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ROMA LEATHERS, INC. *v.* Jim RAMEY

CA 98-1406 2 S.W.3d 82

Court of Appeals of Arkansas
Division II
Opinion delivered October 20, 1999

Appellant, not represented by licensed counsel.

No response.

WENDELL L. GRIFFEN, Judge. Appellant Roma Leathers, Inc., a California corporation, filed suit in Lonoke County Circuit Court and was represented by Linda Lee, a non-attorney and presumably an officer of the corporation who is not licensed to practice law in Arkansas. The corporation claimed that the appellee received leather goods for which he had not paid. Although the trial court rendered a judgment in its favor, the appellant contends that the trial judge erred in two aspects: 1) the trial court failed to exhaust all legal means to get the legal documents and proof necessary for two of appellant's invoices and failed to reverse itself when the documents finally arrived; and 2) the amount of judgment entered was not based upon the proper amount according to the invoices. Appellee has not filed a brief.

Appellant offers no authority for its arguments. Its abstract is flagrantly deficient. Moreover, appellant's representative has engaged in the unauthorized practice of law. Therefore, we dismiss the appeal.

Appellant sold and shipped to Jim Ramey four packages on four separate invoices. According to appellant, Ramey paid for two invoices with bad checks and failed to pay on two other invoices. Appellant sued for recovery of the invoice amounts in municipal court, and the case was tried on May 20, 1997. Ramey disputed receiving two of the packages. Appellant won a judgment for $1,942.04. Ramey filed an appeal in circuit court on November 3, 1997. He presented a check for one invoice, admitted that he owed appellant for the second invoice, and alleged that proofs of delivery for the other two invoices were not legal documents. The trial judge then sent a letter to UPS demanding UPS to certify their proofs of delivery. A response from UPS did not arrive until after

the trial court entered a judgment for appellant for the second package only.

Appellant contends on appeal that the trial court should have enforced its request for certified delivery records from UPS. Furthermore, appellant contends that the court should have reversed itself after the documents eventually arrived. For the second point on appeal, appellant contends that judgment was entered for the incorrect amount, and that the invoice was for an additional $49.50.

The appellant cites no authority for its arguments. It is well-settled that we do not consider arguments on appeal that are not cited by authority and where it is not apparent, without further research, that the arguments are well-taken. *Hodges v. Lamora*, 227 Ark. 740, 989 S.W.2d 530 (1999); *Gnas v. Burger & Assocs., Inc.*, 295 Ark. 569, 750 S.W.2d 58 (1988).

We also decline to address the merits of the appellant's arguments because the abstract is flagrantly deficient. The invoices are not included in the abstract, nor are the "certified delivery records" which were evidently necessary for the appellant's case.

Beyond these factors, we must dismiss the appeal because appellant has engaged in the unauthorized practice of law. The appellant is an out-of-state corporation seeking redress in the Arkansas courts. It is not represented by an attorney licensed to practice law in the state of Arkansas. Ms. Lee, the unlicensed individual representing the corporation, has invoked the processes of the Arkansas courts at the municipal, circuit, and appellate levels.

Under Arkansas law, no person shall be permitted to practice law in any court of record in Arkansas unless he has been licensed to practice by the Arkansas Supreme Court. Ark. Code Ann. § 16-22-206 (Repl. 1994). An individual who attempts to practice law without being properly licensed shall be deemed guilty of contempt of court and shall be punished as in other cases of contempt. Ark. Code Ann. § 16-22-209 (Repl. 1994).

With regard to corporations, Ark. Code Ann. § 16-22-211(a) (Repl. 1994) provides that "[i]t shall be unlawful for a corporation or voluntary association to practice or appear as an attorney at law for any person in any court in this state or before any judicial body...[or] to render legal services of any kind in actions or pro-

ceedings of any nature in any other way or manner." Further, Arkansas caselaw is clear that individuals may represent themselves, but corporations may do so only through a licensed attorney. *McAdams v. Pulaski County Circuit Court*, 330 Ark. 848, 956 S.W.2d 869 (1997); *All City Glass and Mirror, Inc. v. McGraw Hill Information Systems Co.*, 295 Ark. 520, 750 S.W.2d 395 (1988).

