted in a particular mode and within a fixed time, are conditions and qualifications attached to the right itself, and do not form a part of the law of the remedy. If it is not asserted within the permitted period, it ceases to exist and cannot be claimed or enforced in any form."

■ ■ Appellant contends that appellees are estopped to rely on Ark. Code Ann. § 28-9-209(d) because appellant has always been acknowledged to be Willie Rasberry's son, was named as such in Willie Rasberry's obituary, and was described as an "heir" of Willie Rasberry in the July 1997 deed executed by appellant and Pamela Rasberry Ivory by which they relinquished any claim to the homestead of Mary Rasberry. Even assuming that the doctrine of estoppel could serve to circumvent the requirement of asserting a claim within the 180-day period (a question we need not decide), we do not agree. Four requirements must be satisfied before the doctrine of equitable estoppel will apply: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his or her conduct be acted on or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the latter must be ignorant of the true facts; and (4) must rely on the former's conduct to his or her injury. *Miller County v. Opportunities, Inc.*, 334 Ark. 88, 971 S.W.2d 781 (1998). In the present case the description of appellant as an "heir" of Willie Rasberry in the 1997 deed could not work an estoppel because the 180-day period for asserting a claim under the statute expired many years before appellant was so described in the deed, and appellant therefore could not have relied on the description to his detriment. Nor do we think that any estoppel could arise from the mere fact that appellant had always been acknowledged to be Willie Rasberry's son. There was evidence that many of the appellees did, in fact, acknowledge that appellant was Willie Rasberry's son; however, the crucial issue in the case at bar is not appellant's lineage but is instead his legitimacy. Although appellant was recognized and accepted as a family member despite his illegitimate birth, nothing in the record indicates that appellees ever led appellant to believe that he was not illegitimate or that he could inherit from his father without

filing a claim within the statutory time period. Under these circumstances, we hold that the chancellor did not err in ruling that appellant failed to establish estoppel.

Affirmed.

BIRD and ROAF, JJ., agree.

TRUCKER'S EXCHANGE, INC. *v.*
BORDER CITY FOODS, INC.

CA 98-1433 998 S.W.2d 434

Court of Appeals of Arkansas
Division I
Opinion delivered September 8, 1999

Sexton & Fields, P.L.L.C., by: *William Kropp III*, for appellant.

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

ANDREE LAYTON ROAF, Judge. Trucker's Exchange, Inc., appeals from a judgment awarded to appellee, Bor-

der City Foods, Inc., for damages Border City suffered when its customer rejected a load of frozen chicken transported by Trucker's Exchange because the seal placed on the refrigerated trailer had been broken during shipment. The trial court found that Border City established a course of dealing or usage of trade that explained or supplemented the bill of lading issued by Trucker's Exchange so as to require delivery with the seal intact. On appeal, Trucker's Exchange argues that the trial court erred in 1) finding that it breached the shipment contract because delivery with the seal intact was not an express term included on the bill of lading; and 2) finding for Border City when Border City's improper loading of the shipment was the proximate cause of its damages. We find no merit to either argument and affirm.

Between April 11th and May 23rd of 1997, Border City obtained the services of Trucker's Exchange to transport shipments of frozen poultry parts. On May 23, 1997, Trucker's Exchange agreed to transport a load of poultry from Fort Smith to Seaboard Farms in Elberton, Georgia. Border City loaded the goods and placed a seal on the rear door of the trailer as required by the buyer. The bill of lading issued by Trucker's Exchange did not make mention of the seal but contained a serial number that both parties acknowledged to be the designation of a seal. Trucker's Exchange arranged for one of its agents, Gregory Trucking, to deliver the goods. During transit, the driver of the truck heard the load shift, pulled over, and broke the seal to inspect the product and restack it if necessary. The driver discovered that a portion of the load had been improperly loaded by Border City and had fallen onto the floor. After determining that he was unable to restack the product, the driver proceeded to Seaboard Farms to deliver the load.

Upon arrival, Seaboard Farms rejected the entire load when it found that the seal had been broken and that some of the parts had fallen onto the trailer floor. Seaboard Farms sent Border City a letter explaining the reason it rejected the shipment. Border City condemned that portion of the shipment deemed contaminated from falling on the trailer bed and reprocessed, repackaged, and resold the remainder of the chicken at a reduced price.

Border City invoiced Trucker's Exchange for $15,240.86, the difference between the amount it received from the salvaged chicken and what Seaboard Farms was to have paid for it. Trucker's Exchange refused to pay, and Border City filed suit. Trucker's Exchange filed a counterclaim for $16,150 in unpaid shipping charges owed to them. After a bench trial, the judge awarded Border City $14,190.06, the amount of its damages less the value of that part of the shipment lost due to improper loading, and awarded Trucker's Exchange its unpaid shipping charges, resulting in a net award to Trucker's Exchange of $1,959.94. Trucker's Exchange appeals from the award to Border City.

In reviewing a bench trial in circuit court, we do not reverse a judgment unless we conclude that the trial court erred as a matter of law or if we decide that its findings were clearly against the preponderance of the evidence. *Santifer v. Arkansas Pulpwood Co.*, 66 Ark. App. 145, 991 S.W.2d 130 (1999); *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 judge, sitting as the trier of fact. *Ford Motor Credit Co. v. Ellison,* 334 Ark. 357, 974 S.W.2d 464 (1998).

Trucker's Exchange first argues that Border City failed to prove that delivery with the seal intact was a material term of the agreement and consequently failed to establish that breaking the seal was the proximate cause of its damages. Trucker's Exchange contends that, in construing the contract between the parties, the trial court must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain, ordinary meaning, and that the bill of lading failed to indicate that delivery with the seal intact was a material term of the contract. In response, Border City contends that ample evidence supports the findings of the trial court and refers to the evidence of trade usage it introduced during trial; specifically, Border City avers that it is commonly accepted in the trucking industry that trucks with seals on them are to be delivered with the seal intact. In awarding judgment to Border City, the trial judge found "that there is a custom in the industry, particularly in the poultry and fresh meat business, of having chicken delivered with the seal unbroken."

A bill of lading operates as both a receipt and as a contract. *Arkansas Western Railway Co. v. Robson,* 171 Ark. 698, 285 S.W. 372 (1926); *St. Louis, Iron Mt. & S.Ry. Co. v. Citizens Bank of Little Rock,* 87 Ark. 26, 116 S.W.154 (1908). Generally speaking, Article 7 of the Uniform Commercial Code (U.C.C.), codified as Ark. Code Ann. § 4-7-101 et seq., governs disputes and interpretations involving bills of lading.[1] However, Article 1 of the U.C.C. contains general provisions and definitions used throughout the code. Section 1-205, codified at Ark. Code Ann. § 4-1-205, provides:

> (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
>
> *(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.*
>
> *(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.*
>
> (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(Emphasis supplied.) Comment 7 to this section indicates that subsection three does not require "universality" of the practice or custom, but rather the "regularity of observance" of the practice.

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[1] We note that the Federal Bill of Lading Act somewhat diminishes the significance of Article 7's provision concerning bills of lading covering the interstate transportation of goods but, except as discussed below, primarily concerns the negotiation of bills of lading as commercial paper. See 49 U.S.C. § 80101 et seq.; White & Summers, *Uniform Commercial Code* § 29-2 (1995).

Generally, bills of lading are to be construed strictly against the carrier and favorably to the shipper, and the language used is subject to the general rules of construction which govern other contracts. 13 AM. JUR. 2d § 280. Course of dealing or usage of trade that explains or supplements a contract is considered competent evidence of the parties' intent and can become a part of a contract. *Precision Steel Warehouse v. Anderson-Martin,* 313 Ark. 258, 854 S.W.2d 321 (1993). If the usage was known to both parties or so widespread in the industry that the contract would be presumed to have been made with reference to it, it becomes a part of the agreement. *Id.* (citing *Sharpensteen v. Pearce,* 219 Ark. 916, 245 S.W.2d 385 (1952); *Ben F. Levis v. Collins,* 215 Ark. 172, 219 S.W.2d 762 (1949)).

During trial, Border City introduced the testimony of its employees, Pam Stewart, Dale Worthy, and Milton Smallwood, all of whom had experience in the poultry industry. Collectively, they testified that Trucker's Exchange had been informed of the need for shipments to Seaboard Farms to be delivered with the seal intact and that it is the custom in the industry that poultry shipped under seal always be delivered with the seal intact. Bruce Miller, John Gregory, and Arthur Brumfiel, employees of Trucker's Exchange, testified on its behalf. They testified that they had not been informed of the need for delivery with the seal intact, that this requirement should have been reflected on the bill of lading if it was material to the contract, and that their driver's decision to break the seal was reasonable under the circumstances, in that some of the boxes of chicken had shifted due to Border City's failure to properly load the truck.

Here, the trial judge heard the testimony, weighed the credibility of the witnesses, and found the testimony of Border City's witnesses persuasive concerning trade usage. The existence and scope of such usage are to be proven as facts. Ark. Code Ann. § 4-1-205(2). Given that the findings of disputed facts and the determination of the credibility of witnesses are within the province of the trial judge who has the opportunity to observe the witnesses during trial, we cannot say that the trial court erred in finding that Border City established that it was accepted custom in the poultry industry that products shipped under seal should be

delivered with the seal intact. *Ford Motor Credit Co. v. Ellison, surpa.* Consequently, we affirm on this point.

Trucker's Exchange next argues that the trial court erred in awarding Border City damages when the evidence did not support a finding that Trucker's Exchange was responsible for the damages, but rather that the negligence of Border City was the proximate cause of any damages it sustained. However, the record reflects that Seaboard Farms stated that it would not have rejected the entire load had the seal not been broken. Moreover, the trial court reduced the award to Border City by the value of the chicken lost due to improper loading. Accordingly this argument is without merit. Trucker's Exchange's also argues that the driver had the obligation to exercise reasonable diligence in inspecting and transporting a shipment on a common carrier; this argument is likewise without merit. Although 49 C.F.R. § 392.9 does state that a driver must regularly inspect the cargo during transit, as Border City points out, this section is not applicable because of the provision contained in subsection (4):

> The rules in this paragraph do not apply to the driver of a sealed commercial motor vehicle who has been ordered not to open it to inspect its cargo or to the driver of a commercial motor vehicle that has been loaded in a manner that makes inspection of it impracticable.

Clearly, a driver is not under the same obligation to inspect the cargo when it is shipped under seal.

Trucker's Exchange also contends that under the Federal Bill of Lading Act, the shipper is liable for damage caused by its own improper loading. However, upon review of the abstract and the record, it does not appear that this was raised to the trial court, consequently, we may not address the issue on appeal. *Reynolds v. Shelter Mut. Ins. Co.,* 313 Ark. 145, 852 S.W.2d 799 (1993); *Gentry v. State,* 47 Ark. App. 117, 886 S.W.2d 885 (1994).

Affirmed.

BIRD and PITTMAN, JJ., agree.

Richard A. EISNER, M.D., and Equivision *v.* Ron FIELDS

CA 98-1271 998 S.W.2d 421

Court of Appeals of Arkansas
Divisions III and IV
Substituted Opinion on Denial of Petition for Rehearing
delivered September 8, 1999

[redacted]

Davis, Cox & Wright, by: *Constance G. Clark* and *Walter B. Cox*, for appellants.

Law Offices of Charles Karr, P.A., by: *Charles Karr* and *Shane Roughley*, for appellee.

SAM BIRD, Judge. On May 12, 1999, this court handed down an unpublished opinion in this case in which we reversed the judge's order granting appellee Ron Fields a new trial and dismissed the appeal. The appellee has filed a petition for rehearing, and, in response to that petition, we issue this substituted opinion and deny appellee's petition.

Appellee Ron Fields filed a lawsuit against Fort Smith ophthalmologist Richard Eisner and his clinic, Equivision, Inc., contending that Dr. Eisner committed medical malpractice when he negligently performed bilateral radial keratotomy surgery on appellee, resulting in the development of an infection in his left eye. Radial keratotomy surgery, commonly referred to as RK surgery, is performed to improve the vision of a person who is nearsighted. A jury sitting in the circuit court of Sebastian County returned a verdict absolving Dr. Eisner and his clinic of all liability. Following the entry of the judgment, appellee filed a motion for a new trial pursuant to Ark. R. Civ. P. 59. The circuit judge granted appellee's motion, stating that the jury's verdict was clearly contrary to the preponderance of the evidence. It is from the granting of that motion that appellants bring this appeal contending that the judge abused his discretion by granting a new trial. We agree that the judge abused his discretion, and we reverse and dismiss.

Appellee Fields testified at trial that he met with Dr. Eisner on December 16, 1994, to discuss the RK procedure and learn what results he could expect from the surgery. Appellee stated that he was nearsighted and wore glasses. During appellee's evaluation, Dr. Eisner discussed with appellee the use of an Excimer laser, which was a new technique. However, because the laser did not have FDA approval, Dr. Eisner recommended RK surgery. Appellee stated that Dr. Eisner told him that he would make eight incisions on each of his eyes and that if his vision did not improve to 20/20, Dr. Eisner would consider doing an "enhancement" surgery. Appellee stated that he understood that Dr. Eisner would perform eight cuts during the first surgery, and that if an enhancement was needed, Dr. Eisner would perform an additional eight cuts, for a total of sixteen cuts in each eye. Appellee testified that appellant informed him that, because appellee's right eye was con-

sidered to be much weaker than his left eye, in all likelihood he would need an enhancement on his right eye. Dr. Eisner also explained to appellee that he would prescribe medications after the surgery that would prevent infections and would cause the eye not to heal as quickly, which would allow appellee's eyeballs to adjust in the correct position before they became solidified.

On December 20, 1994, before Dr. Eisner performed surgery on appellee, appellee was shown a videotape that explained the procedure, the risks involved, and the results that could be obtained from the procedure. The videotape, which was introduced into evidence, stated that patients undergoing RK surgery are to use antibiotic eye drops for the first week after surgery to reduce the risk of infection. The tape also explained that an infection is always a possibility and could lead to blindness or the loss of an eye. It did state that the risk of those complications is rare.

After his surgery, appellee was given an antibiotic and a combination antibiotic and steroid, Tobradex, and he was told to return the next day for a follow-up visit. Appellee testified that his vision was substantially improved by the next day. However, he stated that his right eye began to get a little worse from visit to visit, but, overall, his vision was markedly improved. It was during the follow-up visits that Dr. Eisner began to tell appellee to use the medications less frequently.

Appellee's vision had improved, but it was not 20/20, so Dr. Eisner recommended enhancement surgery for both eyes, even though appellee's left eye was close to 20/20 vision. The enhancement surgery was performed on February 28, 1995. Afterward, Dr. Eisner asked appellee if he had any medication left from the earlier prescription, and appellee told him that he did. Dr. Eisner told him to take the medication so many times a day and then scheduled him for a follow-up appointment for the next week. Over the weekend, however, appellee stated that he ran out of Tobradex and he called the pharmacy for a refill, but the pharmacist could not refill the prescription without a doctor's permission. Appellee stated that he was not concerned since he had an appointment that following Tuesday, March 7.

Appellee said that when he returned on that Tuesday, it was clear that he did not have much improvement in his left eye. Dr. Eisner asked if he had been taking the medication, and appellee told him no, that he had run out. At that point, Dr. Eisner told him he was going to try something, and Dr. Eisner began "going around the eyeball, pressing, and it felt like a stick that he had his thumbs on and was just pressing into the eyeball. As I recall it was direct pressure on the eyeball . . . ." This procedure is known as compression keratoplasty. Dr. Eisner refilled the prescription for Tobradex and told appellee to begin taking it again. Appellee went in for another check-up on March 16, and Dr. Eisner told him that scar tissue that appellee already had in his left eye looked larger and that Dr. Eisner wanted to watch that. He was rescheduled for an appointment in three weeks. However, appellee returned on March 21 complaining of a burning, scratchy sensation in his eye. Plus, he said his vision was much worse and getting blurry. Dr. Eisner commented that appellee's scar tissue looked even larger, so he asked to see him the next day.

By the next day, appellee said he was having a lot of trouble seeing out of his eye, which was also extremely red, very painful, and extremely sensitive to light. It was during that visit that Dr. Eisner detected an infection. He referred appellee to Dr. Thomas Wolf, an ophthalmologist with the Dean A. McGee Eye Institute in Oklahoma City, and told him to go there immediately. Appellee was admitted to the hospital in Oklahoma City that night. He said that at that point, he was taking a lot of pain killers because the pain was intense. He was discharged, returned home, and saw Dr. Eisner almost daily for the next few weeks. He was also taking medication every thirty minutes "around the clock."

Appellee was informed by Dr. Eisner's partner, Dr. Larry Bone, that he needed to return to Oklahoma City because his eye was getting worse. He was readmitted to the hospital on April 4, and Dr. Wolf brought in another doctor to diagnose appellee. Dr. Jim Kirk, an infectious disease expert, was the one who informed appellee that the infection in his eye was caused by Mycobacterium chelonei, which is very rare. Even though there was no known cure for the infection, Dr. Kirk suggested trying to stop the infection by using experimental drugs. However, Dr. Kirk

was not optimistic and told appellee that there was a great possibility that he would need a cornea transplant. In the meantime, Dr. Wolf requested that appellee come to Oklahoma City every other day for check-ups. After many follow-up visits and various complications, seven weeks later Dr. Wolf stated that appellee was healed.

During the time that he was being treated in Oklahoma City, appellee was still seeing Dr. Eisner because Dr. Wolf had wanted appellant hospitalized, but stated that since he would be far from home, he would allow him to travel back and forth on the condition that appellee had someone in Fort Smith check on him as an "early warning system."

Appellee testified on cross-examination that the bacteria he had contracted was very rare and that there had not been more than twenty cases reported worldwide. He also stated that he realized that after the surgery infection was a risk and that if he developed an infection, it could lead to a total loss of vision or loss of the eye.

Appellee also presented the testimony of Dr. Michael Insler, a professor of ophthalmology at Louisiana State University. He stated that appellee had severe nearsightedness that is hard to eliminate with RK surgery. Therefore, he testified, appellee was not a good candidate for RK and that Dr. Eisner breached the standard of care in performing RK surgery on appellee because appellee had such a severe case of nearsightedness. He also stated that because the Excimer laser was about to be approved by the FDA, very few doctors would have recommended appellee for RK surgery. In addition, he stated that an enhancement should not have been performed on the left eye because it was improving on its own; to do the enhancement surgery was a violation of the standard of care.

As to what caused the infection, Dr. Insler stated:

> As far as whether I have an opinion within a reasonable degree of medical certainty as to what caused that infection, I think it is going to be difficult to prove where the infection came from because it is a very abnormal infection, but I think there is a greater probability that it occurred either during the enhance-

> ment procedure, since it involved one of the enhancement incisions, or it occurred during the compression keratoplasty.
>
> . . . .
>
> I am going to tell the jury that I think that most likely the infection came from somewhere in Dr. Eisner's clinic. Until the epithelium heals, the eye is susceptible to infection. The epithelium generally will heal up in a few days, two, three or four days. It is exactly right that until the epithelium heals and closes over, there is a risk of that epithelium being invaded by a bug such as M.chelonei or some other microbacterium. As long as there is a scratch or defect or abrasion, that puts the patient at risk for an infection.
>
> . . . .
>
> As far as whether Mr. Fields could have been in contact with the microbacterium at any point within the next few days after he left Dr. Eisner's office, anything is possible, but that is not likely what happened. Anything is possible, but name me what he would have done at home or outside the office to come in contact with this very abnormally difficult microbacterium.
>
> I do not know where the bug came from. Chances are it came from the office. Bacteria are most commonly transferred from person to person by the hands. This is an environmental pathogen, known to live in different solutions, even disinfecting solutions.

He also stated that, if appellee had not had the surgery, he would not have had the infection. Then he stated that he was certain that the infection occurred either from the enhancement on February 28 or the compression keratoplasty on March 7. He stated that it is common for patients who develop eye infections to do so in the out-patient surgical facility where the doctor performs the surgery. He stated during cross-examination that the fact that appellee ran out of Tobradex was not a factor in the cause of the infection. He stated that he did not fault Dr. Eisner for not prescribing different medications.

The appellants then presented their case and began with the deposition testimony of Dr. Wolf. Dr. Wolf stated that he first treated the appellee on March 22 at the Presbyterian Hospital's emergency room in Oklahoma City, after appellee was referred to

him by Dr. Eisner. Dr. Wolf said that he was not sure how or when the appellee came into contact with the bacteria that caused the infection, but wearing contact lenses or having trauma or surgery to the eye breaks down the barrier that protects the eye. He said that appellee could have had the bacteria on his eye lids when the surgery was performed and with that barrier broken, the infection could have gotten in the eye.

Dr. Wolf also stated many times during his testimony that an infection is a recognized risk from RK surgery. He stated: "The fact that a patient such as Mr. Fields contracts an infection in the eye following RK surgery does not signify or suggest that there was negligence in the performing of the surgery. There is always the risk of infection any time you make a wound."

Dr. Wolf last saw appellee as an outpatient on November 27, 1996, and he agreed that appellee had healed. Dr. Wolf stated that since appellee was discharged, appellee has complained of blurry vision, but that the majority of appellee's complaints are "probably more related to the RK. . . . It is possible that some or all of those symptoms may have existed simply because he had refractive surgery, even if the infection had never occurred." In addition, Dr. Wolf stated that appellee would probably not need a cornea transplant.

Dr. Eisner testified on his own behalf that he first met appellee on December 16, 1994, when appellee came to his office for a refractive evaluation, and that appellee was a good candidate for RK surgery. He also stated that at the time of appellee's surgery, the Excimer laser had not been approved by the FDA and that the only type of corrective surgery for nearsightedness was RK surgery.

In regard to the infection, Dr. Eisner stated that he had performed more than 1,000 RK procedures and he had never had another patient develop the infection that appellee developed. Furthermore, Dr. Eisner's partner at the clinic, Dr. Larry Bone, with whom he shared an operating room and equipment, had also never had one of his patients develop an M.chelonei infection. Dr. Eisner testified that he and Dr. Bone sterilized their instruments by steam heat rather than by placing them in a disinfectant.

Dr. Eisner stated that he did not know of anything that he did to cause the infection and that he does not believe that the "bug" was in his office.

As for appellee's contention that he was not informed of the enhancement procedure, Dr. Eisner stated that after a couple of months had passed since the first RK procedure, he considered performing an enhancement surgery. He stated that he had that discussion with appellee and that appellee understood that the enhancement procedure carried the same risks and complication rate that the original procedure carried. The enhancement procedure was performed in the same operating room as the original RK procedure had been performed.

Dr. Eisner also testified that he did not believe that the compression keratoplasty was the cause of appellee's infection. He stated that he used a sterile cotton tip applicator when he performed the procedure on March 7, and when appellee returned on March 16, there were no complications, his incisions looked fine, and there was no hint of infection. Dr. Eisner stated that he asked appellee to return in three weeks, but that he returned in five days. At that time, Dr. Eisner noticed that something appeared strange. The next day appellee returned, and Dr. Eisner realized that he had a possible infection and referred him immediately to Dr. Wolf. He stated that he continued to monitor appellee for local care while he was in Dr. Wolf's care.

On cross-examination, Dr. Eisner stated that he believed that the infection was around the incision that he performed when doing the enhancement surgery. He stated that when he did the compression keratoplasty, he put an anesthetic drop in appellee's eye, but that it was common practice not to note that in his patients' charts. He stated that he put the anesthetic drops, used to numb the eye, on the end of the Q-tip and did not dip the Q-tip in the solution. He stated that although he does not believe that the compression keratoplasty caused the infection, he admitted that since he performed the procedure on appellee, he had read an article about a patient who had developed an infection two weeks after the procedure, which was the amount of time that had

elapsed in appellee's case between the compression keratoplasty procedure and detection of the infection.

Dr. Lee Nordan, an eye surgeon in San Diego, California, was the final witness to testify on behalf of the appellants. He testified that appellee's vision was improved since his RK surgery and that it was not a breach of the standard of care for Dr. Eisner to perform RK surgery on appellee. Dr. Nordan stated that infections are a risk that the patient takes when undergoing eye surgery, that he was familiar with the bacteria that caused appellee's infection, and that it is very rare. He also stated that there was no way to tell to any degree of reasonable certainty where the microbacterium came from. Further he stated that, had the bacteria been common at Dr. Eisner's clinic, other patients at the clinic would have developed the infection. Dr. Nordan testified that there will probably never be an answer as to where the bacteria came from. However, he did state that he did not believe that the compression keratoplasty was the cause of the infection and that, most likely, the infection also did not come from the sterile Q-tip.

On cross-examination, Dr. Nordan testified that he did not have an opinion to a reasonable degree of medical certainty as to the cause of appellee's eye infection, but that anytime the epithelium is broken, there is a chance of an infection. He stated that the epithelium can be broken simply by rubbing an eye; however he stated that the epithelium would not break during compression keratoplasty because the physician is pushing on the eye and that does not break the epithelium. He also stated that there is a risk of getting an infection by wearing contact lenses.

In summary, he testified:

> But this Mycobacterium, this bug, is so rare that there is no way that you could say with any kind of medical certainty that you would expect to get it or where you got it from. It is just a very unfortunate, rare event that could not be prevented, whether you are wearing contact lenses or having the surgery.

The jury rendered a verdict for appellants, and the trial judge entered an order granting a new trial by stating only that the verdict was clearly contrary to the preponderance of the evidence. The law affecting the granting of a new trial and appellate review

is well settled. A trial court may not substitute its own view of the evidence for that of the jury and grant a new trial unless the verdict is clearly against the preponderance of the evidence. *Razorback Cab v. Martin*, 313 Ark. 445, 856 S.W.2d 2 (1993); *Clayton v. Wagnon*, 276 Ark. 124, 633 S.W.2d 19 (1982). The test we apply on review of the granting of a motion for a new trial is whether the trial court abused its discretion. *Razorback Cab v. Martin, supra*; *Schrader v. Bell*, 301 Ark. 38, 781 S.W.2d 466 (1989). An abuse of discretion in granting a new trial means discretion improvidently exercised, *i.e.*, exercised thoughtlessly and without due consideration. *Razorback Cab v. Martin, supra; Clayton v. Wagnon, supra.* A showing of an 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. *Arkansas Power & Light Co. v. Bolls*, 48 Ark. App. 23, 888 S.W.2d 319 (1994); *Razorback Cab v. Martin, supra.* However, the trial court is not to substitute its view of the evidence for that of the jury. *Razorback Cab v. Martin, supra*; *Clayton v. Wagnon, supra.*

In the case at bar, we find that the trial judge abused his discretion in granting a new trial on the grounds that the verdict was clearly contrary to the preponderance of the evidence. Even if the jury had found that Dr. Eisner was negligent, which we cannot say that it did, it could have determined also that Dr. Eisner's negligence was not the cause of appellee's eye infection. There was evidence from which the jury could have found that appellee's eye infection was contracted at a place other than Dr. Eisner's clinic. Four doctors testified in the case, including Dr. Eisner, all of whom stated that they did not know where or how appellee came into contact with the bacteria that caused the infection. Appellee argues that his expert witness, Dr. Insler, testified to a reasonable degree of medical certainty that appellee contracted the bacteria at Dr. Eisner's officer either during the enhancement procedure or during the compression keratoplasty. However, Dr. Insler also stated that "I can't exactly prove where the infection came from, but I believe that it came from the office."

Appellant testified that he had performed 1,000 RK surgeries and that none of his other patients had contracted the infection. In addition, he stated that his partner used the same surgical

equipment and surgery room and that none of his patients had contracted the infection. Other experts stated that it is nearly impossible to prove where appellee contracted the infection and that, even though they had not performed the compression keratoplasty, they did not think that the procedure would produce the infection. In addition, Dr. Eisner stated that he used a sterile Q-tip to perform the procedure. All of the witnesses testified that the infection is very rare, and appellee testified that there were probably only twenty cases ever reported in the United States.

The jury heard the testimony of the expert witnesses, absolved the appellants of any liability, and we cannot agree with the trial court that the verdict was clearly against the preponderance of the evidence. To the contrary, there was testimony of a substantial nature that supported the verdict and that was at least the equivalent of any countervailing evidence. In the court's order, the judge simply stated that the verdict was clearly contrary to the preponderance of the evidence, a conclusion we are unable to reconcile with the testimony of the witnesses. Having only the trial court's conclusion, without any elaboration or reference to the evidence that he found to be contrary to the verdict, we are of the opinion that the trial court substituted its view of the evidence for that of the jury and an abuse of discretion has resulted. *See Razorback Cab v. Martin, supra.*

The appellee also contended that a new trial was appropriate because the judge erred in refusing to give a jury instruction on *res ipsa loquitur* and because the judge erred in giving jury instruction AMI Civ. 3d 603. The appellee argued that even though the judge did not include these errors in his order granting a new trial, that does not preclude our court from considering the errors as grounds for affirmance on appeal. For this proposition, the appellee cited *Toney v. Miller,* 268 Ark. 795, 597 S.W.2d 102 (Ark. App. 1980).