The seminal Arkansas case in this regard was *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954). In this case, the court made its ruling under Ark. Stat. Ann. § 29-205 (1947), now codified at Ark. Code Ann. § 16-22-211 (Repl. 1994). The court definitively stated that invoking the process of a court of law constitutes the practice of law. The court stated:

> [W]hen one appears before a court of record for the purposes of transacting business with the court in connection with any pending litigation or when any person seeks to invoke the processes of the court in any matter pending before it, that person is engaging in the practice of law.

Arkansas Bar Ass'n v. Union Nat'l Bank, 224 Ark. at 53, 273 S.W.2d at 411. The court stated further that "[a] corporation may . . . represent itself in connection with its own business or affairs in the courts of this state provided it does so through a licensed attorney." *Id.* at 51, 273 S.W.2d at 410.

The results of a finding that a party has engaged in the unauthorized practice of law vary under Arkansas law. In *McKenzie v. Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973), the Arkansas Supreme Court noted that in many other jurisdictions,"proceedings in a suit instituted or conducted by one not entitled to practice are a nullity, and if appropriate steps are timely taken the suit may be dismissed, a judgment in the cause reversed, or the steps of the unauthorized practitioner disregarded."*Id.* at 333, 500 S.W.2d at 359-60. Examples of appropriate steps cited by the *Burris* court include a motion to strike a complaint, a motion to strike an answer, a motion for mistrial, or a motion to strike a petition. *Id.* at 333, 500 S.W.2d at 360. Given the options provided by the *Burris* court, the Arkansas Supreme Court has denied a writ of certiorari filed on behalf of a corporation by a non-attorney. *McAdams, supra.* The supreme court has also affirmed the trial court's striking of an answer filed on behalf of a corporation by the president of the corporation, who was not an attorney. *All City Glass, supra.*

In *All City Glass*, the court stated that Ark. Code Ann. § 16-22-211(a), which makes it unlawful for an corporation to practice law, did not govern that case. The court then discussed Ark. Code Ann. § 16-22-206 (Repl. 1994), which requires that an *individual* who practices law in Arkansas must be licensed by the Arkansas Supreme Court, and noted that corporations must be represented by licensed attorneys. *Id.* at 521, 750 S.W.2d at 395. The court also stated that filing an answer constitutes the practice of law, and quoted the above language from *Burris and Union Nat'l Bank. Id.* at 521, 750 S.W.2d at 395-96. The court seemed to hold that the individual, but not the corporation, engaged in the unauthorized practice of law. Nonetheless, the corporation ultimately suffered the consequences of the actions of its representative; it was the corporation's answer that was stricken and the corporation's cause of action which suffered as a result.

By contrast, in *Moreland v. Vickers Chevrolet Co.*, 37 Ark. App. 1, 826 S.W.2d 289 (1992), we affirmed a judgment where a corporation was initially represented in municipal court by its president, a non-attorney. At the municipal level, the adverse party did not make any objections or motions to strike. However, once the municipal decision was appealed to the circuit court, the adverse party objected and the corporation obtained licensed legal counsel. *Id.* at 4, 826 S.W.2d at 291. The appellant quoted the above language from *Burris*, and argued the municipal judgment was a nullity. *Id.* at 3-4, 826 S.W.2d at 290. However, we found that *Burris* did not support the argument that the municipal judgment was a nullity, because the adverse party failed to object at the municipal level, and when he objected, the corporation obtained licensed counsel. *Id.* at 4, 826 S.W.2d at 291. Therefore, we affirmed the judgment.

In the case at bar, the appellant is an out-of-state corporation seeking redress in our courts. It has been represented through all stages of this case by an individual not licensed to practice in this state. According to the reasoning of *All City Glass*, *supra,* it appears that Ms. Lee has engaged in the unauthorized practice of law; thus, the corporation she represents, Roma Leathers, must bear the ultimate responsibility for the conduct of its unauthorized representative.