In our original opinion, we addressed appellants' argument that the judge erred in granting a new trial when he stated that the jury's verdict was clearly against the preponderance of the evidence. We said:

> Appellee asks this court to affirm the trial court's ruling for other reasons, stating that the court erred in instructing the jury. We will not consider those arguments because the court's ruling was that the verdict was contrary to the preponderance of the evidence, rather than because an error was committed while instructing the jury.
>
> . . .

In the case at bar, the circuit court reached the wrong result in granting a new trial. Further, this court will not search for any ground upon which a new trial could have been granted. *General Motors Corp. v. Tate*, 257 Ark. 347, 516 S.W.2d 602 (1974). In *Tate*, the trial judge granted a new trial without stating a specific ground. The court wrote, "It is generally conceded that, in the interest of good practice and the proper dispatch of judicial business, courts should specify in orders granting new trials, with particularity the grounds on which the order was made." *Id.* at 359, 516 S.W.2d at 610. The rule that this court will not search for any ground upon which to grant a new trial was promulgated to improve the administration of justice by eliminating the problem of "exploring every possible facet of the case to determine whether there has been an abuse of the trial court's discretion." *Id.* at 359, 516 S.W.2d at 610.

The appellee has filed a petition for rehearing, arguing that this court erred by disregarding the general rule that this court may affirm the trial court when the trial court reaches the right result for the wrong reason. He states that the trial court was correct in granting a new trial because it erred in not allowing a *res ipsa loquitur* jury instruction and it erred in instructing the jury with AMI Civ. 3d 603. Citing *Toney v. Miller, supra*, as precedent, the appellee states that this court should address those issues as they were before the trial court and before this court in the original appeal, even though they were not included in the court's order granting a new trial.

The rule relied upon in our original opinion was set forth in *General Motors v. Tate, supra* and by a per curiam order, *In the Matter of Procedure in Granting New Trials*, 257 Ark. 1064 (1974), and promulgated as Rule 16 of the Uniform Rules of Procedure for Circuit, Chancery and Probate Courts. That rule stated:

> Whenever a trial court grants a new trial, the court shall state, with particularity, the specific ground or grounds for its decision in its order granting the new trial. Appellate review will be limited to the grounds stated in the order. On appeal, in any case in which the requirements of this rule have not been met, the presumption will be that the verdict of the jury or the finding of the trial court sitting as a jury was correct and the burden will be on appellee to show that the trial court did not err in granting a new trial; however, appellee, before filing his brief, may move to remand the case to the trial court for compliance with this rule.

In 1980, in contradiction to that rule, our court published *Toney v. Miller, supra,* which stated:

> The failure of the trial court to include this error as a reason for granting a new trial does not preclude our considering the erroneous instruction as a ground for affirmance on appeal.

268 Ark. at 799, 597 S.W.2d at 105.

Because *Toney v. Miller, supra,* was not good law when it was published, in that it contradicted Rule 16, we refuse to accept it as good law today, and we overrule that case in so much as it contradicted Rule 16.

In 1988, the court abolished the Uniform Rules, *see In Re: Abolishment of the Uniform Rules of Circuit and Chancery Courts,* 294 Ark. 664, 742 S.W.2d 551 (1987), thus abolishing Rule 16. In 1996, the court addressed the issue in *Young v. Honeycutt,* 324 Ark. 120, 123, 919 S.W.2d 216, 218 (1996), and it held:

> Young first contends that the trial judge's order granting the new trial is deficient because it does not include a "finding" that the jury's verdict was clearly contrary to the preponderance of the evidence. Before the Uniform Rules for Circuit and Chancery Court were abolished in 1988, see *In Re: Abolishment of the Uniform Rules of Circuit and Chancery Courts,* 294 Ark. 664, 742 S.W.2d 551 (1987), Rule 16 required judges to state, with particularity, the specific reasons for their decision in their order granting the new trial. If they failed to do so, there was a presumption on appeal that the jury's verdict was correct. *See e.g., Stephens v. Saunders,* 293 Ark. 279, 737 S.W.2d 626 (1987); *Brant v. Sorrels* [Sorrells], 293 Ark. 276, 737 S.W.2d 450 (1987). There is no

> such requirement present in Arkansas Rules of Civil Procedure; thus, Young's argument is without merit.

Because Rule 16 has been abolished and in light of the supreme court's holding in *Young v. Honeycutt, supra*, we will address appellee's two contentions that the court erred in failing to give a *res ipsa loquitur* instruction and erred in giving AMI Civ. 3d 603 jury instruction, which states that an occurrence of an accident is not, of itself, evidence of negligence.

The appellee asserts that the motion for a new trial was properly granted because the trial court erred in not giving his proposed *res ipsa loquitur* instruction. He argues that appellants owed appellee a duty of due care and that the infection was caused either during the enhancement procedure or during the compression keratoplasty. He asserts that Dr. Eisner was in complete control of both procedures and the instruments used to carry out those procedures. And, he argues that there was nothing that he could have done to have caused the infection. We do not agree.

The supreme court has held that the doctrine of *res ipsa loquitur* may apply in medical malpractice cases if the essential elements for application of the doctrine exist. *Schmidt v. Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991). The doctrine of *res ipsa loquitur* may be given as a jury instruction when:

> 1. The defendant owes a duty to the plaintiff to use due care; 2. The accident is caused by the thing or instrumentality under the control of the defendant; 3. The accident that caused the injury is one that, in the ordinary course of things, would not occur if those having control and management of the instrumentality used proper care; 4. There is an absence of evidence to the contrary.

Id. at 387, 807 S.W.2d 931.

If each of these elements is present, then the accident from which the injury results is prima facie evidence of negligence. At that point, the burden shifts to the defendant to prove that the injury was not caused through any lack of care on its part. *Id.* A party is entitled to a jury instruction when it is a correct statement of the law and there is some basis in evidence to support

the giving of the instruction. *Coca-Cola Bottling Co. v. Priddy*, 328 Ark. 666, 945 S.W.2d 355 (1997).

Based upon the testimony presented at the trial, we cannot say that the judge abused his discretion in not giving the instruction. Dr. Insler, appellee's expert witness stated,

> As far as whether I have an opinion within a reasonable degree of medical certainty as to what caused that infection, I think it is going to be difficult to prove where the infection came from because it is a very abnormal infection. . . . I'm going to tell the jury that I think that most likely the infection came from somewhere in Dr. Eisner's clinic. . . . As far as whether Mr. Fields could have been in contact with the microbacteium at any point within the next few days after he left Dr. Eisner's office, anything is possible, but that is not likely what happened. . . .

Dr. Wolfe, one of appellee's physicians, stated that he was not sure how or when the appellee came into contract with the bacteria that caused the infection, that the appellee could have had the bacteria on his eye lids when the surgery was performed and that with the epithelial barrier broken, the infection could have gotten into the eye. Dr. Eisner testified that he did not know of anything that he did to cause the infection and that he does not believe that the bug was in his office. Dr. Lee Nordan, an expert witness presented by appellants, stated that there was no way to tell to any degree of reasonable certainty from where the microbacterium came. He also stated that he did not believe that it was caused by the compression keratoplasty.

It is clear that a duty of care was owed by appellants to appellee; however, based upon this evidence, we cannot say that the judge abused his discretion in not allowing the instruction because there was substantial evidence that the infection was not caused by the thing or instrumentality under the control of the appellant, and that appellee could have contracted the infection at a place other than Dr. Eisner's clinic.

Appellee also asserts that the court was correct in granting a new trial because it erroneously instructed the jury that the fact that an injury has occurred is not, of itself, evidence of negligence on the part of anyone. This instruction is AMI Civ. 3d 603. Appellee contends that the instruction is unconstitutional because

it is a comment on the evidence, and it requires the jury to draw an inference and it is impermissible for the trial court to instruct the jury to draw an inference. Moreover, appellee suggests that this court should "abolish AMI 603." He also argues that *Lambert v. Markley*, 255 Ark. 851, 503 S.W.2d 162 (1973), is on point in this case and it held that when a case is submitted to a jury only upon the issue of *res ipsa loquitur* and ordinary care, it is proper for the trial court to decline to give AMI Civ. 3d 603.

The supreme court has held that AMI Civ. 3d 603 is a correct statement of the law. *See Taylor v. Riddell*, 320 Ark. 394, 896 S.W.2d 891 (1995), and *Pilkington v. Riley*, 271 Ark. 746, 610 S.W.2d 570 (1981). This court cannot overrule a decision by the supreme court and thereby abolish AMI 603. *Kearse v. State*, 65 Ark. App. 144, 986 S.W.2d 423 (1999).

Further, unlike *Lambert v. Markley*, *supra*, appellee's case was not submitted solely on the doctrine of *res ipsa loquitur*. Appellee asserted other acts of negligence, including that appellants failed to obtain informed consent, that appellee was not a good candidate for the surgeries, and for failing to inform appellee of the risks involved in the surgeries.

Based upon the foregoing, we cannot say that the judge abused his discretion by instructing the jury that just because an injury occurred, it was not, in and of itself, evidence of negligence. The jury was allowed to consider whether an injury occurred in its assessment of whether appellants were liable for damages. The jury simply was not allowed to consider the fact that the injury occurred to be, in and of itself, evidence of negligence.

Therefore, because we find that the judge did not err in refusing to instruct the jury on the doctrine of *res ipsa loquitur*, that he did not err in giving the jury instruction AMI Civ. 3d 603, but that he did err in finding that the evidence was clearly contrary to the preponderance of the evidence, we reverse the judge's order granting a new trial, and we dismiss the appeal.

Reversed and dismissed.

ROBBINS, C.J., and PITTMAN, HART, NEAL, CRABTREE, JJ., agree.

Bruce and Deborah BELCHER *v.* James A. STONE

CA 99-65 998 S.W.2d 759

Court of Appeals of Arkansas
Division I
Opinion delivered September 15, 1999

The Dennis C. Sutterfield Law Firm, A Professional Association, by: *Dennis C. Sutterfield*, for appellants.

Skelton & Steuber, P.A., by: *William Douglas Skelton* and *Kristin Steuber*, for appellee.

JOHN B. ROBBINS, Chief Judge. In this case, we are asked to review a chancery decree quieting title to approximately

one acre of land in appellee James Stone. Appellants Bruce and Deborah Belcher argue that the chancellor's decision was erroneous and that title should have been quieted in them. We disagree and affirm as modified.

The parties are adjoining property owners in Yell County. Appellee holds title to a five-acre tract of land. As best we can tell from a survey contained in the record, it is a rectangular-shaped piece of property lying north of Highway 27. Appellants own a little over three and one-half acres. Their property is contiguous to the lower, western part of appellee's property. Their home is located on top of an approximately forty-foot-high hill. Behind their house, to the south, the land drops off down a steep hillside, then levels out until it meets Little Chickalah Creek. The area in dispute in this case is a 1.2-acre triangular tract. The triangle comes to a point on the west where the creek and the hill meet. Its southern side is the foot of the hill; its northern side is the creek. Its base, on the east, rests against appellee's acreage. Both appellants and appellee claim ownership of the 1.2 acres.

Appellee bought his property in 1996 from his stepfather, Bud Rector, who had owned the land since 1954. The property description in the deed from Rector to appellee reads as follows:

> Commence at the SE Corner of the NE1/4 of Section 24, Township 6 North, Range 22 West, then run West 8 chains and 4 links, then North 23 chains and 50 links then East 3 chains and 1½ links as a point of beginning, then run North 68 degrees West 5 chains and 15 links, then North 7 chains and 50 links to the center of the channel of Little Chickalah Creek, then up the channel of said creek 6 chains and 45 links, then South 7¼ degrees West 9 chains and 50 links to the point of beginning, containing 5 acres, more or less, Being a part of the NE1/4 of the NE1/4 of Section 24, Township 6 North, Range 22 West. Also about 1 acre, or all of the land lying between the hill and Little Chickalah Creek and joining the above described tract on the West.

All conveyances of the property since 1910 have contained virtually the same description. According to appellee, it is the last sentence of the description that gives him ownership of the 1.2-acre tract.

Appellants purchased their property in 1988. A survey based upon the property description in their deed indicates that they are the owners of the disputed tract.

On June 14, 1996, appellee filed an action in Yell County Chancery Court seeking to quiet title to the 1.2 acres in himself. He claimed ownership by virtue of the 1996 deed from Bud Rector and by virtue of his and his predecessors' adverse occupation of the property. Appellants responded that the property description in the deed from Rector to appellee was insufficient to convey color of title and that any use of the property by appellee or his predecessors was permissive rather than adverse. They also claimed, in the alternative, that they had used the property adversely to appellee since 1988. After a hearing, the chancellor found that the deed conveying the 1.2 acres to appellee was adequate to constitute color of title. He quieted title in appellee in recognition of appellee's and his predecessor's payment of taxes and running of cattle on the property since 1954 under said color of title.[1] He further found that any use of the property by appellants was not sufficient to constitute notice to appellee of an adverse claim of ownership. It is from these findings that appellants bring their appeal.

Chancery cases are tried *de novo* on appeal. *Tolson v. Dunn*, 48 Ark. App. 219, 893 S.W.2d 354 (1995). However, we do not reverse a chancellor's finding of fact unless it is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998).

Appellants argue that appellee cannot claim ownership of the disputed tract because that portion of his deed which concerns the 1.2-acre tract in question contains an indefinite and uncertain property description. Appellants are correct that a deed containing an indefinite property description is void and does not

[1] See Ark. Code Ann. § 18-11-102 (1987), which provides that one who has color of title and pays taxes on unimproved and unenclosed land for seven years is deemed to be in adverse possession of the land.

constitute color of title. *See Darr v. Lambert*, 228 Ark. 16, 305 S.W.2d 333 (1957). However, we agree with the chancellor that the description in this case was adequate. A deed will not be held void for uncertainty of description if by any reasonable construction it can be made available. *Gipson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974); *Rye v. Baumann*, 231 Ark. 278, 392 S.W.2d 161 (1959). A description of land is sufficient if the descriptive words in the deed furnish a key for identifying the land conveyed. *See Davis v. Burford*, 197 Ark. 965, 125 S.W.2d 789 (1939). A deed is not void for uncertainty if the land can be located by the description used. *Tolle v. Curley*, 159 Ark. 175, 251 S.W. 377 (1923).

During the trial of this case, Donald Bland testified that in 1996 he prepared a survey for appellee to locate the boundary lines of the 1.2-acre tract. To accomplish this task, Bland used a 1943 deed containing the property description. The deed's description was the same in all important respects as the 1996 deed from Rector to appellee. Because the deed recited that the disputed tract "join[ed] the above described tract on the West," Bland started at the western border of the "above described" tract. He ran westward from the corners of that tract along the "toe" of the hill on the south and the center line of the creek on the north. The tract closed on the west where the hill and the creek came together. Although Bland testified that he used an earlier survey to establish the corners of the "above described" tract, he was clear in his testimony that the legal description contained in the deed was sufficient to determine the boundary lines of the disputed tract. He further stated that, in his twenty-five years of surveying experience, it was not uncommon to see a legal description like the one in this case. In light of this testimony, we cannot say that the chancellor's finding that the property description was adequate to convey color of title was clearly erroneous.

Appellants also argue that the chancellor erred in finding that they had not established ownership of the property through adverse possession. In order to establish title by adverse possession, a claimant has the burden of showing that he has been in possession of the property continuously for more than seven years and that his possession was visible, notorious, distinct, exclu-

sive, hostile, and with the intent to hold against the true owner. *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999). Whether possession is adverse to the true owner is a question of fact. *Id.*

The evidence at trial supports the chancellor's finding that appellants have not satisfied the requirements of a claim for adverse possession. In fact, the record supports the chancellor's finding that appellee and his predecessors in title were in continuous possession of the disputed tract for forty years. Bud Rector, appellee's grantor, testified that, beginning in 1954, he ran cattle on the property, kept it clipped, paid taxes on it, and maintained a fence located on the hill. He said that no one had ever asserted adverse ownership of the property until appellants did so when this lawsuit arose. Although appellants and their witnesses testified that appellants paid taxes on the property and used it by clearing it, cutting firewood, picnicking, playing with their children, and shooting guns for target practice, Rector denied ever seeing appellants maintaining the property or engaging in any substantial activities on it.

In reviewing a chancery court's findings with regard to adverse possession, due deference is given to the chancellor's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Anderson v. Holliday, supra.* When the evidence is conflicting or evenly poised, or nearly so, the judgment of the chancellor on the question of where the preponderance of the evidence lies is persuasive. *Clark v. Mathis*, 253 Ark. 416, 486 S.W.2d 77 (1972). In this case, it appears that the chancellor exercised his prerogative as trier of fact and resolved the conflicts in testimony in favor of appellee. Thus, we cannot say that the chancellor's findings on this issue were clearly erroneous.

Finally, our *de novo* review of the record points up an error in the chancellor's decree. Donald Bland testified that, in the course of describing the boundaries of the disputed tract, he omitted a call from the property description. The decree entered below reflects the original, erroneous description. Therefore, we modify that portion of the decree containing the property descrip-

tion as follows: in the third line of the description, after the call reading "thence North, along the East line of Section 24, 1632.70 feet," there should be inserted the following: "thence West 310.23 feet."

Affirmed as modified.

BIRD and CRABTREE, JJ., agree.

Altricia MUHAMMAD *v.* STATE of Arkansas

CA CR 97-1048 998 S.W.2d 763

Court of Appeals of Arkansas
Division I
Opinion delivered September 15, 1999

Alvin Schay, for appellant.

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

JOHN B. ROBBINS, Chief Judge. Altricia Muhammad appeals her conviction for possession of a controlled substance, crack cocaine, for which she was sentenced to ten years in prison. She argues on appeal that the trial court erred in denying her motion to dismiss. We disagree and affirm.

The facts elicited at trial were as follows. On February 18, 1995, appellant was a passenger in a car driven by L.E. Kennell. They were just outside Gurdon at approximately 12:20 a.m. when their car was spotted driving well over the speed limit. An officer attempted to stop them, but it required a five- to six-mile chase at over 130 miles per hour before the car was stopped. Once blockaded, appellant and the driver were removed from the car, and the officer summoned an ambulance for the appellant, who was hyperventilating. Medical personnel located marijuana in her pocket, and she was given a citation for misdemeanor possession of a controlled substance on that date. Crack cocaine was found on the console, in the passenger seat, and on the driver's side floorboard inside the vehicle; a plastic bag and scales were also retrieved. The misdemeanor citation was docketed on April 5, 1995.

Kennell was charged with possession with intent to deliver cocaine. Appellant went to the office of an attorney and signed an affidavit on May 11, 1995, stating that the crack cocaine was hers

and unknown to Kennell. She testified to the same at Kennell's trial on June 24, 1995, stating that she realized she would probably be charged based upon her testimony at this trial. On July 24, 1995, appellant was, as she suspected, charged with possession of crack cocaine. She filed a motion to dismiss based upon double jeopardy, which was denied after a hearing on that motion on May 10, 1996. A jury convicted her of the offense, and she received a ten-year sentence. This appeal resulted. Because there was no error, we affirm.

Neither we nor our supreme court has articulated the standard of review to be applied on appeal of a double jeopardy issue. We are guided, however, by the persuasive authority of federal and sister state decisions that have addressed this issue. It has been held that, when reviewing a denial of a motion to dismiss for violation of the Double Jeopardy Clause, typically a question of law, a *de novo* review should be conducted. *See United States v. Brekke*, 97 F.3d 1043 (8th Cir. 1996); *United States v. Ivory*, 29 F.3d 1307 (8th Cir. 1994); *United States v. Allen*, 984 F.2d 940 (8th Cir. 1993). It has also been held that when the analysis presents itself as a mixed question of law and fact, the factual determinations made by the trial court are given due deference and are not reversed unless clearly erroneous, *see Garrity v. Fielder*, 41 F.3d 1150, 1151 (7th Cir. 1994); *Utah v. Mendoza*, 938 P.2d 303 (Utah 1997); *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993). However, the trial court's ultimate conclusion that the Double Jeopardy Clause was or was not violated is reviewed *de novo*, with no deference. *See id.* Consequently, we hold that on review of a double jeopardy issue, where the issue is a question of law, we review the question *de novo*, as we do on review of any question of law, and simply apply the applicable law. If the double jeopardy issue involves a question of fact or a mixed question of law and fact, then we conduct a *de novo* review but give deference to the trial court's credibility determination of the evidence and do not reverse factual findings unless they are clearly erroneous.

Many of the general principles underlying the Double Jeopardy Clause are analyzed in *United States v. DiFranscesco*, 449

U.S. 117 (1980), where the Court noted that the guarantee against double jeopardy consists of three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. It is the second protection that appellant seeks to invoke, but her argument is not well founded.

To the extent that appellant argues that she had already been prosecuted in municipal court for possession of crack cocaine, her argument is misplaced. Possession of a controlled substance, namely cocaine, is considered a Class C felony and could not have been adjudicated in municipal court. Municipal courts do not have jurisdiction to render final judgments on felony charges. *Sherman v. State*, 326 Ark. 153, 931 S.W.2d 417 (1996); *Archer v. Benton County Circuit Court*, 316 Ark. 477, 872 S.W.2d 397 (1994). This is known as the "jurisdictional exception" to the double jeopardy bar. The "jurisdiction exception" was stated in *Diaz v. United States*, 223 U.S. 442, 449 (1912), as follows:

> [T]he justice of the peace, although possessed of jurisdiction to try the accused for assault and battery, was without jurisdiction to try him for homicide; and, of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction. All that could be claimed for that jeopardy was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide. . . . It follows that the plea of former jeopardy disclosed no obstacle to the prosecution for homicide.

The municipal judge who tried appellant on her citation for possession of a controlled substance stated that he had no jurisdiction to try a felony; he stated that he did not try crack cocaine charges in his municipal court. The docket reflected the same charge and disposition that he usually gave for a possession of less than one ounce of marijuana. The officer who gave her the citation stated that the ticket was for marijuana possession. Double jeopardy does not attach when a former prosecution was conducted in a

court lacking jurisdiction over the offense. Ark. Code Ann. § 5-1-115(1) (Repl. 1997); *Sherman v. State*, *supra*; *Archer v. Benton County Circuit Court*, *supra*; *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984).

Alternately, appellant argues that the State did not sufficiently demonstrate to her that she was being charged with two separate offenses. However, appellant admitted in Kennell's trial that she had pled guilty in Gurdon Municipal Court to her only charge of marijuana possession. Her words were "It was mine and I was only charged with the marijuana. . . . Yes, I know I'm about to be charged." The attorney who had represented appellant in municipal court was also called as a witness and corroborated that appellant had been charged with misdemeanor possession of marijuana in Gurdon Municipal Court. This testimony was admitted during the hearing on the motion to dismiss. Further, the docket sheet noting the municipal court conviction listed "Possession of a Controlled Substance (up to 1 oz.)." Marijuana is typically listed in ounces, while cocaine is typically listed in grams. *See, e.g.*, Ark. Code Ann. § 5-64-401(d) (Repl. 1997). Because the State sufficiently demonstrated that she was charged with two distinct offenses and that her claim of ignorance was without credibility, her argument fails. The trial court's denial of appellant's motion to dismiss on double jeopardy grounds was not clearly erroneous.

Affirmed.

BIRD and ROAF, JJ., agree.

TRIBCO MANUFACTURING COMPANY, Inc. *v.*
PEOPLE'S BANK of IMBODEN and Dorothy Downing,
Personal Representative of the Estate of Bob Downing

CA 98-1515 998 S.W.2d 756

Court of Appeals of Arkansas
Division II
Opinion delivered September 15, 1999

[redacted]

Arlon L. Woodruff, for appellant.

Lyons, Emerson & Cone, P.L.C., by: *Scott Emerson*, for appellee People's Bank of Imboden.

Charles R. Singleton, for appellee Dorothy Downing, Personal Representative of the Estate of Bob Downing.

JOSEPHINE LINKER HART, Judge. On May 18, 1992, appellant filed a complaint against appellees alleging breach of contract and tortious conduct by appellees. After allowing appellees to amend their pleadings to allege the defense of lack of capacity, the trial court granted appellees' motions for summary judgment on August 5, 1998. For reversal, appellant asserts that the trial court erred by allowing appellees to assert that defense. In support of its contention, appellant first argues that the lack-of-capacity defense is an affirmative defense that must be raised in the initial response to the complaint. Second, appellant maintains that appellees' motions for summary judgment and the amended answer were untimely and, thus, constitute a waiver of that defense. Third, appellant contends that appellees' untimely assertion of the lack-of-capacity defense allowed the statute of limitations to run on this action, and therefore, appellees are estopped from obtaining the benefits of that defense. Fourth, appellant

argues that the reinstatement of its corporate charter is retroactive to the date of revocation and, thus, it is entitled to a trial on the merits. We disagree and affirm.

It is undisputed that appellant's corporate charter was revoked on December 19, 1991, for nonpayment of franchise taxes and was not reinstated until July 24, 1998. On May 18, 1992, some five months after its charter was revoked, appellant filed its complaint alleging, among other things, that it was an Arkansas corporation. Appellees filed a timely joint answer and responded that they neither admitted nor denied appellant's corporate status.

After a trial date was set for August 11, 1998, appellee, Bank of Imboden, filed a motion for summary judgment on July 21, 1998, asserting for the first time that appellant was not a valid Arkansas corporation and, therefore, lacked the capacity to bring this action. Three days later, appellant's corporate charter was reinstated by the Secretary of State. The appellees then filed their amended answers on August 5, 1998, and again asserted the defense of lack of capacity.

To support its first argument that appellees are required to plead the lack-of-capacity defense in their original answer, appellant cites Rule 8 of the Arkansas Rules of Civil Procedure. Rule 8(c) provides that any matter constituting an avoidance or affirmative defense shall be asserted in responding to the complaint. Nothing in this rule mandates that the defense be barred unless asserted in the first response to the complaint. Rule 12(h) of the Arkansas Rules of Civil Procedure lists the specific defenses that are waived if not asserted in the original responsive pleading. The defense of lack of capacity is not included in Rule 12(h) as a defense that must be asserted in the original answer in order to avoid the doctrine of waiver. Although Rule 9 of the Arkansas Rules of Civil Procedure provides that lack of capacity shall be by specific negative averment, it does not provide that the defense is waived if not asserted in the first response to the complaint. Thus, appellant's argument is without merit.

Appellant cites *Flanagin v. Drainage District No. 17*, 176 Ark. 31, 2 S.W.2d 70 (1928), to support its second argument that appellees waived the defense of lack of capacity by allowing the

case to be developed for a period of six years before asserting the lack-of-capacity defense twenty-one days before trial. We disagree. The facts of the present case are distinguishable from those in *Flanagan* because there the movant did not assert the lack of capacity defense until after proof on the merits had been submitted. Here, appellees raised the defense prior to trial. Our supreme court held in the subsequent case of *Flanagan v. Burden Construction Corp.*, 238 Ark. 43, 377 S.W.2d 870 (1964), that a party does not waive its right to be dismissed from the action where this issue is raised prior to a hearing on the merits. *See also Sulphur Springs Recreational Park, Inc. v. City of Camden*, 247 Ark. 713, 447 S.W.2d 844 (1969).

Rule 15(a) of the Arkansas Rules of Civil Procedure allows a party to amend its pleadings at any time unless the opposing party objects and the court finds prejudice or undue delay would result from the amendment. The trial court heard arguments regarding the lack-of-capacity defense on August 5, 1998, the same day the amended answers were filed, but allowed appellees' amendment of the answer to stand as appellant knew of the defense on July 21st when the motion for summary judgment was filed. The trial court has broad discretion in determining whether an amended answer should be allowed to stand and will not be reversed absent an abuse of discretion. *Turner v. Stewart*, 330 Ark. 134, 952 S.W.2d 156 (1997). Based upon the facts presented, we do not find the judge abused his discretion in allowing the lack-of-capacity defense to be asserted prior to trial.

For its third point, appellant argues that appellees are estopped from asserting the defense of lack of capacity because they did not assert that defense until the statute of limitations had run on this action. Appellant's argument is without merit. A party asserting estoppel must show that the party to be estopped knows the facts; the other party must be ignorant of the true facts; the party to be estopped must have acted so that the other party had reason to believe that the party intended its conduct to be acted upon; and the other party relied on the conduct to its prejudice. *Kitchens v. Evans*, 45 Ark. App. 19, 870 S.W.2d 767 (1994). Thus, to prove estoppel, appellant had to show that appellees knew appellant lacked corporate status; that appellant was unaware

it lacked corporate status; that appellant had the right to believe appellees would not assert its lack of corporate status as a defense to the action; and appellant relied on appellees' failure to assert its lack of corporate status to its detriment. As appellant failed to prove any of these four elements, we find the trial court did not err in declining to apply the doctrine of estoppel.

Pursuant to Ark. Code Ann. § 16-56-126 (Repl. 1997), appellant could have requested a nonsuit and filed a new action within one year of the entry of the order of nonsuit without regard to the statute of limitations. The right to nonsuit prior to the submission of the case to the jury is absolute. *Blaylock v. Shearson Leman Bros., Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997). A nonsuit has the effect of an absolute withdrawal of the claim and carries with it all the pleadings and all issues with respect to a plaintiff's claim. *Austin v. Austin*, 241 Ark. 634, 409 S.W.2d 833 (1966). The trial judge discussed with appellant's counsel the option to nonsuit, and this option was declined.

For its fourth and last point, appellant maintains that the reinstatement of its corporate status under Ark. Code Ann. § 26-54-112 (Repl. 1997), retroactively restored the corporation as of the date of its revocation. In *Sulphur Springs, supra*, the Arkansas Supreme Court held that a subsequent reinstatement of a corporate charter does not vest the corporation with continuous existence from its date of origin. *See also, First Commercial Bank v. Walker*, 333 Ark. 100, 969 S.W.2d 146 (1998); *Schmidt v. McIlroy Bank & Trust*, 306 Ark. 28, 811 S.W.2d 281 (1991). Thus, the trial court did not commit error by granting appellees' motions for summary judgment.

We affirm the decision of the trial court.

Affirmed.

GRIFFEN and ROGERS, JJ., agree.

Elmer KRALICEK *et al. v.* Wayne and Diane CHAFFEY

CA 98-1351 998 S.W.2d 765

Court of Appeals of Arkansas
Division III
Opinion delivered September 15, 1999

Gean, Gean, & Gean, by: *Roy Gean III*, for appellants.

Jones, Jackson & Moll, PLC, by: *Mark Moll*, for appellees.

TERRY CRABTREE, Judge. This appeal concerns a dispute between adjoining landowners over the right to use a twenty-five-foot alley that runs between their properties. The chancellor issued a decree quieting title to the alley in appellees. On appeal, appellants contend that the chancellor should have found that an easement by prescription or an easement by implication existed in their favor, or should have found that appellants were part-owners of the alley by virtue of Ark. Code Ann. § 14-301-306 (1987). We find no error and affirm.

The parties' lots are adjacent to each other on the north side of Rogers Avenue in Fort Smith. Appellants' property to the west contains an old home that has been converted to commercial use. At the time this case arose, the home was leased to Vintage Gallery & Interiors, Inc. Appellees' property to the east contains a two-story apartment building. A twenty-five-foot alley lies between the two tracts. It runs north from Rogers Avenue to the back of the properties for a distance of approximately 225 feet. Along the west side of the alley, near its beginning point at Rogers Avenue, there is a rectangular-shaped parking area. The area extends approximately sixteen feet west of the alley and approximately one hundred feet northward, parallel with the alley. To reach the parking area, it is necessary to turn off of Rogers Avenue onto the alley. The alley is not the only means of access to appellants' property, but it is the most convenient.

According to appellants, both their property and appellees' property had common owners: Tommy Keeton, Charles Palmer,

and Ralph Freeman.[1] Ownership was split when the three men conveyed what would eventually become appellees' tract (the apartment building) to CRT Properties and conveyed what would eventually become appellants' tract (the old home) to Tommy Keeton. Keeton and CRT entered into a contractual arrangement in 1981, whereby Keeton was granted an easement of ingress and egress in the alley and CRT was granted an easement for parking purposes in the parking area. They agreed to be jointly responsible for the maintenance of both areas.

In 1983, CRT conveyed the apartment building and the twenty-five-foot alley to Mr. Rob's, Inc. Mr. Rob's deeded the apartment building to appellees in 1996 and, by quitclaim deed, conveyed the twenty-five-foot alley to them in 1997. Keeton maintained ownership of the old house until 1989. In that year, he conveyed the property to Steve Whitlock, appellants Darrell and Deborah Robinson, and others. As we interpret the property description in the deed, the parking area was part of the conveyance. The Robinsons, who apparently became sole owners of the property at some point, conveyed it to themselves and appellants Elmer and Donna Kralicek by warranty deed in 1995.

During the time the two properties were owned by appellants' and appellees' predecessors in title, use of the alley and the parking area was shared in a harmonious manner. However, controversy arose in late 1996. Appellants' tenant, Village Gallery & Interiors, Inc., began to object to appellees and their tenants using the sixteen-by-one-hundred-foot parking area. Further, appellants began constructing additional parking at the north end of the twenty-five-foot alley in such a manner as to encroach upon the alley. In response, appellees filed a quiet-title action seeking a declaration that they were the owners of the twenty-five-foot alley and that they had a right to use the parking area. Appellants answered that they and their predecessors had used the alley for so long as to establish an easement by prescription. They also averred that the alley had once been dedicated as a public street by the city

[1] The record contains no deeds or other documentary evidence to support appellants' assertion of common ownership by Keeton, Palmer, and Freeman. However, there was testimony to that effect at trial.

of Fort Smith but was later abandoned. Therefore, they claimed, appellees and they each owned to the center line of the alley, as dictated by Ark. Code Ann. § 14-301-306.

After a trial, the chancellor found that neither appellants nor appellees had established a prescriptive easement in each others' property, *i.e.*, appellants had no prescriptive easement in the alley, and appellees had no prescriptive easement in the parking area. He ruled that any prior uses of the alley and the parking area were permissive. He further found that Ark. Code Ann. § 14-301-306 did not apply in this case. It is from these findings that appellants bring their appeal. Appellees do not cross-appeal.

Chancery cases are tried *de novo* on appeal. *Lammey v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998). However, we do not reverse a chancellor's findings of fact unless they are clearly erroneous. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

Appellants argue first that the chancellor erred in failing to impose an implied easement in their favor in the twenty-five-foot alley. An easement by implication arises where, during unity of title, a landowner imposes an apparently permanent and obvious servitude on part of his property in favor of another part and where, at the time of a later severance of ownership, the servitude is in use and is reasonably necessary for the enjoyment of that part of the property favored by the servitude. *Kennedy v. Papp*, 294 Ark. 88, 741 S.W.2d 625 (1987); *Diener v. Ratterree*, 57 Ark. App. 314, 945 S.W.2d 406 (1997). Appellants claim that their use of the alley was reasonably necessary for the effective management and operation of their commercial enterprise. Appellees respond that appellants are procedurally barred from making this argument because it is being raised for the first time on appeal. *See generally Benton v. Barnett*, 53 Ark. App. 146, 920 S.W.2d 30 (1996).

Appellants acknowledge that they did not raise the theory of easement by implication or the similar theory of easement by necessity in their pleadings. However, they contend that facts

supporting these theories were raised during the trial. Further, they assert that, during the trial, they made a motion to amend the pleadings to conform to the proof. *See* Ark. R. Civ. P. 15(b). However, even if it can be said that appellants raised the implied easement and easement by necessity theories by virtue of a motion to amend their pleadings, they are still procedurally barred from obtaining review on these issues because they failed to obtain a ruling on them from the chancellor. *See Santifer v. Arkansas Pulpwood Co.*, 66 Ark. App. 145, 991 S.W.2d 130 (1999), where the same argument regarding the theory of estoppel was unsuccessfully asserted. A ruling by the chancellor on a challenged issue is a prerequisite to our review of that issue. Even questions raised at the trial level, if left unresolved, are waived and may not be relied upon on appeal. *Britton v. Floyd*, 293 Ark. 397, 738 S.W.2d 408 (1987).

In any event, we do not believe that appellants proved the necessary elements of an easement by implication. Their evidence did not show that, during unity of title, the landowners imposed a servitude on their property in favor of another part of their property. At most, appellants proved that an express easement was created by contract *after* title was severed.

Next, appellants argue that the chancellor should have imposed an easement by prescription in their favor. The chancellor declined to find that such an easement existed because prior use of the alley by appellants and their predecessors was permissive rather than adverse. One asserting an easement by prescription has the burden of showing by a preponderance of the evidence that his use of the disputed area has been adverse to the owner and the owner's predecessors in title under claim of right for the statutory period. *Fields v. Ginger*, 54 Ark. App. 216, 925 S.W.2d 794 (1996). The statutory period is seven years. *Johnson v. Jones*, 64 Ark. App. 20, 977 S.W.2d 903 (1998). Permissive use of an easement cannot ripen into an adverse claim without clear action placing the owner on notice. *Manitowoc Remanufacturing, Inc. v. Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991). However, there is a variation in that rule. If usage of a passageway over land, whether it began as permissive or otherwise, continues for seven years after the facts and circumstances of the usage are such that

the landowner would be presumed to know the usage was adverse, then the usage ripens into an absolute right. *Chapin v. Talbot*, 13 Ark. App. 53, 679 S.W.2d 219 (1984).

Determination of whether use of a roadway is adverse or permissive is a question of fact. *Fields v. Ginger, supra.* A chancellor's finding with respect to the existence of a prescriptive easement will not be reversed unless clearly erroneous. *Johnson v. Jones, supra.* Former decisions are of little value on the factual issue of whether a use is permissive or adverse. *Id.*

It is apparent from the evidence at trial that appellants and their predecessors in title have used the twenty-five-foot alley since at least 1981 to gain access to their property. However, we agree with the chancellor that the use appears to have been permissive rather than adverse. Appellants' predecessor ,Tommy Keeton, was entitled to use the alley between 1981 and 1989 by virtue of a written agreement between himself and appellees' predecessor, CRT. It cannot be said that such use, pursuant to a contract, was adverse. Appellants' next predecessor, Steve Whitlock, used the alley from 1989 to 1993, during which time it was owned by appellee's predecessor, Mr. Rob's, Inc. According to Whitlock, his use of the alley was the result of an "unspoken agreement" between himself and Ray Stroud of Mr. Rob's. Ray Stroud testified that, during the time he owned appellees' property between 1983 and 1996, neither Keeton nor Whitlock made any adverse claim against or maintained any ownership interest in the alley. Under these circumstances, the chancellor was justified in finding that no adverse usage was made of the alley prior to appellants' ownership in 1995. Therefore, we cannot say his finding was clearly erroneous on this issue.

Finally, we come to the question of whether appellants and appellees have an equal ownership interest in the alley by virtue of Ark. Code Ann. § 14-301-306(a) (1987). That statute reads:

> Upon the adoption of [a city] ordinance [vacating a public way], the absolute ownership of the property abandoned by the city or town shall vest in the owners of the real estate abutting thereon. Each such abutting owner shall take title to the center line of the street or alley so abandoned, and the ownership shall

be free from the easement of the city or town for public use as a street or alley.

Testimony in the record indicates that the alley was dedicated to the city of Fort Smith in 1933. The alley was abandoned by the city in 1981. According to appellants, section 14-301-306 means that, when the city abandoned the alley, the adjoining landowners, *i.e.*, they and appellees, became vested with title to the center line of the alley from their respective sides of the alley. A literal reading of section 14-301-306 would support appellants' argument. However, we decline to interpret section 14-301-306 in such a way as to automatically vest the fee to the abandoned alley in both appellants and appellees. At common law, when property was dedicated for a public purpose, such as a highway, the landowner retained a fee ownership in the highway, subject to the public's right to use it. *McGee v. Swearengen*, 194 Ark. 735, 109 S.W.2d 444 (1937). However, whether the landowner's reversionary interest, upon abandonment of the highway, extended to the center of the highway or to the entire highway depended upon whether he contributed land on one side of the highway only or on both sides. Generally, his fee would extend only to the center of the highway. However, if he had owned property on both sides of the highway, his reversionary interest extended to the entire highway. *Id.* We do not believe section 14-301-306 was intended to change these common law rules. Statutes will not be taken in derogation of common law unless the act shows that such was the intent of the legislature. *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297 (1997). No such intention is apparent here.

We have no information concerning the ownership of the abutting property at the time the dedication of the alley was made. Thus, we cannot apply section 14-301-306. It is appellants' burden to make a record showing entitlement to relief. *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

Affirmed.

JENNINGS and STROUD, JJ., agree.

Robert T. WILLIAMS, *et al. v.*
Bill HARMON, *et al.*

CA 99-23 999 S.W.2d 206

Court of Appeals of Arkansas
Division I
Opinion delivered September 22, 1999
[Petition for rehearing denied November 3, 1999.]

James F. Lane, P.A., for appellants.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *David M. Fuqua*, for appellees.

JOHN B. ROBBINS, Chief Judge. This appeal involves a challenge to an annexation proceeding. We affirm the trial court's holding that the challenge is barred by the applicable limitation period.

On August 23, 1982, the City of Sherwood, through its then-elected mayor and city council, adopted Ordinance No. 515, which provided for annexation of certain real property. The ordinance was presented to the qualified electors of Sherwood at the November 2, 1982, general election, and the annexation was approved.

On May 2, 1995, the appellants, who are residents of the annexed property, filed suit against the appellees in their respective capacities as mayor and aldermen of Sherwood. Their complaint sought a declaratory judgment that Ordinance No. 515 was void because it omitted the schedule of services required by Ark. Code Ann. § 14-40-303(a)(2) (Repl. 1998). Alternatively, the appellants asked that the City of Sherwood be ordered to extend all services, including water, sewer, and fire protection, into the annexed area. In an amended complaint, the appellants dropped their alternative basis for relief.

The appellants moved for summary judgment, which was denied on April 23, 1998. The case was set for trial, but prior to trial the chancery court entered final judgment dismissing appellants' claim with prejudice. In its September 23, 1998 order, the chancery court concluded:

> 1. The central issue of this case was disposed of in the Court's Order of April [23], 1998, wherein the Court held that the Plaintiffs had failed to file their objections to Ordinance 515 of 1982 within thirty (30) days of the annexation election in accordance with the provisions of Ark. Code Ann. § 14-40-304.
>
> 2. Based upon the pleadings, affidavits filed in this case, exhibits, stipulations, and statements of counsel, the Court finds that the Amended Complaint of the Plaintiffs should be dismissed because the challenge to the annexation pursuant to Ordinance 515 of 1982 of the City of Sherwood, Arkansas, was not filed within thirty (30) days of the date of the annexation election as required by Ark. Code Ann. § 14-40-304, and the Court further finds that the claim of the Plaintiffs fails due to their laches in bringing the claim as well as because of estoppel in that the Plaintiffs acquiesced in the annexation for a long period of time, have participated in the municipal government of the City of Sher-

> wood, Arkansas, and should not now be allowed to de-annex themselves from the City of Sherwood after receiving benefits and services provided by the City.

For reversal of the chancery court's order, the appellants argue that the court erred in dismissing the annex challenge because it was not filed within thirty days of the annexation election, and further erred in finding that their action was barred by laches and estoppel. The appellants submit that the trial court should have ruled that Ordinance No. 515 was void as a matter of law for failure to include the schedule of services as required by statute.

We find the disposition of this case to be controlled by Ark. Code Ann. § 14-40-304 (Repl. 1998), which provides:

> (a) If it is alleged that the area proposed to be annexed does not conform to the requirements and standards prescribed in § 14-40-302, a legal action may be filed in the circuit court of the county where the lands lie, within thirty (30) days after the election, to nullify the election and to prohibit further proceedings pursuant to the election.
>
> (b) In any such action filed in the circuit court of the county where the lands lie, the court shall have jurisdiction and the authority to determine whether the procedures outlined in this subchapter have been complied with and whether the municipality has used the proper standards outlined in § 14-40-302 in determining the lands to be annexed.

The appellants argue that the above authority is inapplicable because the appellees violated Ark. Code Ann. § 14-40-303(a)(2), which is not a subsection of Ark. Code Ann. § 14-40-302. However, we disagree.

■ ■ The Arkansas Supreme Court has stated that words in a statute are to be given their ordinary and common usage. *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). Furthermore, when construing any statute, the statute is placed beside other statutes relevant to the subject matter in question so that its meaning and effect can be derived from the combined whole. *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407,

939 S.W.2d 280 (1997). In recent decisions, our supreme court has made it clear that the thirty-day limitation period prescribed in Ark. Code Ann. § 14-40-304 extends to challenges to procedures outlined in its subchapter, including those not enumerated in § 14-40-302.

In *City of Springdale v. Town of Bethel Heights*, 311 Ark. 497, 845 S.W.2d 1 (1993), the appellants complained that passage of an annexing ordinance by Bethel Heights' council was defective because the council or its members failed to meet or violated certain by-laws and statutory requirements when adopting the ordinance. In ruling that the action was procedurally barred, the supreme court announced:

> It is undisputed that no one filed suit under the foregoing provision to challenge the procedures followed by Bethel Heights in calling its annexation election. Clearly, the Benton County Circuit Court had the jurisdiction and authority to consider and decide such issues under § 14-40-304(b) above if a complaining party had filed suit within thirty days of the November 6, 1991 election. Since neither appellants nor others did so, appellants' attempt now to raise such an issue in this collateral proceeding must fail.

311 Ark. at 499-500, 845 S.W.2d at 2.

In *Duennenberg v. City of Barling*, 309 Ark. 541, 832 S.W.2d 237 (1992), the appellants challenged an annexation ordinance and election, citing alleged violations of both § 14-40-302 and § 14-40-303. Because the amended complaint was not filed within thirty days as mandated by § 14-40-304, the circuit court dismissed the complaint. The supreme court reversed, holding that since the original complaint had been timely filed within thirty days, and was not deficient in stating a cause of action, the complaint was within the limitation period notwithstanding the subsequent amendment, which merely corrected an obvious error in the complaint. However, the supreme court did not hold that the appellants' challenge was not subject to the thirty-day limitation period.

The aforementioned cases make it evident that challenges to procedures outlined in the subchapter at issue must be made within thirty days of the annexation elections, and that this is so whether or not such challenges arise from requirements prescribed by Ark. Code Ann. § 14-40-302. Thus, the appellants' complaint that cited a violation of Ark. Code Ann. § 14-40-303(a)(2) was untimely and properly dismissed by the chancery court.

In their brief, the appellants cite *Brooks v. City of Benton*, 308 Ark. 571, 826 S.W.2d 259 (1992), for the proposition that municipal zoning authority is conferred solely by state-enabling legislation, and that noncompliance with a procedural requirement renders a zoning ordinance void. By analogy, appellants submit that the appellees' annexation in the instant case was void, and not voidable, because each legislative requirement was not met. Despite appellants' contention, we find *Brooks v. City of Benton, supra*, to be inapposite because that case involved zoning and not annexation, and the timeliness of the complaint was not an issue.

Because we affirm the chancery court's dismissal on the ground that the complaint was not filed within thirty days, a review of whether the complaint is barred by laches or estoppel is unnecessary.

Affirmed.

BIRD and CRABTREE, JJ., agree.

W. Scott HOUSTON *v.* Linda L. HOUSTON

CA 98-1492 999 S.W.2d 204

Court of Appeals of Arkansas
Division III
Opinion delivered September 22, 1999

Walker, Campbell & Campbell, PLC, by: *Gail Inman-Campbell*, for appellant.

Gresham & Kirkpatrick, by: *James E. Gresham*, for appellee.

JOSEPHINE LINKER HART, Judge. On November 2, 1983, the Superior Court of the State of Washington for Whatcom County granted the parties a divorce. The decree of

dissolution adopted and recited almost verbatim the property-settlement agreement entered into by the parties prior to their divorce action. As part of that agreement, appellant agreed to "maintain . . . the [appellee] on medical insurance equivalent to that insurance coverage that has been provided during the marriage." On July 23, 1997, the appellant filed in the Boone County Chancery Court a petition to terminate his obligation to provide medical insurance, alleging that the appellee was remarried, employed, and able to obtain medical insurance through her employer. The parties presented the case on stipulated facts and further stipulated that the court would apply Arkansas law. The appellant, however, did not make these stipulations of fact a part of the record on appeal.

In an order filed September 4, 1998, the chancellor denied appellant's petition, concluding that the property-settlement agreement was an independent contract and that the language requiring appellant to maintain medical insurance was unambiguous. The appellant challenges these findings on appeal. We affirm.

When parties execute an independent property-settlement agreement that is incorporated into a decree of divorce, it cannot subsequently be modified by the court. *Gentry v. Gentry*, 327 Ark. 266, 938 S.W.2d 231 (1997). When a contract is unambiguous, its construction is a question of law for the court. *Kennedy v. Kennedy*, 53 Ark. App. 22, 918 S.W. 2d 197 (1996). On appeal, a chancellor's conclusion of law is not given any deference; our review is *de novo*. *Duchac v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999); *see also Arkansas Burial Ass'n v. Dixon Funeral Home, Inc.*, 25 Ark. App. 18, 751 S.W.2d 356 (1988).

The appellant argues that "it is not so much that [he] is claiming the [d]ivorce [d]ecree does not refer to an independent contract but that the language within the contract allows for such modification." Appellant cites two separately-numbered paragraphs of the property-settlement agreement to show that the agreement could be modified. The provisions are as follows:

> 13. . . . The [appellant] agrees to guarantee that portion of the Social Security payment that relates to the [appellee] personally

> for the [appellee's] life. . . . . Finally, it is agreed that this guarantee is not maintenance on the part of the [appellant] and is not subject to increase, modification[,] or change.
>
> 17. The [appellant] shall maintain . . . the [appellee] on medical insurance equivalent to that insurance coverage that has been provided during the marriage.

Appellant contends that the express prohibition in paragraph thirteen specifically stating that "this guarantee is not maintenance on the part of the appellant and is not subject to increase, modification[,] or change," implies that the court has the authority to modify paragraph seventeen because that paragraph has no clause prohibiting modification. Appellant also notes that the property-settlement agreement does not set forth a date on which the medical insurance is to terminate.

The chancellor, in his findings that the agreement was an independent contract, specifically noted two other provisions of the agreement. The agreement provided that it was understood and agreed by the parties that the agreement was "final and binding, whether or not a [d]ecree of [d]issolution is granted or obtained by either party." The agreement also provided that the "parties desire to reach an agreement of property and otherwise growing out of the marriage relationship existing between them and to effect a complete settlement of any and all claims that either may have against the other." After our *de novo* review, we cannot say that the chancellor erred in finding that the agreement of the parties was an independent contract and that he did not have the power to modify the decree. Further, we cannot say that the contract provision for medical insurance was ambiguous merely because it did not contain a termination date or differed from the social security clause. The requirement that appellant provide insurance is clear on its face and needs no further words to provide for a clear understanding of its language. Appellant seeks to have the provision of the agreement rewritten to provide for termination upon the happening of an event or date. The chancellor properly declined to rewrite the parties' agreement.

In his reply brief, the appellant further contends that the contract was "not proven" because a notarized contract was

never entered into evidence. This argument was not raised below and need not be addressed on appeal. *See, e.g., Jamison v. Estate of Goodlett*, 56 Ark. App. 72, 938 S.W.2d 985 (1997). We note, however, that this case was presented based on stipulated facts, and the chancellor specifically found that the property-settlement agreement was "executed solely by the parties with notarized signatures."

Affirmed.

PITTMAN and STROUD, JJ., agree.

Lilly KILDOW *v.* BALDWIN PIANO & ORGAN

CA 99-38 999 S.W.2d 199

Court of Appeals of Arkansas
Division IV
Opinion delivered September 22, 1999
[Petition for rehearing denied November 3, 1999.]

Mashburn & Taylor, by: *Timothy J. Myers*, , for appellant.

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *James A. Arnold II* and *Rebecca D. Hattabaugh*, for appellee.

OLLY NEAL, Judge. Lilly Kildow appeals the order of the Workers' Compensation Commission finding that she failed to prove that she sustained a compensable injury. In *Kildow v. Baldwin Piano & Organ*, 58 Ark. App. 194, 948 S.W.2d 100 (1997) (*Kildow I*), this court reversed the Commission's order that denied the compensability of the claimant's claim for benefits related to carpal tunnel syndrome based upon the Commission's finding that her work activities did not involve rapid and repetitive motion. Our reversal was based upon the belief that the claimant had proven that her work involved rapid and repetitive motion. In *Kildow v. Baldwin Piano & Organ,* 333 Ark. 335, 969 S.W.2d 190 (1998) (*Kildow II*), the supreme court reversed our decision in *Kildow I*, and in doing so held that proof of rapid and repetitive motion was not necessary in workers' compensation claims where the alleged injury is carpal tunnel syndrome. The matter was then remanded to the Commission so that additional proceedings could be conducted consistent with the supreme court's opinion. On remand, the Commission determined that Ms. Kildow did not prove the compensability of her claim by offering objective medical findings. Ms. Kildow appeals to this court and argues two points for reversal: the Workers' Compensation Commission erred in rehearing this case on the merits and failing to apply the doctrines of *res judicata* and collateral estoppel; and, alternatively, that the Commission's decision is not supported by substantial evidence. We find no error and affirm.

Appellant first argues that the Commission erred in rehearing the merits of her claim on remand, and that the doctrine

of *res judicata* prohibits such action. The doctrine of *res judicata*, which is applicable to decisions of the Workers' Compensation Commission, forbids the reopening of matters once judicially determined by competent authority. *Thurman v. Clarke Indus., Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994). Appellant essentially contends that because the court of appeals held that her claim was compensable and remanded the matter to the Commission for an award of benefits in *Kildow I*, and because the supreme court, in *Kildow II*, only reversed *Kildow I* with regard to the statutory interpretation issue, the Commission's duty on remand was to award benefits. We disagree.

Appellant overlooks the standard the supreme court utilizes when reviewing cases that were originally decided by the court of appeals. When the supreme court grants review following a decision by the court of appeals, the case is reviewed as though the appeal was originally filed with the supreme court. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 383, 944 S.W.2d 524, 525 (1997). Therefore, when the supreme court undertook a review in *Kildow II* it reviewed the Commission's decision, not that of the court of appeals. After the supreme court issued its opinion in *Kildow II*, its opinion became, for all intents and purposes, the only appellate opinion in the matter. Thus, to the extent that appellant's argument relies upon our opinion in *Kildow I*, such reliance is in error.

A plain reading of *Kildow II* leads to the conclusion that the supreme court intended that the Commission would review the merits of the claim to determine compensability. The supreme court made the following pronouncement:

> Finally, the Act provides safeguards to protect employers from claims that are feigned. In addition to showing that the injury arose out of and in the course of employment, the claimant must also produce objective medical evidence that the injury is compensable (section 11-9-102(5)(D)); and for injuries falling within the definition of rapid repetitive motion, the claimant not only bears the burden of proof by a preponderance of the evidence, but also must show that the alleged injury is the major cause of the disability or need for treatment (section 11-9-102(5)(E)(ii)).

> . . . [t]he order of the Commission is reversed and *the case is remanded for further proceedings consistent with this opinion.* (Emphasis added).

Kildow, 333 Ark. at 340, 969 S.W.2d at 192.

It is clear that the supreme court intended that the Commission conduct further proceedings to determine if the claim was compensable, and not merely award benefits as appellant suggests. The appellant's first argument is without merit.

Appellant next argues that the Commission's determination that her carpal tunnel syndrome is not compensable is not supported by substantial evidence. The facts indicate that appellant was employed by appellee from February 1, 1993, until March 7, 1994. Her duties consisted primarily of manning a station on an assembly line where she secured small electrical components to a one-eighth-inch-thick board with three to five small wires that were two to three inches long. In January 1994, appellant began complaining to her supervisor of pain in her wrists. The pain gradually worsened until she was seen by the company physician, Dr. David Ureckis, on March 10, 1994.

In his initial report, Dr. Ureckis noted a nerve conduction velocity test suggesting borderline carpal tunnel syndrome. Dr. Ureckis fitted appellant with wrist splints, ordered her to temporarily cease working, prescribed anti-inflammatory medication, and referred her to Dr. Tom Patrick Coker for surgical evaluation.

Dr. Coker's initial report, dated March 31, 1994, indicated that appellant had an EMG which confirmed right carpal tunnel and that the left was insignificant. Appellant was seen by Dr. Coker on seven occasions and underwent a course of physical therapy over several months.

Appellant was involved in a motor-vehicle accident on August 20, 1994, which complicated her medical records with chiropractic and psychological treatment that was apparently unrelated to her workers' compensation claim. Appellant was referred to UAMS and treated by Dr. Harris Gellman, a professor and Chief of the Hand Surgery Service. Dr. Gellman reviewed the previous treating physicians' test results and noted appellant's com-

plaints before providing diagnoses of carpal tunnel syndrome and cubital tunnel syndrome. Appellant underwent a carpal tunnel release in July 1995, and cubital tunnel surgery in the summer of 1995.

In denying appellant's claim for benefits related to carpal tunnel syndrome, the Commission found that the objective medical findings documenting carpal tunnel syndrome failed to support a finding that appellant was entitled to further benefits.

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

In making its decision to deny the compensability of appellant's claim, the Commission noted that the results of several nerve conduction studies performed after the intial study were within normal limits. The Commission also noted that Dr. Gellman based his carpal tunnel syndrome diagnosis on appellant's continued clinical complaints as well as her classical clinical examination. Also noted was the fact that Dr. Gellman's diagnosis of carpal tunnel syndrome was never confirmed by electrodiagnostic studies. In making its determination, the Commission reasoned:

> In light of claimant's negative nerve conduction tests after her release on July 19, 1994, Dr. Coker's negative clinical testing, and the claimant's August 20, 1994, automobile accident and subsequent symptoms discussed, we conclude that either the initial discrepancy, in fact, was within normal limits and claimant never actually had compensable carpal tunnel syndrome or that claimant failed to establish that Dr. Gellman's right carpal tunnel release surgery on July 6, 1995, was causally related to the claimant's work duties and any carpal tunnel symptoms that the claimant may have experienced in the spring and early summer of

> 1994. Either finding bears the same result: claimant has failed to prove entitlement to further benefits.