It is true that we generally do not address issues not raised below. It is also true that, unlike the adverse party in *Moreland*, *supra*,

the appellee in this case did not raise any objections or make any motions to strike, even at the appellate level. However, the appellee's failure to object and the trial court's failure to recognize this issue at the outset should not inure to the benefit of a party whose actions violate Arkansas law and fly in the face of our rules. Moreover, an affirmance here will produce an anomaly in the caselaw: an out-of-state corporation, represented by a person not licensed to practice law, will prevail at the municipal, circuit, and appellate levels, despite its clear violation of Arkansas law and its failure to comply with this court's abstracting requirements. We refuse to sanction such a precedent that would offend the dignity of our judicial process and would encourage the unauthorized practice of law.

At every level of the judicial process, judges are duty-bound to protect the integrity of our court system. We recognize that the appellant will still receive the judgment awarded below. Nonetheless, our decision rests on the view, well-established by the authorities cited herein, that the unauthorized practice of law by a corporation is a serious matter that should not be countenanced. Accordingly, we dismiss this appeal.

Appeal dismissed.

ROGERS and HART, JJ., agree.

Thomas F. RANDLES and Lilly K. Randles *v.*
Billy Eugene COLE; Denise Cole; Tex Holt; and
Boomer, Inc., a/k/a Victor's Properties, Inc.

CA 99-239 2 S.W.3d 90

Court of Appeals of Arkansas
Division III
Opinion delivered October 20, 1999

Harry McDermott, for appellants.

Penix & Taylor, by: *Stephen L. Taylor*, for appellees.

JOHN F. STROUD, JR., Judge. Appellants, Thomas and Lily Randles, sued appellees, Billy and Denise Cole, Tex Holt, and Boomer, Inc., a/k/a Victor Properties, Inc., for fraud and breach of contract after appellants discovered that five acres of property they had purchased from the Coles had been the site of a landfill. Appellee Tex Holt, an employee of appellee Victor Properties, was the real estate agent who represented the Coles and handled the sale of land to the Randles. The Randles purchased the property on August 15, 1994, but did not file a complaint against appellees until more than three years later, on October 10, 1997. The Coles moved for summary judgment contending that the suit was barred by the three-year statute of limitations for fraud. After a brief hearing on November 13, 1998, the circuit judge granted the Coles' motion for summary judgment and subsequently entered a judgment dismissing with prejudice appellants' complaint against all of the appellees. We reverse and remand.

Appellants contend that the circuit court erred in granting the Coles' motion for summary judgment because there was a genuine

issue of material fact regarding when the appellants discovered that the property had been a landfill. We agree.

The standard we must apply in reviewing a grant of summary judgment is well established:

> 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 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, this 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. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*; *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997); *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998). After reviewing undisputed facts, summary judgment should be denied if under the evidence reasonable men might reach different conclusions from the undisputed facts. *See, Leigh Winham, Inc. v. Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983).

George v. Jefferson Hosp. Ass'n, Inc., 337 Ark. 206, 210-11, 987 S.W.2d 710, 712 (1999).

Moreover, the pertinent legal principles are also well established regarding the application of the statute of limitations. The statute of limitations for fraud and all tort actions not otherwise limited by law is three years. *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994); *Gibson v. Herring*, 63 Ark. App. 155, 975 S.W.2d 860 (1998). The limitations period begins to run, in the absence of concealment of the wrong, when the wrong occurs, not when it is discovered. *Gibson v. Herring, supra.* However, affirmative acts concealing the cause of action will bar the start of the statute of limitations until the time when the cause of action is discovered or should have been discovered by reasonable diligence. *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997); *Gibson v. Herring,*

supra. A plaintiff's ignorance of his rights or the mere silence of one who is under no obligation to speak will not toll the statute. *Gibson v. Herring, supra*; *Skaggs v. Cullipher*, 57 Ark. App. 50, 941 S.W.2d 443 (1997). There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. *Wilson v. General Electric Capital Auto Lease, Inc.*, 311 Ark. 84, 841 S.W.2d 619 (1992); *Gibson v. Herring, supra.* Although the question of fraudulent concealment is normally a question of fact that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion a trial court may resolve fact issues as a matter of law. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998); *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996).