Because our standard of review requires that we affirm the Commission's decision if reasonable minds could have reached the conclusion arrived at by the Commission, we affirm the Commission's decision to deny benefits.

Appellant also contends that the Commission erred in determining that her claim for cubital tunnel syndrome, or ulnar nerve compression, was not compensable. In 1995, appellant was diagnosed by Dr. Gellman with cubital tunnel syndrome, which is the compression of the ulnar nerve at the elbow. Although there were objective medical findings that confirmed the cubital tunnel syndrome diagnosis, the Commission denied the compensability of appellant's injury. In doing so, the Commission noted that nerve conduction studies performed after appellant ceased her employment with appellee in March of 1994 and again in October of 1994 did not document any abnormality along appellant's ulnar nerve. The Commission supplied the following rationale for its decision:

> It was not until May of 1995, more than one year after claimant ceased her employment with respondent, that any problem was first detected by objective medical findings with claimant's ulnar nerve. During this time frame, claimant was involved in a severe motor vehicle accident which resulted not only in neck, upper back, and shoulder problems but also produced ". . . stiffness and pain in both arms which she thinks was from clenching the steering wheel." Although at the hearing claimant denied sustaining any injury to her upper extremities during the motor vehicle accident, it is our opinion that the history claimant provided to Dr. Davis on September 13, 1994, approximately three weeks after the accident is entitled to greater weight than claimant's testimony provided at the hearing more than a year later.

The Commission also noted the fact that Dr. Gellman drafted an opinion in September of 1995, in which he stated within a reasonable degree of medical certainty that appellant's cubital tunnel syndrome was causally related to her employment with appellee. However, he later acknowledged that at the time he prepared that opinion he was not made aware of appellant's

automobile accident. Dr. Gellman also acknowledged that the causation question would depend upon the degree of trauma that appellant sustained in the accident. The Commission then determined that Dr. Gellman's opinion should be entitled to little weight, and that under the circumstances appellant's negative nerve conduction studies, Dr. Coker's negative clinical testing in March of 1995, Dr. Coker's July 14, 1994, release of appellant with no impairment rating, and the various complaints appellant made to her physician after the August 1994 automobile accident would be afforded a much greater weight.

After weighing Dr. Gellman's written opinion against the other factors, the Commission found that appellant failed to establish that her cubital syndrome diagnosis in May of 1995 was causally related to her 1994 work for appellee. The Commission also found that appellant failed to prove by a preponderance of the evidence that her work duties were the major cause of her development of ulnar nerve compression that eventually required a cubital tunnel release. The Commission was of the opinion that too much time had elapsed between appellant's last day of work, the onset of her problems and the diagnosis of ulnar nerve compression for a causal connection to be found without giving appellant the benefit of the doubt.

Appellant argues that because this court has already determined that her tasks were rapid and repetitive, there is no reason why the court should change its prior decision to award benefits. However, because appellant has failed to establish the threshold requirement of proof by a preponderance of the evidence that the cubital tunnel syndrome injury arose out of and in the course of her employment, we need not address the issue of whether her work was rapid and repetitive. *See* Ark. Code Ann. § 11-9-102(5)(A)(ii) (Repl. 1996).

Moreover, the weight to be given medical testimony is for the Commission to determine. *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986). Here, given the fact that the first objective medical evidence of appellant's cubital tunnel syndrome did not manifest itself until more than a year after appellant's last day of work in March of 1994, and the fact that appellant

was involved in an automobile accident in August of 1994 and at that time made complaints regarding arm pain to her physician, we hold that substantial evidence exists in the record that supports the Commission's decision.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

Patsy Rena SWADLEY *v.* Paul Andrew KRUGLER

CA 99-259 999 S.W.2d 209

Court of Appeals of Arkansas
Division IV
Opinion delivered September 22, 1999

J. Robin Pace, for appellant.

Johnnie Emberton Rhoads, for appellee.

OLLY NEAL, Judge. Appellant Patsy Swadley appeals the decision of the chancellor awarding permanent custody of the parties' two children to appellee, Paul Krugler. Her points on appeal are: 1) the trial court erred in not qualifying Dina C. Williams as an expert on sexual-abuse issues; 2) that based on the doctrine of *res judicata* and collateral estoppel, the trial court erred in allowing evidence of previous sexual-abuse examinations performed on one of the parties' children prior to the date of the last hearing; and 3) there was not sufficient evidence to support the trial court's finding that a material change in circumstances had occurred to modify the last custody order.

After a hearing conducted on March 12, 1998, the Benton County Chancery Court entered an order of modification on May 26, 1998, and awarded custody of the parties' minor children to appellant. Appellee was given visitation and ordered to pay child support. On July 13, 1998, appellee filed a motion to modify custody alleging that appellant had made consistent allegations of sexual and physical abuse against him and that appellant had subjected at least one of the parties' children to a rape-examination kit and repeated medical examinations. Appellant filed a response to the motion to modify custody on July 23, 1998. She alleged that the motion made allegations to events that happened prior to the May 26 order and, therefore, was barred by the doctrine of *res judicata* and collateral estoppel. Appellant further denied that she had made any improper allegations since the May 26 order. It should be noted that the May 26, 1998, order stemmed from the modification of custody hearing held March 12, 1998.

On August 24, 1998, a hearing was held on appellee's motion to modify custody. Lori Joslin of the Arkansas Department of Human Services (DHS) testified that she had interviewed

one of the parties' children for allegations of sexual abuse. Ms. Joslin testified that within the last year, DHS had four unsubstantiated sexual-abuse allegations regarding the child. She further testified that a fifth investigation was pending at the time of trial, and that, during her interview with the child in that investigation, the child made no disclosure of sexual abuse. Daryl Briggs, a detective with the Rogers Police Department, testified that he had received reports on or near June 15, 1998, and July 6, 1998, regarding allegations of sexual abuse involving the parties' child. He testified that appellee was the alleged perpetrator. Briggs testified, however, that the child did not disclose any evidence of sexual abuse during a June 16 interview session and that he did not open an investigative report on the July 6 sexual-abuse allegation against appellee. He further testified that he became aware that the Children's Safety Center had performed a colposcope examination on the child on June 26, 1998, which was found to be negative.

Dina C. Williams was called to testify as an expert witness on behalf of appellant. She stated that she held master's degrees in both Social Work and Criminal Justice. Ms. Williams testified that she had attended a one-year internship at a child sexual-abuse treatment program in Little Rock and that she had worked for two years at the Ozark Guidance Center's family-outreach-services program to assist sexually abused children and their parents. She stated that she has dealt with sexual-abuse issues for twenty-four years in her professional work. At trial, the parties stipulated that Ms. Williams was a licensed certified social worker. However, appellee's counsel objected to Ms. Williams's testimony regarding hearsay statements by the child. Appellee argued that Ms. Williams was not a licensed psychologist and that the child-abuse courses taken by Ms. Williams did not establish her as an expert in child sexual-abuse cases. Instead, appellee argued that Ms. Williams's training involved areas that were not related to the present case. The trial court sustained appellee's objection.

At the end of trial, the chancellor entered an order on September 28, 1998, which found that there was a material change of circumstances since the entry of the last order to warrant change of custody of the parties' children from appellant to appellee.

Appellant first argues that the trial court erred in not allowing Dina Williams to be qualified as an expert witness on matters pertaining to Ms. Williams's counseling session with the minor child on the issue of sexual abuse.

Under Rule 702 of the Arkansas Rules of Evidence, the test for admissibility of expert testimony is whether specialized knowledge will aid the trier of fact in understanding the evidence or in determining a fact in issue. *Mearns v. Mearns*, 58 Ark. App. 42, 946 Ark. S.W.2d 188 (1997). Whether to allow a witness to give expert testimony rests largely within the sound discretion of the trial court, and that determination will not be reversed absent an abuse of that discretion. *Id.*

Appellant presented Ms. Williams as an expert on child sexual-abuse examinations. Ms. Williams was also presented to the trial court as the minor child's counselor due to her assessment of the child regarding sexual-abuse allegations against appellee. However, when Ms. Williams began to offer her testimony regarding statements made by the child, the trial court refused to qualify her as an expert witness.

In this case, appellant made no proffer to the record as to what Ms. Williams would have stated in regard to any disclosures of sexual abuse by the parties' child, as required by Ark. R. Evid. 103(a)(2) to preserve the trial court's decision for appeal. To challenge a ruling excluding evidence, an appellant must proffer the excluded evidence so the appellate court can review the decision, unless the substance of the evidence is apparent from the context. *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996).

Appellant next argues that, based upon the doctrines of *res judicata* and collateral estoppel, the trial court erred in allowing evidence prior to the previous hearing in this case on March 12, 1998. She argues that Ms. Joslin of DHS did not establish a time frame as to when her investigations of sexual abuse against appellee had taken place.

While the primary consideration in a change-of-custody suit is the welfare and best interest of the child, an order changing custody cannot be made without proof showing a

change in circumstances from those existing at the time the original order was made. *Fitzgerald v. Fitzgerald*, 63 Ark. App. 254, 976 S.W.2d 956 (1998). *Res judicata*, or claim preclusion, bars the relitigation of issues that were actually litigated or that could have been litigated in the first suit. *Moon v. Marquez*, 65 Ark. App. 78, 986 S.W.2d 103 (1999). Collateral estoppel, or issue preclusion, bars relitigation of issues of law or fact actually litigated by parties in the first suit. *Guidry v. Harp's Food Stores, Inc.*, 66 Ark. App. 93, 987 S.W.2d 755 (1999).

In this case, however, appellant has not set forth in her assignment of error that the trial court considered any evidence of sexual-abuse allegations that occurred prior to the date of the last hearing. During cross-examination, Ms. Joslin testified that she had first interviewed the child regarding sexual-abuse allegations one year ago. However, Ms. Joslin testified that the child revealed no signs of child abuse during her last interview with the child, which was conducted one month prior to the final hearing. Further, the record shows that three child-maltreatment determinations dated from June 17, 1998, to July 2, 1998, all revealed that no credible evidence of child maltreatment existed toward the parties' child. It is the appellant's burden to produce a record sufficient to demonstrate error, and the record on appeal is confined to that which is abstracted. *Martin v. State*, 337 Ark. 451, 989 S.W.2d 908 (1999).

Finally, appellant argues that there was insufficient evidence presented to the trial court to modify custody in favor of appellee.

In chancery cases, the appellate court reviews the evidence *de novo* but does 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). The appellate court gives due deference to the superior position of the chancellor to view and judge the credibility of the witnesses. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). A heavier burden is placed on a chancellor in child-custody cases to utilize, to the fullest extent, all of his powers of perception in evaluating the witnesses, their testimony, and the child's best interests. *Freshour v. West*, 61 Ark. App. 60, 962

S.W.2d 840 (1998). 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. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). The party seeking modification has the burden of showing such a change in circumstances. *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999).

Upon *de novo* review, the evidence showed that no substantiated case of sexual abuse was ever filed against appellee. This was evidenced by three unsubstantiated child-maltreatment determinations filed by DHS and several rape-kit examinations performed on the child since the March 12 hearing. Medical reports dated June 10, 1998, June 26, 1998, and July 4, 1998, indicated that a physical examination had been performed on the child, yet no positive findings of sexual abuse were made. In an order filed September 28, 1998, the chancellor found that there had been a material change of circumstances since the May 26, 1998, order, which stemmed from the March 12 hearing, due to appellant's repeated and unfounded accusations against appellee of sexual abuse toward the parties' child.

In view of the evidence presented in this case and our standard of review, we cannot say that the chancellor's findings were clearly against the preponderance of the evidence.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

Julia D. JONES, Joseph H. Klerekoper, and Jean W. Mallet *v.* Fairfax ABRAHAM, Jr., Henry Abraham, Martha Abraham, Charles Abraham, Sarah D. Karney, Jeanette D. Stucke, Frances G. Elola, John T. Abraham, Julia D. Shepard, Ruth A. Seymour, and William T. Abraham

CA 98-1076 999 S.W.2d 698

Court of Appeals of Arkansas
Division III
Opinion delivered September 29, 1999
[Petition for rehearing denied November 3, 1999.]

[redacted]

Wright, Chaney, Berry, Daniel, Slaughter & Hughes, P.A., by: *Edward M. Slaughter*; and *Hatfield & Lassiter*, by: *Richard F. Hatfield*, for appellants/cross-appellees.

Morgan & Turner, by: *Todd Turner*; *Robert R. Wright*; and *Ray Baxter*, for appellees/cross-appellants.

JOHN MAUZY PITTMAN, Judge. This case involves an alleged oral contract to make a will between two sisters, both deceased, Sarah Klerekoper and Frances Abraham. This case returns to us after trial on remand from our decision in *Jones v. Abraham*, 58 Ark. App. 17, 946 S.W.2d 711 (1997). Sarah Klerekoper and Frances Abraham were daughters of John Turner Abraham, who died in 1949. Ms. Klerekoper died in 1975 and Ms. Abraham died in 1994. The issue at trial was whether appellants could prove by clear, cogent, satisfactory, and convincing evidence that their mother, Sarah Klerekoper, entered into an oral contract in 1973 or 1974 with her sister, Frances Abraham, whereby Ms. Klerekoper assigned to Ms. Abraham her one-fifth share of their father's estate, which was settled in 1990 by family agreement, in return for Ms. Abraham's promise to prepare a will in which she would leave all her property to appellants. In February 1974, Sarah Klerekoper filed an assignment in probate court in which she assigned to Frances Abraham all of her interest in their father's estate. In November 1987, Frances Abraham executed her will. Therein, she left one-fourth of all her property to appellants and the remainder to appellees, who are appellants' first cousins.

At trial, the Clark County Chancery Court granted appellees' motion to dismiss. Appellants appeal this decision. Appellees, as cross-appellants, appeal the chancery court's denial of their requests for attorney's fees and litigation expenses. We affirm on appeal and cross-appeal.

We handed down our opinion in *Jones v. Abraham, supra*, in June 1997. Insofar as is pertinent to this appeal, we there reversed the chancery court's grant of appellees' motion for summary judgment concerning whether appellants had shown there was a genuine issue of material fact to be decided regarding the alleged oral contract to make a will, and we remanded for trial. This case was tried before the chancery court in December 1997 with appellants as plaintiffs. After they presented their case in chief, appellees' counsel moved to dismiss appellants' case. The chancery court heard argument from counsel on appellees' motion and took the matter under advisement overnight. The next day, the chancellor announced a decision in appellees' favor in which he set forth findings of fact and explained in detail why he was granting appellees' motion to dismiss appellants' case. On January 29, 1998, the chancery court handed down an order granting appellees' motion to dismiss that, in large part, recited the explanation the chancellor had given from the bench when he initially granted appellees' motion to dismiss. It is this order that appellants challenge on appeal.

In its January 29, 1998, order the chancery court denied appellees' request for an award of attorney's fees. Subsequently, appellees moved, pursuant to Ark. R. Civ. P. 68, for an award of litigation expenses on the basis of an offer of judgment that they had filed in October 1997. Appellees also renewed their previous requests for an award of attorney's fees. On March 3, 1998, the chancery court handed down an order denying appellees' Rule 68-based motion for award of expenses and their renewed request for attorney's fees. It is this order that appellees, as cross-appellants, challenge on cross-appeal.

Appellants raise four issues on appeal. Cross-appellants raise five issues on cross-appeal. We will review the appellants' four

allegations of error and then review the cross-appellants' five allegations of error.

First, appellants assert that the chancery court erred in weighing the credibility of witness testimony when it granted appellees' motion to dismiss. Second, appellants allege that the chancery court erred in determining that they had to present clear, cogent, satisfactory, and convincing evidence of the oral contract to make the will at issue to surmount appellees' motion to dismiss. Third, appellants contend that the chancery court erred in determining that they had not presented a prima facie case that Sarah Klerekoper and Frances Abraham had entered into an oral contract whereby Ms. Abraham agreed to prepare a will leaving all of her property to appellants. Fourth, appellants maintain that the chancery court erred in refusing to consider the testimony of certain witnesses that Sarah Klerekoper stated that Frances Abraham had offered to make a will in favor of appellants if Ms. Klerekoper transferred her one-fifth share of the estate of their father, John Turner Abraham, to Ms. Abraham.

The standards governing our review of 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 chancery court's findings were clearly erroneous. Ark. R. Civ. P. 52(a); *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999). A chancery court's finding of fact 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. *Lammey v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998). In reviewing a chancery court's findings, we defer to the chancellor's superior position to determine the credibility of witnesses and the weight to be accorded their testimony. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). However, we do not defer to a chancery court's conclusion on a question of law. If the chancery court erroneously applied the law and the appellant suffered prejudice as a result, we will reverse the chancery court's erroneous ruling on the legal issue. *City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996).

For their first allegation of error, appellants maintain that the chancery court erred in granting the motion to dismiss that appellees made at the conclusion of appellants' presentation of their case-in-chief. According to appellants, the chancery court erred in granting appellees' motion to dismiss because it weighed the credibility of one of appellants' witnesses and also considered some of appellants' evidence in the light favorable to appellees. Recently, we set forth the standard that a chancery court is to apply when considering a defendant's motion for directed verdict or motion to dismiss the plaintiff's case:

> The supreme court has recently set forth the analytical framework that a chancery court is to follow when evaluating a defendant's motion for directed verdict. A chancery court is to evaluate the motion by deciding whether, if the proceeding were a jury trial, the evidence would be sufficient for the case to go to the jury. *See Swink v. Giffin*, 333 Ark. 400, 970 S.W.2d 207 (1998). In its evaluation of the plaintiff's case, the chancery court is not to assess the credibility of the testimony presented by the plaintiff's witnesses. *Id.* To determine whether the plaintiff has presented a prima facie case, the trial court must view the evidence in the light most favorable to the plaintiff, as the non-moving party, and give the evidence its highest probative value, taking into account all reasonable inferences deducible from the evidence. *Bradford v. Verkler*, 273 Ark. 317, 619 S.W.2d 636 (1981); *Suzuki of Russellville, Inc. v. Mid-Century Ins. Co.*, 14 Ark. App. 304, 688 S.W.2d 305 (1985). If the evidence, viewed in the light most favorable to plaintiff, is insubstantial, the trial court should grant the defendant's motion for directed verdict. *City of Little Rock v. Cameron*, 320 Ark. 444, 897 S.W.2d 562 (1995).

Bice v. Green, 64 Ark. App. 203, 209, 981 S.W.2d 105, 108 (1998).

We cannot address this allegation of error because appellants failed to make a contemporaneous objection before the chancery court. It is well established that we do not consider allegations of error raised for the first time on appeal. *See Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996); *Moses v. Dautartas*, 53 Ark. App. 242, 922 S.W.2d 345 (1996). The purpose of the contemporaneous-objection rule is to give the trial court a fair opportunity to consider an allegation of error and to correct it, if

the allegation is meritorious. *See Brooks v. State*, 256 Ark. 1059, 511 S.W.2d 654 (1974); *Western Union Tel. Co. v. Freeman*, 121 Ark. 124, 180 S.W. 743 (1915); *Jones v. Seymour*, 95 Ark. 593, 130 S.W. 560 (1910). Appellants' allegation of error is a good example of the sort of objection that, had it been made to the trial court, would have given it the opportunity to check whether it was applying the law correctly. The appellants should have objected when the chancellor's explanation from the bench of why he was granting appellees' motion to dismiss made it clear that the court was using the wrong standard to evaluate the motion. Because they did not do so, they deprived the chancery court of the opportunity to correct an alleged error, and we will not address this alleged error for the first time on appeal.

For their second allegation of error, appellants argue that the chancery court erred in determining that the evidence they presented had to be clear, cogent, satisfactory, and convincing in order to surmount appellees' motion to dismiss. In essence, appellants contend that in granting appellees' motion to dismiss, the chancery court erred by failing to consider the appellants' evidence in the light most favorable to them. We are unable to address this allegation of error for the reason set forth in the preceding paragraph — appellants failed to make a contemporaneous objection on this basis before the chancery court.

For their third allegation of error, appellants assert that the chancery court erred in determining that they had not presented a prima facie case that Sarah Klerekoper and Frances Abraham had entered into an oral contract whereby Ms. Abraham agreed to prepare a will leaving all her property to appellants. According to appellants, because they presented *prima facie* proof of this oral contract the chancery court erred in granting appellees' motion to dismiss. We cannot reach this allegation of error because, as we noted in our discussion of appellants' first allegation of error, appellants failed to make an contemporaneous objection to the chancery court that it was using the wrong standard to evaluate the appellees' motion. *See Stacks v. Jones, supra.* The chancery court did find that appellants failed to present clear, cogent, satisfactory, and convincing evidence that Sarah Klerekoper and Frances Abraham had entered into the oral contract at issue. We

have reviewed the record and our consideration of the evidence relating to the purported agreement leads us to conclude that the chancellor's finding is supported by the evidence.

For their fourth allegation of error, appellants contend that the chancery court erred in sustaining the appellees' objection, on the basis of double hearsay, to the proffered testimony of some of appellants' witnesses concerning out-of-court statements made by Sarah Klerekoper about out-of-court statements made to her by Frances Abraham stating her intent to bequeath all her property to appellants. The chancery court made this ruling in a pretrial order in response to a motion *in limine* that appellees had filed in November 1997. In this order, the court also ruled that the witnesses could repeat statements made by Frances Abraham concerning her intention to make a will in favor of appellants. Appellants made the following proffer of the testimony that these witnesses would have given, had they been allowed to testify, about out-of-court statements made to them by Sarah Klerekoper concerning out-of-court statements made to her by Frances Abraham:

> At this time, the [appellants] would make a proffer of evidence that the Court has ruled would be excluded as hearsay, concerning what witnesses were prepared to testify to about what Sarah Abraham Klerekoper told to them. Specifically, [these witnesses] would have all testified that Sarah Klerekoper told them that her sister, Frances Abraham, had offered to leave all of Frances' estate, at her death, to Sarah's three children [the appellants], in exchange for Sarah transferring all of her interest in their father's estate, the J.T. Abraham estate, to Frances, for no other consideration, other than the promise for Frances to leave her estate to Sarah's children. . . .

The chancery court's hearsay ruling was correct. Hearsay is a statement made by an out-of-court declarant that is repeated in court by a witness and is offered to prove the truth of the matter asserted in the out-of-court statement. Ark. R. Evid. 801(c); *see Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). Hearsay is inadmissible except as provided by law or by the rules of evidence. Ark. R. Evid. 802; *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 735 (1996). Statements by an out-

of-court declarant repeated by another out-of-court declarant, both of which are repeated in court by a witness, are inadmissible unless each part of the combined out-of-court statements conforms with an exception to the rule excluding testimony in the form of hearsay. Ark. R. Evid. 805.

Appellants contend that the chancery court's ruling was erroneous because Sarah Klerekoper's out-of-court statements repeating what Frances Abraham told her concerning Ms. Abraham's intention to bequeath all her property to appellants were admissible pursuant to Ark. R. Evid. 803(3). Rule 803(3) sets forth an exception to the rule against the admissibility of testimony in the form of hearsay. In pertinent part, Rule 803(3) states that in-court repetition of a declarant's out-of-court statement of his or her then existing state of mind, such as intent, plan, motive, or design is not excluded by the hearsay rule. Rule 803(3) has been applied to admit, over a hearsay objection, an out-of-court statement by a testator/declarant concerning his intent to make a particular disposition of his property by will. *See Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979); *Easterling v. Weedman, supra.* Appellants assert that Sarah Klerekoper's out-of-court statements repeating statements that Frances Abraham made to her concerning Ms. Abraham's intention to bequeath all her property to appellants are admissible pursuant to *Easterling* as a statement of intent by a testator. Appellants' reliance on *Easterling* is misplaced.

Unlike this case, *Easterling* does not involve hearsay within hearsay. Out-of-court statements made by Sarah Klerekoper would be admissible to show *her* intent to do a particular thing, but Rule 803(3) is limited to statements of the declarant's then existing state of mind and does not include statements by the declarant describing the state of mind of someone else, here Frances Abraham. Appellants fail to cite any other exception to the hearsay rule that would satisfy Rule 805's requirement for hearsay within hearsay and thereby render admissible Sarah Klerekoper's out-of-court statements repeating Frances Abraham's out-of-court statements, for the truth of the matter asserted therein, concerning her intent to bequeath all her property to appellants.

Appellees, as cross-appellants, raise five issues on cross-appeal. First, cross-appellants allege that appellants failed to file the record on appeal in a timely manner and, therefore, this court should dismiss appellants' appeal. Second, they assert that the chancery court erred in denying their request, pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1994), for an award of attorney's fees. Third, they contend that the chancery court should have awarded them attorney's fees pursuant to Ark. Code Ann. § 16-22-309 (Repl. 1994) and Ark. R. Civ. P. 11(a). Fourth, they maintain that the chancery court erred in denying the motion for litigation expenses that they made pursuant to Ark. R. Civ. P. 68. Finally, cross-appellants assert, as an alternative ground for affirmance, that the chancery court could have denied cross-appellees' claim on the basis of the doctrine of accord and satisfaction. None of cross-appellants' issues has merit.

First, cross-appellants assert that cross-appellees, as appellants, failed to file the record on appeal in a timely manner. According to cross-appellants, cross-appellees/appellants failed to file the record on appeal in a timely manner in that they did not obtain an order from the chancery court extending the time to file the record until after expiration of the time to obtain such an order. This allegation of error is meritless.

The chancery court handed down its order dismissing cross-appellees' case on January 29, 1998. Cross-appellees, as appellants, filed a timely notice of appeal on Monday, March 2, 1998, which was the last day upon which they could do so. *See* Ark. R. App. P.—Civ. 4(a); Ark. R. Civ. P. 6(a). Pursuant to Ark. R. App. P.—Civ. 5(a-b), cross-appellees, as appellants, had ninety days from the date of the notice of appeal to file the record on appeal or obtain an order from the chancery court extending the time within which to do so. The chancery court caused to be entered an order extending the time to file the record on appeal on Monday, June 1, 1998. This filing was timely given that the ninetieth day, May 31, 1998, was a Sunday. *See* Ark. R. Civ. P. 6(a). Because cross-appellees, as appellants, obtained an order extending the time to file the record on appeal within ninety days of the date of their notice of appeal, they obtained a timely extension of the time within which to file the record.

For their second allegation of error, cross-appellants assert that the chancery court erred in denying their motions for attorney's fees. Pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1994), the prevailing party in an action involving an allegation of breach of contract may be allowed a reasonable attorney's fee to be assessed by the trial court. *See Friends of Children, Inc. v. Marcus*, 46 Ark. App. 57, 876 S.W.2d 603 (1994). A prevailing party in a contract action may recover attorney's fees pursuant to § 16-22-308 even if he or she defended on the basis that there was no contract. *Cumberland Financial Group, Ltd. v. Brown Chemical Co.*, 34 Ark. App. 269, 810 S.W.2d 49 (1991). The decision to award attorney's fees and the amount to award are discretionary determinations that will be reversed only if the appellant can demonstrate that the trial court abused its discretion. *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998). A trial court is not required to award attorney's fees and, because of the trial judge's intimate acquaintance with the trial proceedings and the quality of service rendered by the prevailing party's counsel, we usually recognize the superior perspective of the trial judge in determining whether to award attorney's fees. *See Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). One of many factors that a trial court may consider in deciding whether to award attorney's fees is the result obtained by the prevailing party's counsel. *Id.*

In its March 3, 1998, order the chancery court noted that it was denying cross-appellants' motions for attorney's fees, "[f]or the reasons stated from the bench at the conclusion of the trial, the court denies all motions by [cross-appellants] for an award of attorney fees." At the conclusion of trial, the chancellor explained from the bench why he was denying cross-appellants' motion for attorney's fees:

> I believe [appellants] were acting in good faith in trying to enforce what they believed [to be the promise of Frances Abraham to Sarah Klerekoper]. I think [appellants'] attorneys did an excellent job, under the constraints of Arkansas law and the Rules of Evidence, and the fact they were trying to prove something that occurred years and years ago with deceased witnesses. For that reason, I'm not going to award any attorney fees or cost to any party in this action.

In their brief, cross-appellants argue, in essence, that they were entitled to an award of attorney's fees because the chancery court granted their motion to dismiss cross-appellees' claim. Cross-appellants' contention that they were entitled to attorney's fees is incorrect. As noted above, the decision to award attorneys' fees is discretionary, not mandatory, with the trial court. *Chrisco v. Sun Industries, Inc., supra.* Moreover, we cannot say that the chancery court abused its discretion to refuse to award cross-appellants attorney's fees where their argument is nothing more than an assertion that they are entitled to attorney's fees because of the manner in which they prevailed, by winning a motion to dismiss, at the chancery court level.

For their third allegation of error, cross-appellants assert that the chancery court erred in refusing to award them attorney's fees pursuant to Ark. Code Ann. § 16-22-309 (Repl. 1994) and pursuant to Ark. R. Civ. P. 11(a). This allegation of error is meritless.

Cross-appellants' contention that the chancery court should have awarded them attorney's fees pursuant to § 16-22-309 is procedurally barred. Cross-appellants never specifically requested that the chancery court award them attorney's fees pursuant to § 16-22-309. A party will not be heard to complain on appeal that the trial court did not grant him a particular kind of relief if he did not request it. *See Fine v. City of Van Buren*, 237 Ark. 29, 371 S.W.2d 132 (1963).

Pursuant to Ark. R. Civ. P. 11(a), a trial court may impose a sanction, including reasonable attorney's fees, on a party or the party's counsel if the party: 1) files a pleading, motion, or other paper that is not well grounded in fact and is warranted by existing law or a good faith argument for the modification of existing law, or 2) files a pleading, motion, or other paper for an improper purpose, such as to harass an opposing party or to cause unnecessary delay or needless expense. However, Rule 11(b) requires that a motion for sanctions pursuant to Rule 11(a) be made separately from other motions or requests and also describes the specific conduct alleged to be violative of Rule 11(a). Cross-appellants never requested that the chancery court impose Rule

11(a) sanctions on cross-appellees or their counsel; therefore, they are procedurally barred from obtaining an award of attorney's fees pursuant to Rule 11(a).

For their fourth allegation of error, cross-appellants contend that the chancery court erred in denying their motion styled, "Offer of Judgment," which they filed in October 1997. Cross-appellants filed this motion pursuant to Ark. R. Civ. P. 68. In pertinent part, cross-appellants' "Offer of Judgment" states:

> The [cross-appellants] offer to withdraw any claim for judgment for their attorneys' fees and costs against the [cross-appellees] in exchange for the [cross-appellees'] dismissal of their lawsuit filed herein.
>
> If this offer is accepted, the [cross-appellees] shall be entitled to receive one-third of one-fourth of the net value of the Estate of Frances Abraham to be calculated at the date of final distribution, as set forth in the Last Will and Testament of Frances Abraham. . . .
>
> If this offer is not accepted by the [cross-appellees] and [they] do not receive an award at trial of an amount in excess of the sum represented by this offer, then the [cross-appellees] shall be liable to the Estate for all costs accrued hereafter and the Estate shall seek judgment for the same as provided by [Ark. R. Civ. P.] 68.

Pursuant to Rule 68, a defendant may serve upon a plaintiff an offer to allow judgment to be taken against the defendant for the money or property specified in the offer and, if the plaintiff declines the offer and eventually recovers a judgment against the defendant less favorable than the defendant's offer to settle, the plaintiff must pay the defendant's reasonable litigation expenses incurred after the date upon which the offer was made. *See Darragh Poultry & Livestock Equipment Co. v. Piney Creek Sales, Inc.*, 294 Ark. 427, 743 S.W.2d 804 (1988). The purpose of Rule 68 is to provide a means by which a defendant can compel the plaintiff realistically to reassess his claim and thereby, perhaps, persuade plaintiff to settle. *See id*; Reporter's Note to Rule 68. Offers of judgment made pursuant to Rule 68 are effective only if they are bona fide offers. *Id.*

In its March 3, 1998, order the chancery court denied cross-appellants' motion for costs based on their October 1997

offer of judgment. The chancery court did so because the cross-appellants had offered cross-appellees "one-third of one-fourth of the net value of the Estate of Frances Abraham," which was *less than* the minimum amount that cross-appellees were to inherit. Pursuant to Frances Abraham's 1987 will, cross-appellees, as the children of Sarah Klerekoper, were to inherit one-fourth of Frances Abraham's property. The circuit court's decision was correct. On its face, Rule 68 is not applicable where a defendant makes an offer of settlement that is less than the minimum amount that the plaintiff can recover. The offer of judgment that cross-appellants made to cross-appellees could not compel them to reassess the likelihood of success on the merits of their claim and, because it offered them a settlement for less of Frances Abraham's property than they were legally entitled to, it was not a bona fide offer.

Finally, cross-appellants urge us to affirm the chancery court's grant of their motion to dismiss on an alternative ground. They maintain that we should affirm the chancery court's grant of their motion to dismiss because cross-appellees' claim was barred by the doctrine of accord and satisfaction. Cross-appellants base this argument on a document styled, "Release of all Claims," which Sarah Klerekoper signed in February 1974. In this release Ms. Klerekoper stated, in essence, that she released Frances Abraham from any claims that she might have arising out of Frances Abraham's handling of this estate of the father, John Turner Abraham. Given that we did not find any of appellants/cross-appellees' allegations of error to be meritorious, we need not consider cross-appellants' contention that there is an alternative ground upon which to affirm the chancery court's dismissal of cross-appellees' claim. If we affirm a judgment on one ground, we need not consider alternative grounds for affirmance. *See, e.g., Barnhart v. City of Fayetteville*, 335 Ark. 57, 977 S.W.2d 225 (1998), *Magness v. Commerce Bank*, 42 Ark. App. 72, 853 S.W.2d 890 (1993).

For the reasons set forth above, we affirm on appeal and we affirm on cross-appeal.

Affirmed on appeal and affirmed on cross-appeal.

HART and STROUD, JJ., agree.

ARKANSAS OKLAHOMA GAS CORPORATION *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 97-1440 999 S.W.2d 691

Court of Appeals of Arkansas
Division I
Opinion delivered September 29, 1999

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Hermann Ivester*, for appellant.

Lee McCullouch, for appellee.

SAM BIRD, Judge. Arkansas Oklahoma Gas Corporation (AOGC) appeals Order No. 19 entered by the Arkansas Public Service Commission in Docket No. 96-420-U. AOGC argues that the Commission erred in holding that its proposed curtailment policy was not in compliance with the Joint Stipulation and Agreement adopted by the Commission earlier in this docket in Order No. 15. Our decision in *Bryant v. Arkansas Pub. Serv. Comm'n,* 64 Ark. App. 303, 984 S.W.2d 61 (1998), reversed

and remanded Order No. 15; therefore, we dismiss this appeal because it is moot.

AOGC's present appeal is the second appeal that has been filed in this court from Commission Docket No. 96-420-U. This docket was opened by the Commission in response to a petition filed by AOGC for a rate increase in which it claimed a rate deficiency of $7,253,853. Prior to a hearing on AOGC's petition, the Commission was presented with a "Joint Stipulation and Agreement" entered into by most of the parties to the proceeding, which, among other things, proposed a revenue deficiency for AOGC of $3,495,988 and assigned the entire revenue deficiency to the residential class. Although the Attorney General did not dispute the proposed revenue requirement and revenue deficiency included in the Joint Stipulation and Agreement, he did urge the Commission to reject it because it resulted in a twenty-two-percent rate increase to the residential class. In Order No. 15, the Commission adopted the Joint Stipulation and Agreement, conditioned upon a three-year phase-in plan. The Attorney General then appealed Order No. 15, and while his appeal was pending, the Commission entered Order No. 19, the order involved in this appeal.

In Order No. 19, the Commission held that AOGC's proposed curtailment policy was not in compliance with the Joint Stipulation and Agreement and Order No. 15 and directed AOGC to refile its curtailment policy to reflect that specified categories of customers all have the same curtailment priority. AOGC filed a revised curtailment policy that was approved by the Commission in Order No. 20, but it also filed an application for rehearing of Order No. 19, which the Commission subsequently denied. AOGC then filed this appeal of Order No. 19.

After AOGC had filed its appeal of Order No. 19, we handed down our decision in the Attorney General's appeal, *Bryant v. Arkansas Pub. Serv. Comm'n, supra.* In *Bryant,* we agreed with the Attorney General's contention that the Commission had failed to make factual findings to support its adoption of the Joint Stipulation and Agreement, conditioned upon the three-year

phase-in plan, and reversed and remanded Order No. 15 to the Commission.

AOGC has filed nothing with this court since we handed down the *Bryant* decision to indicate that the Commission has readopted the Joint Stipulation and Agreement. Therefore, we must assume that the Joint Stipulation and Agreement is no longer a part of a binding Commission order. Although AOGC's appeal is from a different order of the Commission, Order No. 19, it involves the Commission's interpretation of the Joint Stipulation and Agreement and Order No. 15. Because of our reversal and remand of Order No. 15 in *Bryant, supra,* any opinion that we would give addressing the merits of AOGC's appeal would be purely advisory.

■ ■ It is our duty to decide actual controversies by a judgment that can be carried into effect and not give opinions upon abstract propositions or declare principles of law that cannot affect the matter in issue. *Bryant v. Arkansas Pub. Serv. Comm'n,* 45 Ark. App. 47, 870 S.W.2d 775 (1994). An issue is moot when it has no legal effect on an existing controversy; it is one in which a decision of the court on appeal could not afford the appellant any relief. *Id. See also Central Ark. Tel. Coop., Inc. v. Arkansas Pub. Serv. Comm'n,* 61 Ark. App. 147, 965 S.W.2d 790 (1998). As a general rule, we do not address moot issues. *Id.*

Dismissed.

PITTMAN, JENNINGS, ROGERS, STROUD, and ROAF, JJ., agree.

LYON COLLEGE *v.* Melissa GRAY

CA 99-99 999 S.W.2d 213

Court of Appeals of Arkansas
Division II
Opinion delivered September 29, 1999

Hughes & Luce, L.L.P., by: *Jim Hunter Birch*, for appellant.

Robert M. Abney, P.A., for appellee.

JUDITH ROGERS, Judge. This appeal is brought from a jury verdict awarding appellee Melissa Gray $20,644 on her breach of contract claim against appellant Lyon College. In 1995, while appellee was a student at Lyon, she was accused by the college's Honor Council of using improper information to prepare for a physics test. The council found her guilty, and her conviction was upheld on appeal to the president of the college. As a result, she was suspended from school for the remainder of the 1995-1996 academic year, given an "F" in her physics course, and given a "W" in her other courses. In 1996, she filed suit against the college, which resulted in the aforementioned jury verdict. Appellant contends on appeal that the trial court should have granted a directed verdict in its favor. We agree and reverse and dismiss the case.

Appellant is a private Presbyterian-affiliated college located in Batesville. In 1995, it employed an Honor System which was set out in the student handbook. The system consisted of an Honor Code, an Honor Pledge, and the procedures for administering and enforcing the system. The Honor Code provided, among other things, that "we understand honor to include . . . a commitment to abstain from all forms of cheating and plagiarism." In the Honor Pledge, students promised, among other things, to abstain from all fraud in academic work. The administering body of the system was the Honor Council, composed of twelve students. The council's duties included investigation of reports of possible Honor Code violations, conducting trials of those charged with

violations, and imposing a penalty if an accused were found guilty. An accused was provided with written notice of an allegation of a code violation; written notification of actual charges; a student adviser as an assistant and advocate; a closed, recorded hearing; the opportunity to present witnesses at the hearing and to cross-examine other witnesses; and the right to appeal the council's decision to the president of the college.

On October 18, 1995, appellee was notified by the Honor Council that an investigation had begun "surrounding the possibility of an honor violation in your Physics class." Ten days later, she was informed that a trial would be conducted and that she was being charged with using "inappropriate information in preparation for the test administered on October 9 & 10." The dates referred to corresponded with a test given by physics professor Dr. John Sample. Dr. Sample gave his students the option of taking the exam, which was the second of the year, on either day. Appellee took the test on October 10 and scored 100. In her prior exam, she had scored a 29, with a 21 on the corresponding take-home test.

In studying for her October 10 exam, appellee looked at a copy of one of Professor Sample's exams from the previous year. As it turned out, the October 10 test and the previous year's test were identical. Within days after the test was taken, the Honor Council began an investigation. Although use of the old test did not, in and of itself, constitute a code violation, the council explored the possibility that certain students had procured a copy of the old test after having received information that it and the current year's test were the same.

During appellee's trial before the Honor Council, she admitted that she had studied from the old exam. However, she denied any prior knowledge of the content of the test she took on October 10. Her testimony was contradicted by her roommate and sorority sister, Julie Roach. Roach testified that, on the evening of October 9, appellee informed her that the old test and the upcoming test were going to be the same. Roach saw appellee and appellee's boyfriend, Lynn Monroe, working through the problems on the old test. Further, she testified that, when she told

appellee that having prior knowledge about the next day's test was probably cheating, appellee replied that she did not care, that her grades were low in physics, and that she could not afford not to study from the old test.

After the trial, the Council found appellee guilty of a code violation and imposed sanctions. Appellee immediately appealed the decision to John Griffith, President of the college. In her letter to him, she stated that she had always maintained her innocence in the case and that the trial had come down to "the accuser's word against my own." Griffith reviewed the evidence before the council and some additional evidence, including Dr. Sample's grade sheet which reflected that, on the corresponding take-home portion of the October 10 exam, appellee had scored a 51. Following his review, Griffith upheld the sanctions imposed by the council. Appellee withdrew from school, whereupon she lost approximately $15,000 in financial aid, the receipt of which had been dependent upon her academic performance. She subsequently enrolled at UA-Fayetteville.

On May 13, 1996, appellee filed the lawsuit that is the subject of this case. She alleged that the Honor System contained in her student handbook constituted a contract between herself and the college and that the college, by its unwarranted suspension of her, breached the contract. At trial, appellee testified, as she had before the Honor Council, that she was innocent of any misconduct. Upon being cross-examined, she admitted that the college had followed its procedures in its investigation and conduct of the trial. Further, she acknowledged that the Council had been presented with two different versions of what happened on the evening of October 9 — hers and Julie Roach's — and that the Council was "pretty much" faced with the decision of which of them was telling the truth. Additionally, she admitted that it would constitute an Honor Code violation if a person studied for a test by using knowledge obtained from someone else regarding the content of the test. Appellee's testimony regarding her lack of culpability was corroborated by Lynn Monroe (who was also convicted of a code violation). However, John Griffith testified that he had not found appellee's story believable.

At the close of appellee's case, appellant moved for a directed verdict, *inter alia*, on the grounds that, because the college had fully complied with its Honor System procedures and had based its decision on the credibility of the witnesses, the court system should not interfere with the college's decision. The trial judge took the matter under advisement and directed appellant to proceed with its case. At the close of all evidence, appellant renewed its motion for a directed verdict. The trial judge reserved a ruling, but submitted the case to the jury. The jury returned with a general verdict in favor of appellee. Appellant filed a motion for a judgment notwithstanding the verdict based upon its earlier directed-verdict arguments. The court did not act on the motion, and it was deemed denied after thirty days. This appeal followed.

A directed verdict is a challenge to the sufficiency of the evidence. *Sparks Regional Medical Ctr. v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998). On appeal, we view the evidence in a light most favorable to the appellee. *Id.*

Virtually all courts recognize that an educational institution, particularly a private one, must be given some discretion in the administration of its disciplinary proceedings. *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975); *Clayton v. Trustees of Princeton Univ.*, 608 F. Supp. 413 (D.N.J. 1985); *Blaine v. Savannah County Day School*, 228 Ga. App. 224, 491 S.E.2d 446 (1997); *Napolitano v. Trustees of Princeton Univ.*, 186 N.J. Super. 548, 453 A.2d 263 (1982). *See also*, Annot., *Breach-School Dismissal*, 47 A.L.R.5th 1 (1997). Likewise, in Arkansas, we are reluctant to allow the judiciary to encroach upon the disciplinary proceedings of an educational institution. In *Henderson State Univ. v. Spadoni*, 41 Ark. App. 33, 848 S.W.2d 951 (1993), this court recognized that there is a general policy against interference by the courts in matters best left to school authorities. In *Smith v. Denton*, 320 Ark. 253, 895 S.W.2d 550 (1995), our supreme court stated that "[t]he avenue for judicial review of the substance of academic decisions is narrow" and that a court "has no power to interfere in the exercise of a state-regulated university's discretion in the promulgation and implementation of disciplinary measures unless it is shown by clear and convincing evidence that the university abused its discretion."

Abuse of discretion may occur if the university fails to follow its own procedural guidelines or if its disciplinary decision is not based upon substantial evidence. *Slaughter v. Brigham Young Univ., supra; Napolitano v. Trustees of Princeton Univ., supra.*

■ ■ Because we have no allegations of a procedural due process violation in this case, the circuit court review should have been confined to whether appellant's decision to sanction appellee was supported by substantial evidence. The evidence before the Honor Council, by appellee's own admission, was conflicting and a matter of a credibility determination. Despite appellee's testimony that she was innocent of any wrongdoing, Julie Roach provided evidence that appellee had prior knowledge of the content of the October 10 test. If the Council believed Miss Roach's testimony, as it apparently did, then it had substantial evidence to find appellee guilty of an Honor Code violation. Evidence in conflict presents a question of fact to be decided by the university's disciplinary committee. *Henderson State Univ. v. Spadoni, supra.*

■ Based upon the forgoing, we hold that a directed verdict should have been granted in favor of appellant. Even when the facts are viewed in a light most favorable to appellee, there was no clear and convincing evidence of an abuse of discretion by appellant. Once it was shown that appellant followed its own procedural guidelines and based its disciplinary decision on substantial evidence, judicial review of appellant's actions should have ceased, and the case should not have gone to the jury. The jury's verdict is therefore reversed and dismissed. Consequently, appellee's attorney fee award is also reversed and dismissed.

MEADS and ROAF, JJ., agree.

Wiley H. GRUBBS *v.* William C. HALL

CA 99-196 999 S.W.2d 693

Court of Appeals of Arkansas
Division I
Opinion delivered September 29, 1999

Peel & Simmons, P.A., by: *Richard L. Peel*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *William H. Edwards*, for appellee.

TERRY CRABTREE, Judge. This case involves an order from the Faulkner County Circuit Court setting aside a February 2, 1995, judgment against the appellee, William C. Hall. On appeal, the appellant, Wiley H. Grubbs, argues that the trial judge's decision was clearly erroneous because no extrinsic fraud was perpetrated upon the court and because appellee failed to state a meritorious defense in his motion to set aside the judgment. We reverse and remand.

Appellant was driving his vehicle on a highway in Faulkner County, Arkansas, when his car was hit in the rear by appellee. Appellant filed suit against appellee, but appellee's automobile insurance company, Credit General Insurance Company, refused to defend appellee, stating that his policy had expired for nonpayment.

On February 2, 1995, both appellant and appellee appeared for trial; however, counsel for appellant was not present. Both parties went to the home of appellant's counsel and met prior to the hearing set for that afternoon. During that time, several conversations took place between appellant's counsel and the unrepresented appellee, which concerned appellee's liability in the case and a possible settlement. Then, appellee signed a wage assignment prepared by appellant's counsel, which provided for a regular deduction from his paycheck of $50 per month. Appellant's counsel told appellee that he could receive his money back from a contemplated lawsuit against Credit General Insurance Company.

Thereafter, appellant sued Credit General Insurance Company. The circuit judge ruled in favor of the insurance company, but on appeal the Arkansas Supreme Court reversed the decision. *See Grubbs v. Credit General Insurance Company*, 327 Ark. 479, 939

S.W.2d 290 (1997). Later Credit General Insurance Company retained counsel for appellee in an attempt to set aside the judgment in this case. The circuit judge found in favor of appellee based upon Ark. R. Civ. P. 60. The judge determined that appellee had a meritorious defense and that fraud had been practiced upon the court in procurement of the judgment. On September 30, 1998, the circuit judge entered an order setting aside the judgment dated February 2, 1995.

Arkansas Rule of Civil Procedure 60(c) provides:

> 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.

However, in order to vacate or modify a judgment or order, the lower court must determine that at least one of an enumerated list of circumstances exists. Ark. R. Civ. P. 60(c). In this case, we believe that the only subsection that could possibly apply is subsection (c)(4), which requires fraud practiced by the successful party in obtaining the judgment. The fraud to be shown is not intrinsic, but rather fraud in the procurement of the judgment or extrinsic fraud. *Ward v. McCord*, 61 Ark. App. 271, 966 S.W.2d 925 (1998). This issue of whether the procurement of a judgment amounts to a fraud upon the court is a question of law. *Hardin v. Hardin*, 237 Ark. 237, 372 S.W.2d 260 (1963). Appellee had the burden of showing this fraud by clear, cogent and convincing evidence. *Ward, supra.* In *Ward*, this court quoted *United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93, wherein the Supreme Court described extrinsic fraud as follows:

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side.

Id. at 280, 966 S.W.2d at 929 (1998).

To reverse the circuit judge's decision, we must find that he abused his discretion. *See Meisch v. Brady*, 270 Ark. 652, 606 S.W.2d 112 (Ark. App. 1980). After careful review, we find that the lower court judge did in fact abuse his discretion in setting aside the judgment. Appellee proceeded *pro se* in this matter and at his own risk. Perhaps he should have employed counsel to represent him. Nevertheless, we find that no fraud, extrinsic or otherwise, was practiced upon the court or appellee.

We need not address appellant's second argument on appeal as appellant has succeeded on his first challenge. We reverse and remand with directions to the trial court to reinstate the 1995 order. *See Meisch, supra.*

Reversed and remanded.

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

GREEN BAY PACKAGING *v.* Edward BARTLETT

CA 99-205 999 S.W.2d 695

Court of Appeals of Arkansas
Division II
Opinion delivered September 29, 1999

Michael E. Ryburn, for appellant.

David H. McCormick, for appellee.

MARGARET MEADS, Judge. Appellant, Green Bay Packaging, appeals from a decision of the Workers' Compensation Commission which found that appellee's headaches were a result of his compensable injury and that medical treatment provided for the headaches constituted reasonably necessary medical treatment for the injury. The Commission awarded accrued benefits to be paid in a lump sum without discount.

At the hearing before the administrative law judge (ALJ), it was stipulated that appellee sustained a compensable injury in April 1996; that the claim was accepted as compensable; and that benefits were paid until November 1997, when appellant contro-

verted the payment of additional benefits for medical care for appellee's headaches. The ALJ found that the preponderance of the evidence showed that appellee's severe headaches, which he suffered following the trauma to his head, were caused by the compensable injury, and that his treatment by Dr. J. Brett Ironside for headaches was reasonably necessary in connection with his compensable injury. The ALJ also found that appellee suffered facial disfigurement as a result of the injury and awarded benefits of $500. The full Commission affirmed and adopted the ALJ's opinion.

Appellee testified that he was injured in April 1996 when tightening some ropes with a winch. The handle slipped and hit him in the face five times, causing lacerations to his nose, forehead, and skull, and also over his right eye. Appellee received eighteen stitches at the hospital and was released to go home that night. Appellee underwent a rhinoplasty to repair his nose and was eventually referred to Dr. Ironside, a neurologist, because of severe headaches. Appellee said that he suffers a severe headache with massive forehead pain approximately every two weeks. He gets dizzy, has blurred vision, and is sometimes nauseous. When he gets a headache, he takes medicine prescribed by Dr. Ironside, and if that does not work he goes to the emergency room for a pain shot. Dr. Ironside, who has treated appellee for a little over a year, has tried several different medications but they have not helped. Appellee said he wants to return to Dr. Ironside because he does not believe everything has been tried. Appellee testified further that prior to his injury he never experienced any headaches like the ones he described, and he does not remember having headaches prior to April 22.

Appellee testified further that he was a light-heavyweight boxer prior to his compensable injury, but was never knocked down, never received a concussion, never had any facial cuts, and never experienced headaches associated with his boxing career. He has not boxed since March 1996 when he was disqualified for a low blow. He was also involved in a fight at work in September 1996, but only got hit in the stomach.

Dr. Ironside testified that appellee was referred to him by Dr. Jack Lyon, and appellee told him that he was having problems with headaches that started after the facial injury. He testified that appellee is still taking medication; they have made adjustments and tried to reduce the dosage but appellee has worsened; and there is no way to predict how long appellee's problem will last. Dr. Ironside stated that although the headaches could be caused by something else, it was his opinion that the compensable injury was definitely the defining point in regard to the headaches. Dr. Ironside was aware that appellee had been a boxer, but understood that the severe headaches started after the work incident. He said that appellee might have had heavy blows to the head while boxing, but he would be surprised if a boxer were able to strike a blow like a metal winch could. He testified further that appellee's condition has existed for over two years; that there are other medications that can be tried; that appellee is not headache free, but is now as good as he has been in almost two years; and if he does not get a whole lot worse, they may have to be content with this. He said that headaches are subjective, but he has no reason to not believe appellee. Dr. Ironside testified that with a "high degree of certainty" the thing that started appellee's headaches was the head injury with the winch.

Appellant argues on appeal that there is no substantial evidence to support the Commission's findings. When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995). What constitutes reasonable and necessary medical treatment is a

fact question for the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996).

Appellant argues that appellee suffered headaches prior to his compensable injury; that Dr. Ironside and appellee testified that appellee had not improved during his course of treatment with Dr. Ironside; that there are no objective findings to corroborate appellee's headaches; and that Dr. Ironsides' conclusion that appellee's headaches were caused by his compensable injury is "speculation." We do not agree.

In the first place, although appellant states that a March 18, 1996, report of Dr. Jack Lyon establishes that appellee had headaches before being hit in the face, this report as abstracted states only "most likely strep pharyngitis." Moreover, appellee testified that prior to his injury he never experienced any headaches like the ones he described, and he does not remember having headaches prior to April 22. It is the exclusive function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Kuhn v. Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996).

Further, although there was testimony that appellee had not improved over his course of treatment, Dr. Ironside testified that there are other medications that can be tried. In regard to appellant's argument that there are no objective findings to support appellee's claim of headaches, Ark. Code Ann. § 11-9-102(4)(D) (Supp. 1999) requires that a *compensable injury* be established by medical evidence supported by objective findings. Appellant does not challenge the compensability of appellee's injury, but argues that it is "inconsistent" for the workers' compensation act to require objective findings to initiate a claim and yet not require objective findings after the burden of compensability has been met. It argues that the Commission is bound by the requirement of objective medical findings in most situations. Appellant has cited no case or statutory law that requires objective findings in this case. Appellee received a severe blow to the head resulting in multiple facial lacerations as well as a scalp laceration all requiring eighteen stitches and a subsequent rhinoplasty. Appellant does not argue that appellee's injury was noncompensable. Moreover, Dr.

Ironside stated in a November 27, 1996, letter that appellee fell into the category of post-head-trauma syndrome with postconcussion headaches. We do not believe more is required.

In regard to appellant's argument that Dr. Ironside's opinion is based on speculation, suffice it to say Dr. Ironside testified "with a high degree of certainty that the thing that got all this started was the head injury with the winch."

We conclude there is substantial evidence to support the Commission's decision.

Affirmed.

ROAF and ROGERS, JJ., agree.

Alexander W. JONES, Jr.; Dr. Michael L. Carnahan and Fred Carnahan *v.* Larry BARGER

CA 99-203 1 S.W.3d 31

Court of Appeals of Arkansas
Division II
Opinion delivered October 6, 1999

Green & Henry, by: *David G. Henry*, for appellants.

Carl J. Madsen, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Chancery Court of Arkansas County denying the appellants' claim for quiet title. We reverse and remand.

Appellants filed a complaint in 1997 asking that the chancery court quiet title in them to a disputed strip of land in northern Arkansas County. The appellants also asked the chancery court to order the appellee to remove a fence that he had constructed on the land and requested damages in the amount of the fair rental value of the land for the amount of time that the land was surrounded by appellee's fence. Appellee counterclaimed for quiet title. The chancellor determined that the appellants had failed to establish their title to the land and issued a judgment denying their claim from which this appeal arises.

The testimony at trial demonstrates that both parties trace their claim of title to Lee Finch who in 1941 conveyed by warranty deed to appellee's predecessors the following property:

> . . . all that part of the South Half of the Northwest Quarter (S1/2 NW1/4) lying North and East of Bayou Meto, all in Section 24, Township 3 South, Range 6 West.

In 1944 Finch conveyed to the appellants' predecessors the following property:

> The Southwest Quarter of the Northwest Quarter . . . all lying West of and Right of Bayou, Section 24, T-3-S, R-6-W.

It is undisputed that the property descriptions both purport to convey in part the same eleven acres of land at issue and that both of the chains of title passed unbroken to the parties in this matter. The issue presented to the chancery court was simply, whose title is superior? The chancellor determined that, because

the conveyance to appellee's chain pre-dated that to the appellants,' the appellee had superior title unless the appellants were able to prove adverse possession. On appeal, appellants do not contest that in 1944 Finch erroneously issued a deed which purported to convey property which he had already conveyed to another. Nor do the appellants contest that they have failed to satisfy the required proof of adverse possession. Rather, the appellants assert that they were not required to prove adverse possession because they claim superior title by having paid the taxes under color of title over a continuous seven-year period.

Arkansas Code Annotated section 18-11-102 (1987) states:

> Unimproved and unenclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he has color of title thereto, but no person shall be entitled to invoke the benefit of this section unless he, and those under whom he claims, shall have paid the taxes for at least seven (7) years in succession.