Here, the evidence left room for a reasonable difference of opinion concerning when the limitations period began to run. In their complaint, appellants alleged that appellees committed fraud or constructive fraud on August 15, 1994, when they signed the contract for the sale of the property at issue. Appellants alleged that the appellees' failure to tell them that the property had been a landfill, was not suitable to live on, and did not have potable well water constituted the fraudulent conduct. The three-year statute of limitations bars their complaint unless it did not begin to run on August 15, 1994, but rather began to run on a later date within three years of October 10, 1997, the date the complaint was filed.

Appellants argue that appellees concealed their fraudulent conduct when they continuously refused to comply with the following provision of the contract pursuant to which appellants purchased the land: "It shall be the duty of SELLERS to present to BUYERS any pertinent information which comes into their possession in regard [to] pertinent documents which relate to this transaction." Appellants note that one of the documents pertinent to the transaction was a disclosure form in which appellees Billy and Denise Cole stated that there were not any landfills, hazardous wastes, or other substances on the property. The Coles executed this form in June 1994. Although the Coles maintained that appellants had not received a copy of this disclosure form by the closing date of August 15, 1994, their real estate agent Tex Holt stated in a deposition that he had given appellants a copy of the disclosure form, which amounted to a disputed question of fact. Delivery of a false disclo-

sure form would be a positive act of fraud sufficient to toll the statute of limitations until the appellants learned or should have learned that the site had been used as a landfill.

Moreover, the Coles based their motion for summary judgment, in part, on certain statements that appellant Thomas Randles made in his October 8, 1998, deposition. The Coles noted three statements that Mr. Randles made in his deposition that established late September or early October 1994 as the time when the Randles discovered that the property had been used as a landfill. First, the Coles noted that Mr. Randles admitted that sometime toward the end of September 1994 his brother and a man who had bush-hogged the property told him that it was covered with glass, glass bottles, and trash bags. Second, Mr. Randles admitted that by the end of September 1994 he had seen that there were glass, glass bottles, and "junk all over the land." Finally, he admitted that by mid-September 1994 he noticed that a pig he had penned on the land developed a bloody snout after rooting inside its pen. Mr. Randles stated that the pig's bloody snout caused him to inspect the ground inside the pen and that he discovered that the pig had rooted up broken glass, glass bottles, and other trash. The Coles argued in their summary-judgment motion that Mr. Randles's admissions proved that by late September 1994 the Randles should have known the property had been used as a landfill.

However, on October 20, 1998, Mr. Randles signed an affidavit in which he stated that he had been on prescribed medication when he gave his deposition and therefore was not thinking clearly and had made several mistakes in his testimony. In his affidavit Mr. Randles stated that it was not until mid-October 1994 that his brother told him that he and two other men who had been hired to clear the land had hauled a great deal of broken glass and many trash bags off the land. He stated that he moved onto the property on August 30, 1994, after release from the hospital following a heart attack. He further stated that he stayed inside the mobile home until September 28, 1994, when he went outside for the first time. Mr. Randles also stated that in October 1994 he noticed a lot of trash on the land, but that he did not suspect it had been used as a landfill until after the pig developed a bloody snout. He stated further that he did not put the pig in the pen until, at the earliest, the third week in October 1994 and that for several weeks thereafter he discovered that no matter how many times he would clean

the pig's pen, the pig would root up more trash. He stated that it was at this time he began to suspect the trash was not just on top of the ground but was "inside the land itself" and that his suspicion was confirmed when his neighbor told him, on or about Halloween 1994, that the land had been an open garbage dump for many years.

In its order granting the Coles' motion for summary judgment, the circuit court did not set forth a date certain upon which the limitations period began to run. The circuit judge stated from the bench, however, that appellants were on notice by late September 1994 that their property had been used as a landfill. Reviewing the evidence in the light most favorable to the appellants, as the non-moving parties, and resolving all doubts and inferences against the appellees, as the moving parties, we conclude that the circuit court erred in granting the Coles' motion for summary judgment because there were questions of fact regarding whether or when the disclosure form was delivered to the appellants and, given Mr. Randles's statements in his affidavit, reasonable men might reach different conclusions regarding when the Randles discovered that their property had been used as a landfill.