The chancery court, in reliance upon *Alphin v. Blackmon*, 180 Ark. 260, 21 S.W.2d 426 (1929), charged the appellants with the burden of proving that they took by adverse possession under this statute. Specifically, the chancellor stated in his conclusions of law that:

> In [*Alphin*] the Court held "where reliance is placed upon seven (7) years of payment of taxes on wild and unoccupied land, the burden is on the one claiming under Acts 1889 to bring himself within the terms of the statute." That statute provides "that the burden on a party claiming title by adverse possession to show that his possession was actual, open, hostile and exclusive and continued without break for the full statutory period." Plaintiffs have failed to meet that burden and, therefore, their claim for quiet title must fail.

■ We review chancery cases *de novo* on the record. *Appollos v. International Paper Co.*, 34 Ark. App. 205, 808 S.W.2d 786 (1991). But we do not reverse the decision of the chancellor unless his findings are clearly against the preponderance of the evidence, giving due deference to his superior position to judge the credibility of the witnesses and the weight to be given their testimony. *Id.* (citing *Hicks v. Flanagan*, 30 Ark. App. 53, 782 S.W.2d

587 (1990); *Clark v. Clark*, 4 Ark. App. 153, 632 S.W.2d 432 (1982); Ark. R. Civ. P. 52(a)). "However, a chancellor's conclusion of law is not entitled to the same deference. If a chancellor erroneously applies the law and the appellant suffers prejudice, the erroneous ruling is reversed. Manifestly, a chancellor does not have a better opportunity to apply the law than does the appellate court." *City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 339-40, 916 S.W.2d 95, 99 (1996).

In the instant case, the law was erroneously applied to the facts presented. Arkansas Code Annotated section 18-11-102 has three requirements: (1) the land must be unimproved and unenclosed; (2) the party paying the taxes must have color of title; and (3) the party paying the taxes must have done so for at least seven years in succession. If these three conditions are met, the land is deemed to be in the possession of the person who is paying the taxes. "The possession contemplated by this section has the same effect *as if* the person paying the taxes had been in actual, adverse possession of the land for the full seven-year period." *Appollos*, *supra* (emphasis added). The statute does not require actual adverse possession.[1]

Both the chancery court and the appellee rely upon the case of *Alphin v. Blachmon*, *supra*, as authority that the party claiming under section 18-11-102 must prove actual adverse possession. This reliance is misplaced. As the appellants correctly pointed out in their brief, the court in *Alphin* addressed the issue of adverse possession only because the party claiming title by virtue of paying

[1] We recognize that the Arkansas General Assembly amended the statutory requirements for proof of adverse possession in Act 776 of 1995, now codified at Ark. Code Ann. § 18-11-106. In order for a claimant to establish title by actual adverse possession under the new law, the claimant must prove color of title and payment of taxes in addition to all of the elements necessary under existing adverse possession law in the State of Arkansas. *Id.* Although this issue has not been spoken to by the Supreme Court, we read these amendments as applicable only to the law of actual adverse possession. Act 776 does not affect the issue before the court in this matter, namely the quieting of title in one who under color of title pays taxes on wild and unimproved land for seven consecutive years. *Cf. Color of Title and Payment of Taxes: The New Requirements Under Arkansas Adverse Possession Law*, 50 ARK. L. REV. 489.

taxes had not satisfied the requirements of the predecessor to section 18-11-102.

> The appellants seek to fortify their claim of adverse possession by proof of payment of taxes, and insist that actual pedal possession of lands may be tacked to constructive possession of them when wild and unimproved by payment of taxes upon them under color of title. *It is true that where one, having color of title, pays taxes on wild and unimproved land, and thereafter takes possession of the same, continuing to pay the taxes, the benefit of the tax payments will not be forfeited by reason of the possession taken* (Gaither v. Gage, 82 Ark. 51, 100 S.W. 80), but we cannot see how an application of that rule would be of any benefit to the appellants under the facts of this case. *Where reliance is placed on the seven-year payment of taxes, under act March 18, 1899, the burden is upon the one making the payments to bring himself within its terms. Bradley Lumber Co. v. Miller*, 94 Ark. 118, 126 S.W. 98.
>
> This suit was filed on November 26, 1927, and if the theory of the plaintiffs is that the lands were wild and unimproved, and that title vested by reason of the payment of taxes, then it could not avail, *because seven years have not elapsed since the lands became vacant in 1922, nor have seven payments of taxes been made since that date.*

Alphin, 180 Ark. at 265-66 (emphasis added). Because the appellants in *Alphin* had not satisfied the requirement of seven years taxes and vacancy, the court went on to consider whether the parties could take by adverse possession. The court did not require adverse possession as an element under the statute then in effect. It was error for the chancery court to require the appellant to prove actual adverse possession of the land. Therefore, we must reverse.

In his "Findings of Fact and Conclusion of Law," the chancellor made the following findings of fact:

> 4. Subsequent to that time, the Finches conveyed to the predecessors in title of the Plaintiff, the following described property:
>
> "The Southwest Quarter of the Northwest Quarter . . ."
>
> by Warranty Deed on November 9, 1944.

6. The testimony of both parties was that the lands were wild and unimproved.

8. That the testimony of the Plaintiff and his predecessors in title was that they have hunted, posted and otherwise occupied the property, and since 1958 paid the taxes on said property, except for the years of 1994, 1995, and 1996.

The findings of fact outlined above are clearly supported by the record.

Unimproved and Unenclosed:

The statute applies only to "unimproved and unenclosed land;" that is to say, land that is wild and in a state of nature. This does not mean, however, that the lands must never have had any other status, for improved lands may be permitted to return to a state of nature. The statute relates to the condition of the lands at the time the payment of taxes is made under color of title, regardless [of the] former state of the lands; and if at that time are unimproved and unenclosed, that is to say in a wild state as before the improvements were first made, then they fall within the terms of the statute and such payments amount to occupancy which will in course of time ripen into title by limitation.

Appollos, supra.

Although there was a fence erected on the property by the appellee in 1996, the testimony shows that the land was unimproved and unenclosed until that time as required by the statute. Further, although the court stated that the land was "wild" and "unimproved," the wording is synonymous with the statutory requirement of "unimproved and unenclosed." "This court has used the word 'wild' interchangeably with the words 'unimproved and unenclosed,' relative to lands claimed under said statute, and held that a finding that lands were wild was sufficient to show that they were 'unenclosed and unimproved.'" *Schmeltzer v. Scheid*, 203 Ark. 274, 157 S.W.2d 193 (1941). The wild and unimproved nature of the property at issue here was not disputed by either party.

Color of Title:

There is no dispute that the appellants claim title to the property pursuant to the 1944 warranty deed from Finch to appellants' predecessors in title. It is also undisputed that this title passed continuously and unbroken down to the appellants through a series of warranty and trustee deeds. However, the appellee argues that the appellants cannot claim title to the land because appellee's title was first and is therefore superior.

> "Color of title is not, in law, title at all. It is a void paper, having the semblence of a muniment of title, to which, for certain purposes, the law attributes certain qualities of title. Its chief office or purpose is to define the limits of the claim under it. Nevertheless, it must purport to pass title. In form, it must be a deed, a will, or some other paper or instrument by which title usually and ordinarily passes. Such qualities as are imputed to it by the law, for limited purposes, are purely fictitious and are accorded to it only to work out just results. Fictions are never used in procedure or law for any other purpose."

Weast v. Hereinafter Described Lands, 33 Ark. App. 157, 803 S.W.2d 565 (1991) (citations omitted) (quoting *Bailey v. Jarvis*, 212 Ark. 675, 208 S.W.2d 13 (1948)). "A trustee's deed, whether valid, void, or voidable, is color of title unless facts in avoidance appear on the face of the instrument." *Buchner v. Sewell*, 216 Ark. 221, 225 S.W.2d 525 (1949).

■ It is irrelevant in this matter that the deed to appellee's chain of title predated that to the appellants' chain of title. Appellants must have only "color of title." They clearly have.

Payment of Taxes:

At trial, the appellants introduced into evidence a compilation of tax records showing that they and their predecessors in title had paid the taxes on the land in question continuously from 1958 through 1994.

"Where one cannot show a perfect title, he may establish a prima facie title by showing that he and those under whom he claims had color of title to the lands for more than seven years and

during that time he, and those under whom he claims, had continuously paid taxes on the property." *Broadhead, supra.* "Payment of taxes under color of title for more than seven years on unenclosed and unimproved property confers title by limitation." *Appollos, supra.* "In *Towson v. Denson*, 74 Ark. 302, 86 S.W. 661, it was said that payment of taxes on unimproved and unenclosed land under color of title for seven years, if consecutive, 'constitutes an investiture of title.' . . . . [An] investiture follows such payments when all statutory requirements are met and [ ] the title so acquired is fee simple." *Buchner, supra.* "The purpose of the statute was to create a constructive possession by the payment of taxes which will oust the constructive possession of the owner who did not pay taxes." *Hubble v. Grimes*, 211 Ark. 49, 199 S.W.2d 313 (1947). "The act . . . , by its express terms, applies only to persons who pay taxes under color of title, but its obvious and declared purpose was to encourage the payment of taxes and to protect persons who pay them." *Schmeltzer, supra.*

"The taxes on the lands in controversy have been paid by the appellants each and every year since 1905, with the exception of the year 1923. The lands in controversy being unimproved and uninclosed, the appellant acquired title thereto by such payment of taxes." *Union Sawmill Co. v. Pagan*, 175 Ark. 559, 299 S.W. 1012 (1927). "Where lands continue to be unimproved and uninclosed, and seven successive payments of taxes have been made, the possession continues and becomes complete, unless the possession be broken by adverse entry or by commencement of an action before expiration of the seven-year period from the date of the first payment." *Id.*

The evidence clearly demonstrates in this matter that the appellants and their predecessors began paying the taxes on the disputed property in 1958 and did so continuously until 1994. This action was brought in 1997, far outside of the necessary seven years to defeat title. Nor has the appellee regained title through adverse possession as the evidence clearly shows that the land was not occupied or improved at any time. The only indicia of possession which the appellee can rely upon is the posting of the property in 1986 and 1987. This is clearly not seven years worth of possession sufficient to amount to adverse possession and over-

come the appellants' title. Nor did this adverse action take place within the initial seven years after the appellants' predecessors began paying taxes in 1958.

As stated above, the purpose of the statute is to encourage the payment of taxes. "One may not discharge his obligation to pay his taxes by showing that he thought he had paid them when his misapprehension was not induced by some officer charged with the duty of collecting the taxes." *Schmeltzer, supra.* In the instant matter, appellee's predecessors in title claim that they were informed by the tax assessor that they were indeed paying the taxes on the property in question. This testimony is disputed by the tax assessor himself who testifies that he did not so inform them. The tax assessor claims that he informed the appellee's predecessors that they did not own the land in question and that they needed to get it surveyed. Regardless of this dispute in testimony, the appellee is not able to overcome appellants' title because this conversation with the tax assessor did not occur until sometime in the 1980s. The appellants had been paying the taxes since 1958. Therefore, the appellee's inaction cannot be attributed to the tax assessor for the initial seven years of payments.

■ Because all of the conditions of the statute were satisfied, title in fee simple is vested in the appellants. *See Buckner, supra.* We remand so that the chancery court can enter an order quieting title to the disputed land in the appellants and address the two remaining issues: whether the appellee should be directed to remove the fence that he erected and whether the appellee is responsible for the fair rental value of the property during the time the fence was standing.

Reversed and remanded.

ROAF and MEADS, JJ. agree.

NEWCORT FINANCIAL, INC. *v.*
CANAL INSURANCE COMPANY

CA 98-1516 1 S.W.3d 452

Court of Appeals of Arkansas
Division II
Opinion delivered October 6, 1999
[Petition for rehearing denied November 10, 1999.]

Barrett & Deacon, by: *D. P. Marshall Jr.* and *James D. Bradbury*, for appellant.

Ledbetter, Hornberger, Cogbill, Arnold & Harrison, by: *Rebecca D. Hattabaugh*, for appellee.

JUDITH ROGERS, Judge. The appellant, Newcourt Financial, Inc., is a financial institution that loaned money to Mike Fisher for the purchase of a commercial truck. The truck was insured by appellee, Canal Insurance Co. The insurance policy named appellant as a payee under the policy and specified that appellant's interest "shall not be invalidated by an act or neglect" of Fisher. Less than a year after Fisher purchased the truck, it overturned on I-40 in Oklahoma and burned. Appellee accused Fisher of arson and refused to pay on the policy. Appellee filed an action for declaratory judgment in the Crawford County Circuit Court seeking a declaration that it owed no payment to either Fisher or Newcourt. Newcourt filed a counterclaim alleging that Canal was in breach of the contract and seeking the policy proceeds plus a twelve percent penalty, interest, and attorneys' fees under Arkansas Code Annotated section 23-79-208 (Repl. 1992) as well as attorney's fees under Arkansas Code Annotated section 23-79-209 (Repl. 1992); Fisher filed only an answer.

After a jury determined that there was no arson, the trial court entered a declaratory judgment that insurance coverage existed and awarded Newcourt and Fisher the proceeds under the policy as their interests allowed. Fisher still owed $109,000 to Newcourt Financial. The liability limits of the insurance policy were $94,000 minus a $1,000 deductible. The value of the truck was stipulated to be $80,000. Consequently, all of the proceeds under the policy were payable to Newcourt Financial.

The trial court also awarded counsel for Fisher attorney's fees under section 209, but held that Canal "is not obligated to pay attorney's fees to the loss payee, Newcourt Financial, Inc. pursuant to Arkansas Code Annotated section 23-79-209." The Court was silent as to section 208 and made no specific ruling as to appellant's counterclaim. Canal tendered a check into the court's registry for $79,000 plus interest to cover its obligation to Newcourt.

The judgment of the Circuit Court was entered on August 31, 1998. On September 14, 1998, Newcourt filed a motion to amend the judgment, requesting specific findings of fact and conclusions of law from the court. Newcourt also recognized that the Court failed to make a finding as to its counterclaim, and requested that the court do so. The court denied the motion to amend judgment in an order filed September 23, 1998, again making no ruling on the counterclaim. Newcourt filed a notice of appeal on October 2, 1998.

Appellant contends on appeal that the circuit court erred in not awarding Newcourt the statutory penalty, prejudgment interest, and reasonable attorneys' fees.[1] Appellee contends that this court does not have jurisdiction over this matter because Newcourt did not file a timely notice of appeal and that Newcourt is not entitled to remedy under section 208 because this is an action for declaratory judgment subject only to the remedies of Arkansas Code Annotated section 23-79-209.

Jurisdiction of the Court

In *Home Mutual Fire Insurance Company v. Hampton*, 336 Ark. 522, 986 S.W.2d 93 (1999) the supreme court stated:

> Rule 4(a) of the Arkansas Rules of Appellate Procedure—Civil provides that a notice of appeal shall be filed within thirty days

[1] Appellant also argues on appeal that it would have been entitled to recovery under the policy even if the jury had determined that the truck was destroyed by arson. We do not address this issue as it is moot. The jury found that no arson had occurred; it is irrelevant what Newcourt's rights would have been had arson been determined. *Cf. Bendinger v. Marshalltown Trowell Co.*, 338 Ark. 410, 994 S.W.2d 468 (1999); *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999).

from the entry of judgment. Rule 4(b) provides for an extension of the thirty-day period in certain circumstances:

> Upon timely filing in the trial court of a motion for judgment notwithstanding the verdict under Rule 50(b), of a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), or of a motion for a new trial under Rule 59(b), the time for filing notice of appeal shall be extended as provided in this rule.

Thus, to extend that time for filing a notice of appeal, under Rule 4(b), one or more of the enumerated posttrial motions must be timely filed in the trial court. Rules 50(b) and 59(b) provide that motions for judgment notwithstanding the verdict and for new trial must be filed not later than ten days after judgment is entered. Because the time period prescribed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. *See* ARCP Rule 6(a).

Rule 52(b) also allows ten days after judgment for the filing of a motion to amend judgment. Therefore, the rule expressed above applies. Judgment was entered on August 31, 1998. Motion for amended judgment was filed on September 14, 1998. Excluding weekends and holidays, Newcourt filed its motion for amended judgment within the ten days prescribed by the rule. Newcourt then had thirty days to file a notice of appeal from the date the order denying the motion to amend was entered, which in this case was September 23, 1998. Ark. R. App. P.—Civil 4(c). Newcourt filed its notice of appeal on October 2, 1998, well within the thirty-day time limit.

Remedy Under Ark. Code Ann. § 23-79-208

Arkansas Code Ann. § 23-79-208 states:

> (a) In all cases where loss occurs and the cargo, fire, marine, casualty, fidelity, surety, cyclone, tornado, life, health, accident, medical, hospital, or surgical benefit insurance company and fraternal benefit society or farmers' mutual aid association liable therefor shall fail to pay the losses within the time specified in the policy, after demand made therefor, the person, firm, corporation, or association shall be liable to pay the holder of the policy or his assigns, in addition to the amount of the loss, twelve per-

> cent (12%) damages upon the amount of the loss, together with all reasonable attorneys' fees for the prosecution and collection of the loss.

The appellee argues that section 208 does not apply to the case at hand because this case was filed as an action for declaratory judgment and is therefore governed by Arkansas Code Annotated section 23-79-209 which provides that an insured who successfully defends a declaratory judgment action filed by an insurance company may recover all reasonable attorneys' fees.

Appellee's argument is not supported by the law. The appellant filed a counterclaim in this matter asserting its right to payment under the policy and seeking a judgment for the amount of the policy proceeds. The Arkansas Supreme Court has held that there is nothing in section 208 which prevents the award of penalty and attorneys' fees in a counterclaim. *Home Ins. Co. v. Crawford*, 251 Ark. 843, 475 S.W.2d 889 (1972). Therefore, if the appellant prevailed on the counterclaim, section 208 applies regardless of the fact that the original action by appellee was in the form of a declaratory judgment.

However, in order to prevail on the claim for section 208 penalties, all other provisions of the statute must be met. Specifically, there must be (1) a loss, (2) failure to pay under the policy after demand is made, and (3) a judgment against the insurer. If all of these conditions have been satisfied, then the insurer is liable to "the holder of the policy or his assigns." Ark. Code Ann. § 23-79-208.

Section 208 specifically states that the appellee is liable only to *the holder of the policy or his assigns*. The lower court determined that Mike Fisher was "the named insured and *holder of the policy*." Fisher did not file a counterclaim in this matter and thus was not eligible for penalties under section 208. However, the trial court did award attorney's fees to Fisher under section 209 which pertains to insureds who successfully defend against declaratory judgment. The court then expressly denied Newcourt attorney's fees under section 209 and did not award any section 208 remedies.

Appellee relies upon *Farmers Mutual Ins. Co. v. Lane*, 278 Ark. 53, 643 S.W.2d 544 (1982), to support its argument that a

loss payee is not a "holder of the policy" for purposes of section 208. In *Farmers Mutual*, the named insureds [the Lanes] had not paid their premium, so their coverage lapsed. But the loss-payee clause of the policy extended the loss payee's [Ms. Smith's] coverage for ten days beyond any cancellation of the named insured's policy. The loss occurred during that ten-day period. The insurer denied coverage. The Lanes filed suit demanding payment and asking that Ms. Smith's rights as loss payee under the policy be declared. The insurer eventually paid Ms. Smith in full, but she and the Lanes agreed that the Lanes were entitled to the section 208 penalties because they were the named insured and she was only the loss payee. The insurer challenged the award of penalties to the Lanes because their policy had expired at the time of the loss and they were not entitled to any recovery for the loss. Our supreme court stated:

> The plain wording of the statute makes the Company liable to the "holder" of such policy, the appellees herein, for 12% penalty and reasonable attorneys' fees in addition to the amount due under the policy where, as here, payment is not timely after demand is made.
>
> Appellant argues, however, that the insureds should not have been awarded the penalty and attorneys' fees under this statute because they were no longer insured under the policy. We do not agree. The appellees were the named insureds under the policy and, as such, were entitled to have the Company make payment to the loss payee, Mrs. Smith, in accordance with the terms of the policy. This is so even though appellees' rights may have lapsed as to some other provisions of the policy. Only one policy exists in exchange for the premiums paid by the insured. It does not matter whether the actual payment under the policy is made to the insured or to the loss payee in order for the insureds to be entitled to the statutory penalty and attorneys' fees when payment by the Company is late. *Farm Bureau Mutual Ins. Co. v. Shaw*, 269 Ark. 757, 600 S.W.2d 432 (Ark. App. 1980).

Id., 278 Ark. at 56. Although the court held that the named insured was entitled to the section 208 penalties under those circumstances, it did not specifically address whether or not the loss payee could ever be a holder of the policy because the named insured and the loss payee had agreed that it would be the named

insured who pursued the penalties. This case presents the opposite situation. The named insured did not make a claim for section 208 penalties, the loss payee did. *Lane* does not address this situation.

Appellant relies upon the case of *Dalrymple v. Royal-Globe Ins. Co.*, 280 Ark. 514, 659 S.W.2d 938 (1983), for the authority that a standard loss-payee clause like the one at issue here creates an independent contract for insurance coverage between the loss payee and the insurer. *Dalrymple* dealt with the issue of whether a loss payee was immune from suit by the insurer under the theory that an insurer cannot sue its own insured. Our supreme court held that for purposes of immunity from suit, the loss payee was not an insured party. *Dalrymple* does state conclusively, however, that a loss payee is entitled to enforce his right to payment under the policy. The court reasoned that:

> 5A J. Appleman, *supra*, 3401 (1970), states that when a policy contains a standard mortgage clause it is considered that, "the insurer has entered into a separate contract with mortgagee just as if the latter had applied for insurance entirely independent of the mortgagor." But there is no authority for the proposition that a loss payee is an insured for all purposes. *A loss payee is entitled to enforce his right to payment for property loss against the insurer,* but there the right ends; it does not grant immunity to a loss payee that causes the loss.

Id., 280 Ark. at 516 (emphasis added).

In *Huddleston v. Home Life Insurance Co. Of New York*, 182 Ark. 1036, 34 S.W.2d 221 (1931), an action was brought against the insurance company to collect on two separate policies. One of the policies was invalidated as an illegal wagering contract. The other policy, however, was upheld against the insurance company. That policy had been assigned by the named insured to S.P. Blackwood as collateral for a debt. Blackwood assigned the same policy to a bank as collateral for his own debt. The original action against the insurance company was brought by the bank. The widow and child of the insured filed an intervention as beneficiaries. *Id.* Our supreme court ordered the division of statutory penalties between the bank (assignee) and the interveners (beneficiaries), stating:

> The question involved on this appeal is therefore the proper division of the attorney's fee. This fee was assessed under the authority of 6155, C. & M. Digest, which provides that "In all cases where loss occurs, and the . . . insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, . . . all reasonable attorney's fees for the prosecution and collection of said loss; . . . ."
>
> It is the insistence of the appellant attorney that his client, the bank, was the holder of the policy within the meaning of the statute quoted, and that the fee should not have been divided, but should all have been ordered paid to his client for his benefit.
>
> We think, however, that this is not the proper construction of the words "holder," as employed in the statute which we have quoted. The word has reference, not to custody, but to beneficial ownership, and *the holder is the person, or persons, who, having the right to sue, have exercised that right successfully. Entwistle v. Travelers' Ins. Co.*, 202 Pa. 141, 51 Atl. 759.

Id., 182 Ark. at 1037-38 (emphasis added).

■ ■ There is no doubt that Newcourt is entitled to sue under the policy in this case and has done so successfully. *Huddleston, supra,* provides that a "holder" of a policy is one with the right to sue for enforcement of the policy. *Dalrymple, supra,* provides that a loss payee is an "insured" to the extent that it has the right to sue for enforcement of the policy. Therefore, reading the caselaw as a whole, it is apparent that the appellant in this case is a holder who can recover penalties and fees under section 208. Some caselaw from the Eighth Circuit Court of Appeals holds differently; however, Arkansas law is clear and binding.

Appellee also argues that Newcourt is not entitled to recover under section 208 because it made no demand for payment. *Farmers Mutual Ins. Co. v. Lane*, 278 Ark. 53, 643 S.W.2d 544 (1982), states:

> Appellant argues that appellees are not entitled to the statutory penalty and attorneys' fees because the loss payee never "demanded" payment as required by the statute. This argument fails because the insureds made the necessary demand, and we know of no reason why the loss payee must also demand pay-

> ment. In any event there was no offer to pay the loss payee prior to suit; the Company actually denied liability to everyone under the policy until less than three weeks before trial when it paid the loss payee the full amount of the policy. *Cf. Valley Forge Ins. Co. v. Garner*, 277 Ark. 447, 642 S.W.2d 317 (1982). Here, the demand by the insureds was sufficient to put appellant on notice that it should pay in accordance with the terms of the policy.

Id., 278 Ark. at 56-57.

There is also no requirement that formal demand be made. It is sufficient to show that the insurer was put on notice that payment under the policy was due. *Farm Bureau Mutual Ins. Co. v. Shaw*, 269 Ark. 757, 760, 600 S.W.2d 432 (Ark. App. 1980). In the instant case, it is not disputed that the appellee was placed on notice that payment under the policy was due. Fisher made a demand for payment and the appellee filed an action for declaratory judgment against both Fisher and Newcourt seeking to avoid liability under the policy. Demand was made sufficiently to place the appellee on notice that payment was due under the policy, and the fact that the appellee joined Newcourt as a defendant in its declaratory judgment action demonstrates its awareness that payment was due to Newcourt.

Appellee finally argues that Newcourt is not entitled to a remedy under section 208 because the matter rests within the discretion of the trial court. In *Equitable Life Assurance Society v. Rummell*, 257 Ark. 90, 91-92, 514 S.W.2d 224 (1974), the supreme court considered a similar situation where it stated:

> The purpose of the statute is to permit an insured to obtain the services of a competent attorney and the amount of the allowance should be such that well prepared attorneys will not avoid this class of litigation or fail to devote sufficient time for thorough preparation. *Old Republic Insurance Co. v. Alexander*, 245 Ark. 1029, 43 S.W.2d 829. It is contemplated that the allowance should not be a speculative or contingent fee but that it be such a fee as would be reasonable for a litigant to pay his attorney for prosecuting such a case. *Old Republic Insurance Co. v. Alexander, supra.*

The supreme court relied on the *Rummell* case in *Southall v. Farm Bureau Mutual Insurance Co. of Arkansas, Inc.*, 283 Ark. 335, 337, 676 S.W.2d 228 (1984), when it stated:

> The Legislature, not the courts, enacted Ark. Stat. Ann. 66-3238 (Repl. 1980) providing for an award of a reasonable attorney's fee against an insurer who wrongfully refuses to pay under an insurance policy. Our task is simply to carry out this legislative command. The computation of allowable attorneys' fees under the statute is governed by familiar principles. These factors include the experience and ability of the attorney and the time and work required of him, the amount involved in the case and the results obtained, the fee customarily charged in the locality for similar legal services and whether the fee is fixed or contingent.

The award of an attorney's fee is a matter for the sound discretion of the trial court and, in the absence of abuse, its judgment will be sustained on appeal. *Southhall*, 283 Ark. at 338. *Arkansas Blue Cross & Blue Shield v. Remagen*, 25 Ark. App. 96, 101-02, 752 S.W.2d 284 (1988). While courts should be guided by these factors, we have consistently held there is no fixed formula to be used in determining the reasonableness of a fee. *New Hampshire Ins. Co. v. Quilantan*, 269 Ark. 359, 601 S.W.2d 836 (1980); *Federal Life Insurance Company v. Hase*, 193 Ark. 816, 102 S.W.2d 841 (1937).

Section 208(b) states that the "attorney's fee *shall* be taxed by the court where the same is heard on original action, by appeal or otherwise, and *shall* be taxed up as a part of the costs therein . . . ." (Emphasis added.) Although only one attorney's fee can be awarded under the statute, the court can divide the attorney's fee among the parties as it sees fit. *See Huddleston, supra.* "The allowance of fees by the trial court must be affirmed unless the appellant demonstrates, or the record shows, that the allowance is excessive, inadequate or unreasonable." *Farm Bur. Mut. Ins. Co. v. Kizziar*, 1 Ark. App. 84, 88, 613 S.W.2d 401 (1981). The trial court awarded only one attorney's fee of $3,300 in this matter to Fisher. This was based upon the one week of work that Fisher's final attorney billed. However, evidence demonstrates that Fisher's legal aid attorney and counsel for Newcourt worked on this case for more than a year. In view of the complexity of the

case considering the nature of the accusation, the interpretation of the original contract for insurance, and the number of expert witnesses involved, the trial court should have considered Newcourt's application for attorneys' fees. We remand so that the court may revisit the issue of attorneys' fees.

Newcourt has satisfied all of the requirements of Arkansas Code Annotated section 23-79-208. The appellee is hereby directed to pay to Newcourt Financial, Inc., the policy proceeds plus interest and an amount equal to twelve percent of the proceeds due under the policy. We remand so that the trial court can enter an order consistent with this opinion and set reasonable attorney's fees in light of all of the evidence presented, divided as equity demands between Fisher and Newcourt Financial, Inc.

Reversed and remanded.

MEADS and ROAF, JJ. agree.

John BROWN, Hughey D. Brown, and Teresa Brown *v.* FOUNTAIN HILL SCHOOL DISTRICT, Superintendent Opal Crow, Hal Gibson, and Elmer Sparks

CA 99-98 1 S.W.3d 27

Court of Appeals of Arkansas
Division IV
Opinion delivered October 6, 1999

The Cortinez Law Firm, P.L.L.C., by: *Robert R. Cortinez, II*, for appellants.

W. Paul Blume, for appellees.

OLLY NEAL, Judge.

On September 30, 1993, John Brown was a student at Fountain Hill High School, when he amputated the fingers on his right hand while operating a table saw in the school's vocational-agriculture shop class. John's parents, Hughey and Teresa Brown, filed a negligence action against the individual appellees, because of the removal of the table saw's blade safety guard by appellee Hal Gibson. An action was brought against the school district based upon the theory of *respondeat superior.* Appellees filed a motion to dismiss appellants' complaint based upon the statutory immunity afforded school districts and their employees in negligence actions by Ark. Code Ann. section 21-9-301 (1987). Appellants subsequently filed an amended and substituted complaint, in which they added the insurance exception to the statutory-immunity defense, and pled in the alternative that appellees' actions amounted to the tort of outrage. Appellees filed a motion under Ark. R. Civ. P. 12(b)(6) that was not ruled upon. After discovery was completed, appellees filed a motion for summary judgment.

In a hearing held on May 26, 1998, the trial court granted partial summary judgment to appellees based upon its finding that Ark. Code Ann. section 21-9-301 barred appellants' claim for damages caused by appellees' negligence. The trial court allowed appellants to proceed with their claim based upon the tort of outrage.

On September 11, 1998, a subsequent hearing was held and at that time, the trial court granted summary judgment to appellees on appellants' claim for outrage. In granting summary judgment, the trial court found that appellants had not pled sufficient facts to succeed on a claim for damages based upon the tort of outrage. This appeal followed.

On appeal, appellants argue three points: (1) the appellees' motion for summary judgment was defective because it failed to address the appellants' tort of outrage claim in the amended and substituted complaint; (2) the trial court erred when it considered matters in appellees' supplemental brief in violation of Ark. R. Civ. P. 56(c), when making its September 11, 1998, order; and (3)

the trial court erred in dismissing appellants' amended and substituted complaint that adequately pled the tort of outrage.

Appellants' first two points on appeal were not presented to the trial court, and as a consequence, are not preserved for appellate review. *See Helms v. University of Missouri-Kansas City*, 65 Ark. App. 155, 986 S.W.2d 419 (1999).

Appellants' remaining point is that the trial court erred in dismissing the remaining portion of their complaint that adequately pled the tort of outrage. The law is well settled that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On review, the appellate court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Tyson Foods, Inc. v. Adams*, 326 Ark. 300, 930 S.W.2d 374 (1996). This court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

To succeed on a tort-of-outrage claim, the plaintiff must prove that (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous and utterly intolerable in a civilized community; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *Holloman v. Keadle,* 326 Ark. 168, 931 S.W.2d 413 (1996).

In their amended complaint, appellants alleged:

> Defendant Hal Gibson was in charge of Ashley County's school children and had the ultimate responsibility for their safety and his behavior in removing the safety guard which greatly enhances said saw's potential to mutilate, deform and mangle children

> coming in contact with said equipment was beyond all possible bounds of decency and utterly intolerable.
>
> Defendant Hal Gibson purposely, knowingly, willfully and intentionally removed the safety guard of the Delta International table saw that was installed to prevent any unnecessary injury or enhancement of injury. The removal of said safety guard on the part of Defendant Hal Gibson constitutes willful conduct and elevates itself to reckless disregard or conscious indifference of the consequences of his actions.
>
> At said times Defendant Fountain Lake School District, its governing board, officers, agents, and employees, knew or, in the exercise of reasonable care, should have known of the dangerous and defective condition of the table saw, that table saw lacked entirely any effective or adequate automatic or other type release or safety device, and wholly lacked any kind of guard to protect students, using the same.
>
> Jonathan Brown sustained complete amputations of his index, long, ring, and small fingers of the right hand. Plaintiff Jonathan Brown immediately underwent revascularization of these digits and stabilization of the fractures in an eight-hour surgical procedure. In addition, Plaintiff Jonathan Brown has sustained segmental bone loss at the PIP joint of his index, long, and ring fingers, and has undergone two subsequent operations and is scheduled to undergo subsequent operations in the future.
>
> Jonathan Brown has been permanently impaired, suffered great pain and anxiety by reason of said injuries, has suffered and during the remainder of his life will suffer great humiliation and anxiety, will be hindered and damaged in his professional trade or calling by reason of the mutilated and crippled condition of his right hand and will be forever barred from doing certain kinds of work.

Appellants contend that the pleadings found in the amended complaint are not conclusions, and are every bit as express as those found in *Diestch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992). In *Deitsch*, which involved a dismissal pursuant to Ark. R. Civ. P. 12(b)(6), the supreme court found that the wording of the complaint recited more than conclusory allegations, as it was required to do. In making its decision, the court supplied the following rationale:

> In their complaint, the appellants allege the appellees knew of the presence of specific rules and regulations for the removal of asbestos and failed and refused to follow such procedures. The complaint states that appellees knowingly misrepresented and/or concealed the dangerous asbestos condition . . . in order to induce the school employees and students to attend and work at the school. It is further alleged that appellees had such knowledge of the proper procedures (or by the exercise of reasonable care and compliance with state and federal laws, should have known) at least by May 27, 1983, and that the appellees did have such knowledge by October 1988, following inspection of the school for asbestos. The alleged proper standards, comprising both federal and state regulations, were set out at length in the complaint. The appellants allege they have sustained, and continue to sustain, damages for emotional distress and fear, physical injury, and increased risk of serious physical injury in the future. Appellant, Delores Bartizal is alleged to have contracted throat cancer, proximately caused by exposure to asbestos.

In the present case, the wording of appellants' complaint recites conclusory allegations and does not plead facts as this jurisdiction requires. Appellants' complaint merely concludes that the appellees' conduct was outrageous, but fails to support those allegations with facts. At best, appellants' claim is based upon the theory of negligence, and the statutory immunity afforded appellees bars a suit brought on that basis. Ark. Code Ann. § 21-9-301 (1987).

Appellants make the final argument that the dismissal of its complaint was without prejudice because the trial court failed to address whether the dismissal was with prejudice or without prejudice. In so arguing, they rely on the case of *Joey Brown Interest, Inc. v. Merchants Nat'l Bank of Fort Smith*, 284 Ark. 418, 683 S.W.2d 601 (1985), for the proposition that if summary judgment is granted where the plaintiff has failed to state a claim rather than for failure to have a claim, the dismissal is with prejudice to allow the plaintiff the opportunity to plead further. The *Joey Brown Interest* case involved a motion for dismissal under Ark. R. Civ. P. 12(b)(6) that was based upon the defendant's belief that the plaintiff had failed to state a claim for which relief could be granted. The motion pursuant to Rule 12(b)(6) was converted to a motion

for summary judgment because the trial court considered matters outside of the pleadings in making its decision. *See* Ark. R. Civ. P. 12(b).

In making a motion for dismissal under Rule 12(b)(6), the motion is based upon the defendant's belief that the pleadings are defective; whereas, in the motion for summary judgment filed in this case the movants believed that they were entitled to judgment as a matter of law. *Id.*; *see also* Ark. R. Civ. P. 56. In making its decision to grant the summary-judgment motion, the trial court supplied the following rationale:

> I've looked at these outrage cases in doing some research on another case I had. And the cause of action for outrage, as I understood it, is what we studied in law school as the intentional infliction of emotional distress, if my research is correct. . . .
>
> . . .
>
> I've reviewed those cases and don't think our court has extended it past that. I — Just to be frank with you, I find it a little appalling that there wouldn't be any protection for a person like the Plaintiff here injured when, allegedly, if a guard has been removed that was intended for safety. But it appears to me that that really, as I've reviewed these cases on outrage, doesn't fall within what is meant to be in that cause of action as set out by our Supreme Court. And I think probably the best thing would be to go on and grant the motion on the whole case and let the Plaintiff take that up rather than spend time trying this case and the resources trying it if he doesn't have a cause of action to start with. . . .

Here, it is clear that the trial court based its decision to grant appellees' summary-judgment request because they were entitled to judgment as a matter of law, where the facts show that the alleged conduct of the appellees amounted to negligence. Moreover, given the fact that Arkansas Code Annotated section 21-9-301 provides immunity from suit for the negligent acts of school districts or its employees, it is clear that the dismissal of appellants' claim was with prejudice.

Affirmed.

GRIFFEN, J., agrees.

JENNINGS, J., concurs.

JOHN E. JENNINGS, Judge, concurring. The question is whether the plaintiff's complaint adequately pled the tort of outrage. In my view, the case is governed by the decisions in *Miller v. Ensco, Inc.*, 286 Ark. 458, 692 S.W.2d 615 (1985), and *Griffin v. George's, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979), which hold that such conduct does not constitute an intentional tort.

Frank WRIGHT *v.* STATE of Arkansas

CA CR 99-304 1 S.W.3d 41

Court of Appeals of Arkansas
Division I
Opinion delivered October 6, 1999

William R. Simpson, Jr., Public Defender, and *Don Thompson*, Deputy Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. Appellant Frank Wright was charged with the felony offense of third-degree domestic battery, second offense, a violation of Ark. Code Ann. § 5-26-305 (1997). The State alleged that on June 24, 1998, Mr. Wright acted with the purpose to cause physical injury to a family member or household member, causing physical injury to Linda Wright, who at the time of the offense was Mr. Wright's wife. The State further alleged that Mr. Wright had previously been convicted of domestic battery in the third degree.

A bench trial was held on the charge on October 26, 1998, and the trial court found Mr. Wright guilty. The court also found that Mr. Wright had a previous conviction for this same offense. The court sentenced Mr. Wright to two years' probation and fined him $100.

The appellant argues on appeal that there was insufficient evidence of the appellant's prior conviction for domestic battery to support enhancement of this offense to a felony. We disagree and affirm.

The State introduced a certified copy of the appellant's record from the Little Rock Municipal Court. Wright's municipal-court record, duly certified by the court clerk, reflected that he pled guilty to third-degree domestic battery on January 4, 1996, and received a one-year suspended sentence and a fine. The record further revealed that, on January 10, 1996, Wright was "recognized" for purposes of appeal.

Wright objected to the introduction of his municipal-court record and argued that his prior domestic-battery conviction was invalid because it was appealed to circuit court and *nol prossed* by the State. However, the circuit court's computer did not reflect that this specific conviction had been *nol prossed* in circuit court. The only indication that Wright's previous conviction for domestic battery was *nol prossed* was the claim made by his own attorney. However, it is well settled that arguments of counsel are not evidence. *E.g., Johnson v. State*, 326 Ark. 430, 450, 934

S.W.2d 179, 189 (1996). There is no evidence in the record to establish that Wright appealed his municipal-court conviction.

The State had the burden of proving a defendant's prior conviction for purposes of sentence enhancement. *Byrum v. State*, 318 Ark. 87, 94, 884 S.W.2d 248, 253 (1994). In this case, the State introduced *prima facie* evidence of a prior conviction by introducing a self-authenticating certified record of Wright's municipal-court conviction. *See Price v. State,* 48 Ark. App. 37, 39, 889 S.W.2d 40, 42 (1994). Once *prima facie* evidence is introduced, the burden shifts to the appellant to prove that the conviction had been appealed and *nol prossed*. Because the appellant did not overcome his burden after it shifted, substantial evidence supports Wright's conviction for third-degree domestic battery, and his sentence was properly enhanced as a result of his prior domestic-battery conviction.

Affirmed.

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

Rita R. CARTER *v.* William GREEN, *et al.*

CA 99-56 1 S.W.3d 449

Court of Appeals of Arkansas
Division II
Opinion delivered October 6, 1999

Slagle & Gist, by: *Richard L. Slagle*, for appellant.

Carl A. Crow, Jr., & Assocs., by: *Ronald D. Kelsay*, for appellees.

ANDREE LAYTON ROAF, Judge. Rita R. Carter owned two tracts of land in Garland County that were forfeited in 1985 to the state for failure to pay taxes. On May 17, 1993, the State Land Commissioner (Commissioner) executed two deeds conveying the property to "The Eureka Missionary Baptist Church," in exchange for $1,600. On May 15, 1996, Carter filed a petition in the Garland County Chancery Court requesting a declaratory judgment that the deeds were void because they conveyed the property to an unincorporated association. Approximately two weeks later, the Commissioner executed two correction deeds that conveyed the property to the Trustees of the church. Carter amended her petition and challenged the Commissioner's authority to issue the correction deeds. After a hearing, the chancellor found that the Commissioner erroneously conveyed the property to an unincorporated association, but acted within the scope of authority in issuing the two correction deeds.

On appeal, Carter contends that the chancellor erred in concluding that the Commissioner was authorized to issue the correction deeds. We affirm.

The chancellor made the following pertinent findings in the final order:

> 3. On May 17, 1993, the State of Arkansas, by the Commissioner of State lands, executed and delivered Deeds to the [property] to "The Eureka Missionary Baptist Church.". . .
>
> . . .
>
> 6. On June 5, 1996, the Commissioner of State Lands issued Correction Limited Warranty Deeds conveying these lands to William Green, Alma Wesson, Georgia Ticey, James Clay and Charles Smith, Trustees of Eureka Missionary Baptist Church, and their successors and assigns.
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> . . .
>
> 11. When the State Land Commissioner's office determined that the original deed was issued to an unincorporated association incapable of holding title to real estate, it was not necessary to rebid the sale, but instead, the process of issuing a correction deed is and was properly within the scope of authority of the Commissioner, as set forth in A.C.A. § 26-37-101(c), [*sic*] which provides in part as follows:
>
>> The Commissioner of State Lands shall have the authority to promulgate such rules and regulations . . . such rules and regulations shall have the full force and effect of law.
>
> . . .
>
> 15. The court concludes that there was a high bidder, that the Commissioner concluded that high bidder was an entity that could ultimately not take title, and that upon discovery of such fact, a correction deed was issued to the true high bidder, which was an entity or individual who could take title.
>
> 16. The court further finds and concludes that all of the actions of the Commissioner of State Lands in issue herein are within the rules and regulations properly delegated to the Commissioner.

The facts in this case are not in dispute; it is the chancellor's interpretation of law that is at issue. We review cases appealed from chancery court *de novo*, and although the factual findings of the chancellor will not be set aside unless we find that

they are clearly erroneous, a chancellor's conclusion of law is not entitled to the same deference. *Duchac v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999). If the chancellor erroneously applies the law and the appellant suffers prejudice, the erroneous ruling is reversed. Manifestly, a chancellor does not have a better opportunity to apply the law than does an appellate court. *Id.*

On appeal, Carter argues that the chancellor erred in finding that the correction deeds issued by the Commissioner were authorized and valid under the law and contends that the case should be reversed and remanded for the entry of an order requiring the Commissioner to rebid and resell the property. Carter correctly points out that at the time the correction deeds were issued in 1996, an unincorporated association could not acquire and hold title to property in its own name, *Fausett and Co. v. Bogard*, 285 Ark. 124, 685 S.W.2d 153 (1985), and that a conveyance of real property to an unincorporated association was invalid. *Lael v. Crook,* 192 Ark. 1115, 97 S.W.2d 436 (1936).[1] Carter argues that the deeds conveying property to the church were thus void, and the Commissioner lacked the authority to issue the correction deeds in the names of the trustees. Carter contends that the Commissioner's authority to issue correction deeds is limited by Ark. Code Ann. § 22-6-102 (Repl. 1996), which provides:

> (a) The Commissioner of State Lands shall have the power to correct errors that exist or may exist arising from the erroneous sale of lands belonging or formerly belonging to the state.
>
> . . .
>
> (k) Any action to correct errors on the part of the Commissioner of State Lands shall be legal and binding until overruled or set aside by the decision of a court having competent jurisdiction.

In essence, Carter argues that the scope of the Land Commissioner's authority does not allow for the correction of an invalid conveyance, but only of erroneous sales, and only upon certifica-

[1] In 1997, the legislature passed Act 858 that allows a nonprofit association to hold property in its own name. Arkansas Code Annotated section 4-28-504(b) (Supp. 1999) provides: "A nonprofit association in its name may acquire, hold, encumber or transfer an estate or interest in real or personal property."

tion of error by the county collector. The church contends in response that the Commissioner acted within the scope of his authority to issue correction deeds where he erred in the first instance by conveying title to an unincorporated association.

The Commissioner's authority to promulgate rules and regulations concerning tax-forfeiture sales is referenced in subsection (c) of the notes to Ark. Code Ann. § 26-37-101 (1997). This authority originated in Act 814 of 1987, which modified Act 626 of 1983. Act 626 of 1983 made significant changes to the existing law concerning tax-forfeiture sales. In pertinent part, Act 814 of 1987 provided:

> Section 7 of Act 626 of 1983, as amended, the same being Arkansas Statute 84-1132 is hereby amended to read as follows:
>
> > (c) The Commissioner of State Lands shall have the authority to promulgate such rules and regulations as may be necessary to effectively carry out the provisions of Act 626 of 1983, as amended. Upon adoption, such rules and regulations shall have the full force and effect of law.

The fact that this provision is not codified does not deprive it of the force of law. The absence of a portion of an act in the statutes does not indicate that the act is invalid. *See Hinchey v. Thomasson*, 292 Ark. 1, 727 S.W.2d 836 (1987).

In this case, Carter's land was forfeited to the State in 1985. Title to the property vested in the State of Arkansas in care of the Commissioner of State Lands. Ark. Code Ann. § 26-37-101. The land was first offered for public auction by the Commissioner in August 1991; however, no bids were received, and the Commissioner entered into a negotiated sale agreement with the church in 1993, as authorized when land remains either unsold or unredeemed. On May 17, 1993, the Commissioner executed the two original deeds to the property, and Carter has not alleged that there were any irregularities in the proceedings except as to the naming of the church as grantee in the deeds.

The legislature provided the Commissioner with the authority to promulgate rules and regulations to further the intent of the Acts governing tax-forfeiture sales. *See* Ark. Code. Ann.

§ 26-37-101 (Ark. Code Rev. Comm. note c); *see also*, Act 814 of 1987. A senior representative from the Commissioner's office testified that they had an internal policy providing for the issuance of correction deeds when an error is made by their office. Although Arkansas law at the time did not authorize the conveyance of property to unincorporated organizations, the sale was otherwise valid, and we agree that the chancellor correctly found that the Commissioner was acting within the scope of his authority to issue the correction deeds conveying the property to the trustees.

Affirmed.

ROGERS and MEADS, JJ., agree.

Christopher CLARK (Deceased) *v.* SBARRO, INC.

CA 99-383 1 S.W.3d 38

Court of Appeals of Arkansas
Division II
Opinion delivered October 6, 1999
[Petition for rehearing denied December 22, 1999.*]

* PITTMAN, J., would grant. *See* dissent in Vol. 68, *Arkansas Appellate Reports.*

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

Roberts Law Firm, P.A., by: *Mike Roberts*, for appellees.

ANDREE LAYTON ROAF, Judge. Christopher Clark died in an automobile accident while returning from a business trip in Missouri, and Clark's surviving family members (the Clark heirs) filed a claim for workers' compensation death benefits. The Commission denied benefits based upon a finding that the claim was barred because the accident was substantially occasioned by Clark's use of alcohol. The Clark heirs raise two issues on appeal: 1) the Commission erred in concluding that Clark was not performing employment services at the time of the accident;

and 2) substantial evidence does not support the Commission's finding that the accident was substantially occasioned by Clark's use of alcohol. We agree that there is not substantial evidence to support the finding that the accident was substantially occasioned by Clark's use of alcohol and reverse and remand.

On November 20, 1996, Clark was returning home from a required business meeting in St. Louis, Missouri. He drove his own vehicle. Around 8:30 p.m., another vehicle crossed the center line and struck his vehicle head-on near Corning, Arkansas. Clark died as a result of his injuries; the other driver sustained serious injuries, but survived. Blood-alcohol tests revealed that Clark's blood-alcohol content (BAC) was .21%, and the other driver's BAC was .28%.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if the decision is supported by substantial evidence. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998). We reverse a decision of the Commission only if convinced that fair-minded persons using the same facts could not reach the conclusion reached by the Commission. *Id.* As a general rule, this court recognizes that administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than are courts to determine and analyze legal issues affecting their agencies. While not conclusive, the interpretation of a statute by an administrative agency is highly persuasive. *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1997) (*aff'd* 328 Ark. 381, 944 S.W.2d 381 (1998)).

In pertinent part, Ark. Code Ann. § 11-9-102(5)(B)(iv) (Supp. 1997) provides:

> (B) "Compensable injury" does not include:
>
> . . . .
>
> (iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

> (b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders.
>
> . . . .
>
> (d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

For the first point on appeal, the Clark heirs argue that the Commission erred in finding that Clark was not performing employment services at the time of the accident. However, although Sbarro raised this contention in the proceedings below, neither the opinion issued by the ALJ nor by the Commission addresses this issue. Rather, benefits were denied solely upon a finding that Clark's accident was substantially occasioned by his use of alcohol. Because the Commission made no finding on this issue, we do not address this argument on appeal.

The Clark heirs next contend that the Commission erred in finding that the accident was substantially occasioned by the use of alcohol. They argue that the rebuttable presumption that the accident was substantially occasioned by Clark's use of alcohol was overcome by the evidence.

Our supreme court has discussed the statutory presumption concerning whether an accident was substantially occasioned by the use of alcohol. In *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998), the supreme court held that a man who sustained injuries from a fall successfully rebutted the presumption that his fall was due to the presence of alcohol. In *ERC,* the claimant's BAC test indicated a presence of 0.01% blood alcohol, or one-tenth the legal limit, and medical evidence indicated that he suffered a seizure related to alcohol withdrawal. The supreme court concluded that the mere presence of 0.01% BAC

was sufficient to trigger the statutory presumption; however, the court affirmed the Commission's finding that the claimant sufficiently rebutted the presumption. Of significance to this appeal, in construing the meaning of the phrase "substantially occasioned," the court stated:

> First, we turn to the plain and ordinary meaning of the words themselves. The word "occasion" when used as a verb is defined in *Black's Law Dictionary* as "to produce; to cause incidentally or indirectly; to bring about or be the means of bringing about." *Black's, supra,* at 1078. Thus, the word "occasion" is broad in scope and, standing alone, encompasses causation that may be indirect in origin. However, the word "occasioned" is modified by the adverb "substantially," which is defined as "actually and essentially." *Black's,* supra at 1428-29. *When the words "substantially occasioned" are used together, the causal connection becomes more immediate and direct.* Finally, the statute provides that the injury must be caused "by the use of alcohol," not by abstinence from the use of alcohol. We, therefore, conclude that the plain and ordinary meaning of the phrase "substantially occasioned by the use of alcohol" requires that there be a direct causal link between the use of alcohol and the injury in order for the injury to be noncompensable. To conclude otherwise would involve the addition of words that do not appear in the text of Ark. Code Ann. § 11-9-102(5)(B)(iv).

ERC Contractor Yard & Sales v. Robertson, 335 Ark. at 70 (emphasis supplied).

In the instant case, both drivers had a BAC of more than twice the legal limit at the time of the accident. The accident occurred on a straight stretch of highway, and it was raining and the roadway was wet. However, the investigation clearly indicated that the other driver came completely over into Clark's lane and struck Clark's vehicle head-on. The investigating officer also concluded from a time-stamped receipt found in Clark's vehicle that Clark had been speeding during his journey, because he had driven a distance that would ordinarily take three hours and fifteen minutes at the speed limit in a period of about two hours and forty-six minutes. The Commission found that crossing of the center line by the other driver did not rebut the statutory presumption that Clark's use of alcohol substantially occasioned the

accident. The Commission considered the results of Clark's BAC test, the evidence that Clark had been speeding, and concluded that Clark's motor skills and judgment would have been significantly impaired.

The question of whether a rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *ERC Contractor Yard & Sales v. Robertson, supra* (citing *Clark v. State,* 253 Ark. 454, 486 S.W.2d 677 (1972)); *Continental Express v. Harris,* 61 Ark. App. 198, 965 S.W.2d 811 (1998). Our standard of review requires that we affirm if substantial evidence supports the findings of the Commission. Viewing the evidence in the light most favorable to the Commission, we cannot say that substantial evidence supports the Commission's finding in this instance. There was no evidence that Clark was speeding at the time of the accident, and no evidence from which the Commission could have concluded, without resorting to speculation, that he could have avoided the accident. However, the evidence did show that the "immediate and direct" cause of the accident was instead the other driver's crossing onto Clark's side of the road. Given the supreme court's definition of the words "substantially occasioned," we cannot say that fair-minded persons using the facts presented in this case could reach the conclusion reached by the Commission. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

MEADS and ROGERS, JJ., agree.

POCAHONTAS FEDERAL SAVINGS & LOAN *v.* J.T. WHITE HARDWARE & LUMBER CO.

CA 99-168 1 S.W.3d 471

Court of Appeals of Arkansas
Division I
Opinion delivered October 13, 1999
[Petition for rehearing denied November 17, 1999.]

Castleman Law Firm, by *Bob Castleman*, for appellant.

Snellgrove, Langley, Lovett, & Culpepper, by: *Todd Williams*, for appellee.

SAM BIRD, Judge. Appellant Pocahontas Federal Savings and Loan appeals the Greene County Chancery Court's confirmation of a foreclosure sale. J.T White Hardware & Lumber Co. filed a complaint against Richard and Angie Snow to foreclose on a materialman's lien. Pocahontas Federal Savings and Loan was joined as a defendant because it held a construction mortgage on the property that was paramount in priority to appellee's materialman's lien. After a hearing, a foreclosure decree was entered holding that the Snows were indebted to White for

$26,234.76; that appellant held a valid first lien on the property of $65,282.98; and that the property was to be sold by the Commissioner, subject to the first lien. The decree also provided that the proceeds from the sale were to be applied first to the costs and expenses of the sale, second to the judgment in favor of White, and the balance, if any, to be held by the Commissioner pending further orders.

The sale was held on June 17, 1998. Fred Hargett, Pocahontas Federal's Executive Vice President of the Jonesboro branch, attended the sale, and bid $30,000 for the property. There were no other bidders. Subsequent to the Commissioner's sale but before its confirmation by the court, White made demand on Pocahontas Federal to pay its bid of $30,000 into the registry of the court to satisfy White's judgment. Pocahontas Federal objected and filed a petition to set aside the Commissioner's sale and for declaratory judgment or relief, explaining that it had made its bid:

> [U]nder a mistake of fact, believing that the foreclosure sale was also an acceleration of the debt owed separate defendant, Pocahontas Federal, believing that the bid would be a credit against those sums owed Pocahontas Federal as set out in paragraph 8 located at page 3 of the Foreclosure Decree. Defendant believed its bid was necessary in order to protect the first lien status held by Pocahontas Federal. Had the employee and agent, Mr. Fred Hargett, believed otherwise then no bid would have been made on behalf of Pocahontas Federal, without which the Commissioner's Sale would have been concluded with no bid having been made. Again, no third party, nor plaintiff or any representative of plaintiff was present or attended the Commissioner's Sale. At the time and on the date of the sale the bid made by the separate defendant, Pocahontas Federal, was intended to exercise its right of set-off and credit its bid against the outstanding Note and purchase money mortgage owed by the defendants, Richard Snow and Angie Snow, in an amount in excess of its bid.

In the alternative, Pocahontas Federal asked the court to enter specific findings of fact and law setting forth the rights and obligations of the parties regarding its bid, and to declare the bid a set-off or credit against moneys owed to appellant on its mortgage. Poca-

hontas Federal also asked the court to declare that it owed no money to White. The chancellor confirmed the sale.

For reversal, Pocahontas Federal contends the lower court abused its discretion by confirming the foreclosure sale without first having the Commissioner's report of sale before it. It argues that the confirmation is the court's ratification or rejection of the transactions occurring within the formal framework of the judicial sale, and that without the Commissioner's report in the record the court had nothing upon which to exercise its discretion; therefore, the decision was arbitrary and capricious. We are unable to reach the merits of appellant's argument due to a fatal flaw in the record, and, consequently, in the abstract.

The chancellor's order confirming the sale states in part, "[T]he sale [is] confirmed for the reasons set forth in the letter opinion of this Court dated September 2, 1998, a copy of which is attached hereto and incorporated herein by reference." However, there is no letter opinion in the record or abstract. The last sentence of appellant's abstract states: "The Letter Opinion referred to in the Order is not a part of the record compiled by the Clerk for reasons unknown to appellant." Without that letter opinion, we have no way of knowing what the court relied upon in making his decision to confirm the sale. It is appellant's duty to bring us a complete record that demonstrates error. It was the appellant's duty to see to it that the letter opinion *was* included in the record and abstract. The failure to do so is fatal.

■ ■ Rule 4-2(8) of the Rules of the Arkansas Supreme Court and Court of Appeals, provides that the brief shall contain "an Addendum which shall include photocopies of the order, judgment, decree, ruling, *letter opinion*, or administrative law judge's opinion, from which the appeal is taken." Although this court reviews chancery cases *de novo*, it will not disturb a chancellor's findings unless they are clearly against the preponderance of the evidence, *Harrington v. Harrington*, 55 Ark. App. 22, 928 S.W.2d 806 (1996), and it is axiomatic that the burden is clearly placed on the appealing party to provide an abstract sufficient for appellate review. *Oliver v. Washington County*, 328 Ark. 61, 940 S.W.2d 884 (1997). Arkansas appellate courts will not examine

the transcript of a trial to reverse a trial court. *Id. See also Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999); *California v. West*, 61 Ark. App. 69, 964 S.W.2d 221 (1998). In this particular case, it would not be helpful to examine the transcript because, as appellant states in its brief, "The Letter Opinion referred to in the Order is not a part of the record compiled by the Clerk for reasons unknown to Appellant." As the Arkansas Supreme Court has also stated numerous times, it is the appellant's burden to produce a record exhibiting prejudicial error. *City of Maumelle v. Maumelle Lodge of F.O.P.*, 335 Ark. 283, 983 S.W.2d 123 (1998). Without the letter opinion before us, it is impossible to review the chancellor's decision.

Affirmed.

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

John H. EBBING and Peggy O. Ebbing *v.*
STATE FARM FIRE & CASUALTY COMPANY

CA 98-1453 1 S.W.3d 459

Court of Appeals of Arkansas
Division III
Opinion delivered October 13, 1999

Gill Law Firm, by: *John P. Gill*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Beverly A. Rowlett* and *John E. Moore*, for appellee.

TERRY CRABTREE, Judge. This is an insurance contract case arising out of a homeowners insurance policy issued by appellee State Farm Fire and Casualty Company to appellants John and Peggy Ebbing insuring the Ebbing dwelling and its contents. The policy contained exclusions from coverage and limited coverage of the personal property to certain specified causes. After a Pulaski County jury found for State Farm, appellants brought this appeal alleging six issues: (1) as a matter of law, the flood or surface-water exclusion does not apply to bar recovery; (2) there is no substantial evidence to support a jury finding that a flood had occurred; (3) there is no evidence of governmental negligence; (4) the trial court should have directed a verdict because there was undisputed evidence that an explosion occurred; (5) appellants were prejudiced by the admission of evidence of a collateral-source payment to them by the Water Works;

and (6) the appellants were prejudiced by the failure to strike a biased prospective juror. We agree with the appellant that, as a matter of law, the flood or surface-water exclusion contained in the policy does not apply and reverse and remand for a new trial.

On November 22, 1996, the appellants were the owners of and residing at 6 Virginia Lane in Little Rock. The backyard of the house is adjacent to University Avenue. The Ebbings had insured the home and personal property with the appellee State Farm Fire and Casualty Company. Around midnight on November 22, 1996, a neighbor called the Ebbings and told them that there was water running out of their yard and they needed to check the house. The Ebbings left the residence when they discovered a great deal of water running into the back of the house. They later discovered that a water main on University had burst. Water ran through the house for an hour. The parties stipulated to the fact that the appellees suffered damage to the dwelling in the amount of $58,455.26, and to their personal property in the amount of $68,710. The total damage was $127,165.26.

The Ebbings reported the claim to State Farm. Maggie Wrinkler, an agent of State Farm went to the house and after looking at the house, told the Ebbings that the loss was not covered. The Ebbings made claim to the Water Works for the damage and were paid $103,000. Thereafter, the Ebbings brought suit against State Farm.

Before trial, the appellants moved *in limine* to prohibit the introduction of evidence that the Water Works had paid for part of the damage to the home and for personal property. The trial court denied the motion.

The homeowners policy issued by State Farm was subject to the following exclusion:

SECTION I — LOSSES NOT INSURED

(2) We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such

> loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> (C) Water damage, meaning:
>
> (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, all whether driven by wind or not. . . .

The appellant argues that the terms in the exclusion for water damage are ambiguous and must be interpreted against the insurance company. The appellee responds that the policy provisions are clear and unambiguous and that there is no need to resort to rules of construction. We agree that the terms are clear and unambiguous but do not agree that the terms exclude the damages suffered by the appellant.

We note that the insurance policy does not define the terms in dispute but that the terms, when considered in the context in which they are used and the other terms in the exclusion, relate to acts of nature and not events occurring as a result of a man-made structure. To interpret the terms in any other way would result in ambiguity rather than in its normal usage.

■ ■ In Arkansas, the use of the term "surface water" has primarily been in the context of water accumulating as a result of rain or run-off. *See, e.g., Pirtle v. Opco, Inc.*, 269 Ark. 862, 601 S.W. 2d 265 (1980). Surface water does not have a definite bed, banks, or channel and is considered "surface drainage over the entire face of the tract of land occasioned by unusual freshets or other extraordinary causes." *Boyd v. Greene County, Ark.*, 7 Ark. App. 110, 112, 644 S.W.2d 615, 617 (1983)(quoting *Boone v. Wilson*, 125 Ark. 364, 188 S.W. 1160 (1916)). In the Arkansas cases reviewed, "extraordinary causes" are not those originating in

a water main. We find that the definition contained in *Black's Law Dictionary* is the commonly accepted usage of the term. It states:

> *Surface waters.* Those waters coming unto the ground and naturally spreading over the ground before they have formed into natural watercourses. As distinguished from the waters of a natural stream, lake, or pond, surface waters are such as diffuse themselves over the surface of the ground, following the defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh. They generally originate in rains and melting snows. . . . (Citations omitted.)

Therefore, the term "surface water" is that water accumulating from natural causes rather than water from a burst water main.

■ ■ The appellant asserts that the flood exclusion in the policy does not apply to water resulting from a burst water main. As a matter of law, the appellee responds that water from a burst water main is a flood. We agree that the term "flood" is unambiguous but that its common usage applies to water occasioned from natural events rather than a burst water main. The reasoning of the Colorado Court of Appeals in *Ferndale v. Great Am. Ins. Co.*, 34 Colo. App. 258, 527 P. 2d 939 (1974), is persuasive. In the *Ferndale* case, the court of appeals was required to determine if water damage from a burst water main was excluded under the water-damage exclusion in the insurance policy. The court stated that one of the leading commentators on insurance law has stated:

> "Flood waters" are those waters above the highest line of the ordinary flow of a stream, and generally speaking they have overflowed a river, stream, or natural water course and have formed a continuous body with the water flowing in the ordinary channel . . . 'surface water' is water which is derived from falling rain or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground, while it remains in such a diffused state, and which follows no defined course or channel, which does not gather into or form a natural body of water, and which is lost by evaporation, percolation, or natural drainage. 5 *J. Appleman, Insurance Law and Practice* Section 3145.

The court went on to hold that "flood" and "surface water" do not include water from a burst water main. The reasoning of the Colorado Court of Appeals is sound and we adopt the definitions as applied to the exclusions in this policy. We find as a matter of law that the exclusions in the policy issued to the appellants do not include water from a burst water main.

For their second issue, the appellants argue that there is no substantial evidence in the record for the jury to find that a flood had occurred. We agree. As a matter of law, the exclusion for flood did not include water from a water main. When the appropriate definition of flood is applied to the facts of this case, there was no substantial evidence from which the jury could conclude that the damage to the residence was caused by a flood.

For their third issue, the appellants argue that the governmental exclusion contained in the policy does not apply. During a pretrial hearing on April 15, 1998, the following colloquy occurred between the court and the attorney for the appellee:

> THE COURT: But you would agree with me, wouldn't you, that this policy says that if it's not a flood, then this governmental action or inaction has no bearing.
>
> MR. MOORE: If it's not a flood or surface water caused from natural external forces, I would agree.

The policy provides:

> 3. We do not insure under any coverage for any loss consisting of one or more of the items below. Further, we do not insure for loss described in paragraphs 1. and 2. immediately above regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss:
>
> b. Conduct, act, failure to act, or decision of any person, group, organization or governmental body whether intentional, wrongful, negligent, or without fault; or
>
> c. Defect, weakness, inadequacy, fault or unsoundness in:

(1) planning, zoning, development, surveying, siting;

(2) design, specifications, workmanship, construction or repair; or

(3) materials used in construction or repair; or

(4) maintenance;

of any property (including land, structures, or improvements of any kind, whether on or off the residence premises.

However, we do insure for any resulting loss from items a. and b. unless the resulting loss is itself a Loss Not Insured by this Section.

A plain reading of the policy is that the governmental-action-or-inaction exclusion of the policy is covered unless the resulting loss is not insured. We find that the governmental-action-or-inaction exclusion applies only if the loss is not insured and that, as previously stated, the flood or surface water exclusion does not apply; therefore, the exclusion for governmental action, inaction, or no action at all does not apply to exclude coverage.

For appellant's fourth point on appeal, they argue that they were entitled to a directed verdict for damage to their personal property. Although the appellants moved for a directed verdict, the motion was a bare motion and did not specify a directed verdict in regard to the damage to their personal property. In order to preserve the issue of sufficiency of the evidence for appeal, the party moving for a directed verdict must state the specific ground upon which it seeks such relief. *Houston v. Knoedl*, 329 Ark. 91, 947 S.W.2d 745 (1997). The purpose of this requirement is to assure that the specific ground for a directed verdict is brought to the trial court's attention. *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996). Thus, this point was not properly preserved for appeal. We will not address issues that are raised for the first time on appeal. *Meadors v. Meadors*, 58 Ark. App. 96, 946 S.W.2d 724 (1997).

The appellants argue for their fifth point on appeal that any evidence disclosing the nature of the relationship between the Ebbings and the Water Works is irrelevant, inflammatory, and inadmissible under the collateral-source rule. The appellants moved *in limine* for the exclusion of evidence of the payment by Water Works to the Ebbings and that motion was denied.

The collateral-source rule prohibits the admissibility of evidence showing that the injured person received payments from another source, unless relevant for some purpose other than mitigation or reduction of damages. *Amos v. Stroud*, 252 Ark. 1100, 482 S.W.2d 592 (1972). There are limited exceptions to the rule such as to impeach a witness while testifying in a false or misleading way. *See Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993). State Farm argued that it needed to introduce evidence of the collateral source of payment to impeach David Bowling, a Water Works witness; however, the collateral source of payment was never used to impeach the witness and was prejudicial to the appellants and is reversible error. *See Patton v. Williams*, 684 Ark. 187, 680 S.W. 2d 707 (1984).

For their final point on appeal, the appellants argue that the trial court abused its discretion when it refused to strike a prospective juror. Actual or implied bias is sufficient ground for disqualification of a prospective juror. *Grammel v. State*, 259 Ark. 96, 531 S.W. 2d 474 (1976). During *voir dire*, one prospective juror notified the court that he would have a hard time setting aside his good friendship with a State Farm insurance agent and the fact that he was a customer of State Farm when reaching a verdict on the case at bar. Since we are reversing and remanding this case for retrial, it is unlikely that the same juror will be called, and therefore we do not address the issue.

Reversed and remanded.

JENNINGS and STROUD, JJ., agree.

Vernon WHITE, *et al. v.* J.H. HAMLEN & SON CO.

CA 98-1379 1 S.W.3d 464

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 13, 1999

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

Jess Askew III, for appellee.

ANDREE LAYTON ROAF, Judge. This appeal is from a summary judgment order quieting title to certain lands in appellee, J. H. Hamlen & Son Co. (hereinafter "Hamlen"). Appellants Vernon White and several neighboring property owners (hereinafter "White") contend that genuine issues of material fact remain, thus making summary judgment inappropriate. We agree and reverse and remand.

The land at issue in this case is located on Hardin Island, a large island on the Arkansas River. Hamlen acquired title to a portion of the island in 1982. White and the other appellants own property located eastward and across the river from Hardin Island. However, the southeastern portion of the island claimed by appellee lies within the metes and bounds descriptions of appellants' property. Appellants, or their predecessors in title, have had title to their land since the mid-1940s or early 1950s.

Hardin Island was originally a peninsula connected to the west side of the mainland. Over thirty years ago, the Arkansas River, in its southeastward movement toward the Mississippi River, took an easterly turn at a certain point in Jefferson County, meandering around Hardin peninsula before returning to its main channel. This part of the river was known as Brodie Bend. In about 1966, the river's course was changed when the United States government condemned 3,317 acres of land, including over 300 acres on the Hardin property, to complete the Brodie Bend Cut-Off Project. The project straightened the river's course, severing Hardin peninsula from the mainland. The peninsula thus became Hardin Island. The former river channel that had meandered around the peninsula became a slackwater. This slackwater now lies between Hardin Island to the west and White's mainland property to the east.

On September 1, 1992, Hamlen filed suit in Jefferson County Chancery Court seeking to quiet title to the eastern shore of Hardin Island, *i.e.*, that part of the island lying directly across the slackwater from White's property. Hamlen alleged that, for many years prior to the Brodie Bend Cut-Off Project, the river

eroded the shoreline of the eastern bank where White's land was situated. The resulting silt and sediment were deposited along the western bank, thus becoming part of the future Hardin Island area by the process of accretion. White disputed Hamlen's contention and counterclaimed, seeking to quiet the title to the property in himself and his neighbors.

On December 28, 1993, Hamlen filed a motion for summary judgment with six exhibits. The first five exhibits were aerial photographs taken in 1945, 1948, 1950, 1951, and 1957, and the sixth exhibit was a set of drawings prepared by Dan Robison, a registered land surveyor. Hamlen contended that these exhibits were conclusive proof that over a gradual period of time, White's land lying east of the river bank was lost by erosion and was deposited on Hardin Island, thereby vesting title to the increased land mass in it.

White did not dispute the changes in the river's course during the twelve-year period shown by Hamlen's exhibits but argued that Hamlen's proof did not establish that the portion of Hardin Island lying within the legal description of his land was caused by accretion (a slow and gradual addition or building up of lands due to the deposit of sediment eroded from upstream lands) rather than avulsion (a sudden and rapid disruption of a piece of ground due to the change in the course of a river), which would have allowed White to retain ownership. White also claimed title to the disputed lands pursuant to Ark. Code Ann. § 22-5-403 (Repl. 1996), which concerns the formation of lands in navigable waters. Further, White argued that Hamlen had not proved that the land lost by accretion from White's property was actually deposited on Hamlen's land. Attached to White's response was the affidavit of an employee of the United States Corps of Engineers, Louis Kealer, asserting that the government owned 343 acres of land on Hardin Island. According to White, even if the land that had eroded from his land was deposited on Hardin Island, the accretion could have been deposited on the government's property and not that claimed by Hamlen.

Following a hearing, the chancellor granted Hamlen's motion for summary judgment. He concluded that: 1) Hamlen's exhibits reflected a consistent pattern of erosion along the eastern bank of the river where White's property is situated; 2) the change in the course of the river was a slow, gradual process; 3) there was no evidence to support White's theory of avulsion; 4) Hamlen made a *prima facie* showing of entitlement to summary judgment, and the proof offered by White in response — Kealer's affidavit — did not create a genuine issue of material fact; and 5) Ark. Code Ann. § 22-5-403 did not apply in this case. White's appeal is brought from these rulings.

Our standard of review in summary judgment cases is well recognized. While it is no longer considered a drastic remedy, summary judgment is only appropriate 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. *Guidry v. Harp's Food Stores, Inc.*, 66 Ark. App. 93, 987 S.W.2d 755 (1999). The burden of sustaining a motion for summary judgment is on the moving party. *Id.* On appeal, we view the evidence in a light most favorable to the non-moving party and resolve any doubt against the moving party. *Luningham v. Arkansas Poultry Fed'n Ins. Trust*, 53 Ark. App. 280, 922 S.W.2d 1 (1996). Our task is to determine whether the evidentiary items presented by the moving party in support of the motion leave a material question of fact unanswered. *Id.*

We agree with White that material questions of fact exist regarding whether the changes in the land were brought about by accretion or avulsion. A riparian landowner is at the mercy of the river upon which his land is situated. He acquires, incident to his ownership, whatever land may be added by gradual and imperceptible accretion. *See Crow v. Johnston*, 209 Ark. 1053, 194 S.W.2d 193 (1946). At the same time, he assumes the risk of losing his property by its being gradually washed away by the waters of the river. *Id.* When a stream changes its course gradually, *i.e.*, by accretion, the boundaries of the riparian land owners

change with the stream. *Goforth v. Wilson*, 208 Ark. 35, 184 S.W.2d 814 (1945). When a stream shifts suddenly, *i.e.*, by avulsion, the boundaries of the riparian landowners do not change with the stream. *Id.* The question of whether accretion or avulsion has occurred is generally one of fact. *See Pannell v. Earls*, 252 Ark. 385, 483 S.W.2d 440 (1972).

Hamlen's theory in this case was that a gradual erosion of land occurred along White's riparian boundary and that the land was deposited along what ultimately became Hardin Island. Hamlen sought to prove its theory by use of the aerial photographs mentioned earlier and by a set of four drawings prepared by a land surveyor. The chancellor noted that the photographs, taken over the twelve-year period between 1945 and 1957, indicated that land had gradually eroded away from a portion of the eastern shore of the river where White's property lay. However, the four drawings, which depict the river's course in 1825, 1945, 1957, and 1975, and indicate a dramatic shift in course sometime between 1825 and 1945, then slight shifts in the subsequent years. We cannot say that these exhibits entitle Hamlen to judgment as a matter of law.

First, there is a substantial gap of six years between the last two photographs, during which time change occurred with regard to the river's course. Additionally, Hamlen's photographs are illustrative of intermittent moments in a twelve-year window between 1945 and 1957. They do not indicate what effect, if any, the change in the river's course had during more recent times, especially in light of the Brodie Bend Cut-Off Project, which actually changed the Hardin property from a peninsula to an island. Further, the drawings provided by Hamlen, which cover a 150-year period, show a substantial shift in both location and direction of the curve of the river, from a westward bow to an eastward bow, and from section sixteen to section fifteen, a distance of more than a mile. This shift is so large that the change could be explained, at least in part, by avulsion as much as by accretion. In light of these considerations, we hold that questions of material fact remain to be answered on this issue.

Part of the basis for the chancellor's decision to grant summary judgment was White's failure to dispute the changes in the course of the river as shown by Hamlen's photographs. However, summary judgment is not proper where the evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn. *Luningham, supra.* Further, the chancellor noted White's failure to meet proof with proof upon Hamlen's making a *prima facie* case for summary judgment. Based upon our foregoing analysis of the case, we do not believe Hamlen made a *prima facie* case. When a movant does not make a *prima facie* case showing entitlement to summary judgment, the burden of going forward does not shift to the opposing party. *Wolner v. Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986).

We also hold that a fact question remains with regard to the applicability of Ark. Code Ann. § 22-5-403. This statute provides that, when land forms in navigable waters within the original boundaries of the former owner of the land, title vests in the former owner. The purpose of the statute is to give title to the former owner where his land reforms as an island within the boundaries of his original grant. *Knight v. Rogers*, 202 Ark. 590, 151 S.W.2d 669 (1941). White argues that one of the photographs viewed by the chancellor revealed a large sandbar or island that had formed in the river channel between White's property and the eastern edge of the peninsula that became Hardin Island and, because section 22-5-403 does not apply to sandbars, the statute was inapplicable. It is true that the statute applies to islands of a permanent character and not to sandbars. *See Porter v. Arkansas Western Gas Co.*, 252 Ark. 958, 482 S.W.2d 598 (1972). However, a reading of the chancellor's opinion does not convince us that Hamlen's exhibit shows, as a matter of law, that the formation was an island rather than a sandbar. Therefore, summary judgment was erroneously granted on this point as well.

Finally, we mention an issue raised by White concerning the alleged insufficiency of the property description as contained in Hamlen's 1982 deed and as set forth in Hamlen's petition to quiet

title. Because this issue may be remedied or developed further on remand, we decline to address it now.

Reversed and remanded.

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

BIRD and NEAL, JJ., dissent.

SAM BIRD, Judge, dissenting. I respectfully dissent from the majority's decision reversing the chancellor's granting of summary judgment in this case.

First, the decision of the trial court should be affirmed pursuant to Rule 4-2(b)(3) of the Rules of the Supreme Court because the appellants' abstract is flagrantly deficient. In reading the chancellor's written findings of fact, which are set forth verbatim in an addendum to appellants' abstract, it is obvious that his decision was based, in significant part, on five aerial photographs that were attached as exhibits to appellee's motion for summary judgment and referred to in affidavits attached to the motion. The chancellor found these aerial photographs to "reflect a consistent pattern of erosion of the left bank of the Arkansas River, where the [appellants'] property descriptions are located." The chancellor also noted in his findings that "the [appellants] do not dispute the change in the course of the Arkansas River as it relates to the lands in question as depicted in the aerial photographs. . . ."

However, despite the fact that the five aerial photographs obviously constituted significant evidence supporting appellee's motion for summary judgment, and despite the fact that the chancellor relied on the photographs in reaching his decision to grant the motion, appellants neither abstracted the photographs in words nor attached reproduced copies of the photographs to their abstract as required by Rule 4-2(a)(6) of the Rules of the Supreme Court.

In my view, it is not possible for this court to understand and conduct a meaningful appellate review of the decision of the trial court, to the extent that it was based on the photographs, without

examining those photographs. *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996); *Donihoo v. State*, 325 Ark. 483, 931 S.W.2d 69 (1996). Nonetheless, appellants have failed to make them a part of the abstract on appeal, resulting in a flagrantly deficient abstract.

Secondly, even if appellants' abstract is not flagrantly deficient in its failure to include the aerial photographs, I would affirm the trial court's decision because I believe, contrary to the conclusion of the majority, that the appellee presented a prima facie case of entitlement to summary judgment, and that appellants' response to appellee's motion did not create a genuine issue of material fact. *See Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988). Appellee's motion for summary judgment averred that it claimed title to the land in issue because it has accreted to appellee's property on Hardin Island. Attached to the motion are the series of five aerial photographs referred to above, which are alleged by appellee to depict the gradual erosion, between 1945 and 1957, from appellants' land on the east boundary of the Arkansas River and the build up of appellee's land on Hardin Island located in the river to the west of where appellants' land was originally located. Also attached to appellee's motion are a series of four drawings prepared by Dan Robison, a registered professional land surveyor, along with the affidavit of Robison stating that the drawings depict the changing course of the channel of the Arkansas River from 1819 to 1975, alleged by appellee to dramatically and graphically depict the "cumulative effect of the westward movement of the Arkansas River . . . ."

Appellants' response to appellee's motion for summary judgment merely denied appellee's claim of title to all of Hardin Island, contending that a part of the island was owned by the United States of America. Attached to appellants' response was the affidavit of Louis Kealer, from the Little Rock District of the U.S. Corps of Engineers, stating, in substance, that in 1966 the United States had acquired title to 343 acres on Hardin Island. Significantly, however, appellants admitted in their response that they did not dispute the changes in the course of the Arkansas River as

depicted in the aerial photographs but, rather, disputed that those photographs "prove the matters for which they were offered as proof," and alleged that the photographs "speak for themselves." The problem with this response is that appellants refer to no evidence that they would produce at trial that could contradict what the appellee contends that the photographs "say."

Appellants' response to appellee's motion does not allege, much less suggest the existence of any proof, that the growth of Hardin Island, and the corresponding diminution of appellants' land, was caused by anything other than accretion. Although appellants' counsel argued orally to the chancellor that the movement of their land from the east boundary of the river to the east part of Hardin Island "could have" been caused by an avulsion between 1825 and 1945, or "could have" been caused in 1967 when the Corps of Engineers severed Hardin Peninsula from the mainland to create Brodie Bend Cut-off, appellants referred to no proof, by affidavit, photograph, drawing, or otherwise, to support this argument.

I certainly agree with the majority that summary judgment is only appropriate when the state of the evidence, as portrayed by the pleadings, affidavits, discovery responses, and admissions, is such that the non-moving party is not entitled to a day in court. I disagree, however, with the majority's conclusion that summary judgment is not proper in this case. All the *evidence* that the trial court had to consider supports appellee's position that erosion of appellants' land, and the corresponding growth of Hardin Island, was the result of accretion. Although appellants argued that the event "could have" been occasioned by an avulsion, either between 1825 and 1945, or in 1967, they brought to the chancellor's attention no *evidence* that they could produce at a trial that would tend to prove the occurrence of such an event.

The purpose of the summary-judgment remedy is to avoid the waste of time, work, and money involved in requiring the trial of a case in which a party cannot produce evidence that supports the existence of a fact necessary to establish his claim or defense.

Joey Brown Interest, Inc. v. Merchants Nat'l Bank of Fort Smith, 284 Ark. 418, 683 S.W.2d 601 (1985). In the case at bar, appellants postulated nothing but a theory upon which they might be able to prevail at trial. They did not succeed in establishing the existence of any evidence that supported their theory.

In support of its conclusion that a fact issue exists, the majority cites *Pannell v. Earls*, 252 Ark. 385, 483 S.W.2d 440 (1972), as authority for the proposition that the question of whether accretion or avulsion has occurred is generally one of fact. This is, no doubt, an accurate statement. However, it begs the question in this case as to whether there is any evidence in existence that supports appellants' argument that the fact of avulsion occurred. Just because there is a fact question raised in a case does not mean that a summary judgment is not an appropriate remedy where a party cannot establish the existence of evidence to support the fact he seeks to prove. *See Joey Brown v. Merchants Nat'l Bank of Fort Smith, supra.*

The majority correctly states that summary judgment is not proper where the evidence, although not in material dispute as to actuality, reveals aspects from which inconsistent hypotheses may be drawn, citing *Luningham v. Arkansas Poultry Fed'n Ins. Trust*, 53 Ark. App. 280, 922 S.W.2d 1 (1996), but it misapplies that proposition to this case because appellants produced no *evidence* that would support their hypotheses that the growth of Hardin Island was the result of avulsion and not accretion.

The majority also suggests that there are gaps in time between the dates of the aerial photographs during which the trial court could not have known what occurred with regard to the river's course. This is also an accurate statement, but it also begs the question in this case. In their response to appellee's motion for summary judgment, appellants expressly stated that they did not dispute the changes in the river's course as depicted in the photographs, and expressly admitted that the photographs speak for themselves. The chancellor, who had the benefit of viewing the photographs, concluded that they were sufficient to establish

that the changes in the river's course resulted from accretion. Appellants did not suggest that there were any other photographs, taken either during gaps between the photographs produced by appellee or at any other time, that would disprove that the changes in the river's course resulted from accretion.

I am especially puzzled by the majority's conclusion that there is a fact question remaining regarding the applicability of Ark. Code Ann. § 22-5-403 (Repl. 1996), relating to the ownership of islands that form in navigable streams. The majority disagrees with the chancellor's conclusion that a formation in the river channel between appellants' land and the eastern edge of Hardin Peninsula is a sandbar, not an island, thus rendering section 22-5-403 inapplicable. On this point, the chancellor's opinion states as follows:

> Exhibit "B" to the Motion for Summary Judgment shows a sandbar forming in the channel of the Arkansas River. Defendants claim the sandbar was land formed in navigable waters, and any portion of the land falling within the metes and bounds descriptions in Defendants' deeds therefore belongs to the Defendants under Ark. Code Ann. § 22-5-403(a). This statute, however, applies only to islands, as opposed to sandbars. See, *e.g.*, *Glover v. Walter*, 252 Ark. 1294 [1293] (1972). Here, the photographic evidence shows that the sandbar had no vegetation and no fast land but was simply a part of the river bed. As of 1948, "this principal sandbar had no permanent character, no permanent vegetation, no fast land, and was simply a part of the river bed, i.e., sandbar." *Porter v. Arkansas Western Gas*, 252 Ark. 958, 968 (1972). The Court concludes that Ark. Code Ann. § 22-5-403 does not apply to the sandbar at issue in this case because it was not an island and had no permanent character.

I cannot help but wonder what it is in the chancellor's opinion that causes the majority to say that, "a reading of the chancellor's opinion does not convince us that Hamlen's exhibits show, as a matter of law, that the ultimate formation was an island rather than a sandbar." Exhibit B to the motion for summary judgment was one of the five aerial photographs that appellants failed to abstract and are not, therefore, a part of the transcript on appeal.

As stated earlier, the chancellor had the benefit of viewing those aerial photographs, but we do not. I do not see anything in the chancellor's opinion from which the majority could possibly determine, in contradiction of the chancellor's finding, that the formation in the river might be an island, rather than a sandbar. I do not see any way that the majority judges, who have not viewed the aerial photographs, can disagree with the chancellor's conclusion, which was reached after he viewed that aerial photographs, that the formation in the river "had no vegetation and no fast land but was simply a part of the riverbed. . . ."

I would affirm the chancellor's grant of summary judgment in favor of the appellee.

NEAL, J., joins in this dissent.

[redacted]

[redacted]