Appellants also contend that the circuit court erred in determining that there was no genuine issue of material fact regarding whether their complaint stated a cause of action for breach of contract. We need not address this issue because we assume that the circuit court will revisit that matter based upon testimony presented at the trial on remand.

For the reasons set forth above, we reverse the circuit court's order granting the Coles' motion for summary judgment and remand for trial.

Reversed and remanded.

HART and NEAL, JJ., agree.

BOB COLE BAIL BONDS, INC. *v.* STATE of Arkansas

CA 98-1209 2 S.W.3d 94

Court of Appeals of Arkansas
Division III
Opinion delivered October 20, 1999

Wright & Van Noy, by: *Herbert T. Wright, Jr.*, for appellant.

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

JOHN E. JENNINGS, JUDGE. This is an appeal from an order requiring the forfeiture of $2,000.00 on a $5,000.00 bail bond. The issues on appeal center upon whether the statutorily

required notice was properly sent to appellant. We reverse the order of forfeiture.

The appellant posted a bond guaranteeing the appearance of Lacey Helmert on a petition to revoke. Ms. Helmert failed to appear at the hearing scheduled for December 1, 1997. By letter of the same date, the court administrator sent notice to appellant that the 120-day period found in Ark. Code Ann. § 16-84-201 (Supp. 1997) had been activated. The notice was sent to Cole Bonding, 1005 N. Center, Lonoke, Arkansas, 72086. Helmert was arrested on June 25, 1998.

At the forfeiture hearing held on July 15, 1998, appellant questioned whether the notice had been sent to the correct address. For reasons that are not explained in the record, the bond was not located. Nevertheless, the trial court found that notice had been sent to the proper address, and a forfeiture of $2,000.00 was declared, after giving appellant credit for expenses incurred in its attempt to locate Helmert.

Appellant first argues on appeal that the trial court erred in ruling that the statutory service requirements of Ark. Code Ann. § 16-84-201 (Supp. 1997) had been fulfilled. We must agree.

Arkansas Code Annotated section 16-84-201(a)(1)(A) (Supp. 1997) provides:

> If the defendant fails to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court may direct the fact to be entered on the minutes, and shall promptly issue an order requiring the surety to appear, on a date set by the court not less than ninety (90) days nor more than one hundred twenty (120) days after the issuance of the order, to show cause why the sum specified in the bail bond or the money deposited in lieu of bail should not be forfeited.

Arkansas Code Annotated section 16-84-201(a)(1)(B) sets out the procedure by which notice is to be given to the surety. It states that "[t]he one hundred twenty-day period begins to run from the date notice is sent by certified mail to the surety company *at the address shown on the bond*, whether or not it is received by the surety."

It has been held that statutory service requirements, being in derogation of common-law rights, must be strictly construed and that compliance with them must be exact. *Holt Bonding Co. v. State*, 328 Ark. 178, 942 S.W.2d 834 (1997). The court also held in *Holt Bonding* that actual notice of a proceeding does not validate defective process. Because strict compliance is required, we have reversed a bond forfeiture where the notice was sent to an address other than the one shown on the bond. *Bob Cole Bail Bonds, Inc. v. State*, 65 Ark. App. 5, 984 S.W.2d 83 (1999).

Here, the record does not show whether the notice was sent to the address listed on the bond, nor does it reflect that the notice was sent by certified mail. The first question then becomes whose responsibility it is to produce the original bond or a copy, or to explain its absence, or to present evidence of its contents. The bond is the document upon which the State's cause of action is founded. Surely, the burden rests upon the State. Under these circumstances we have no alternative but to reverse the decision of the circuit judge.

Appellant also contends that no judgment of forfeiture can be entered in this case because the 120-day period never began to run because of the defective notice, and because Ms. Helmert has since been apprehended. We agree. The statute provides that the 120-day period begins to run from the date the notice is sent by certified mail to the surety at the address shown on the bond. Ark. Code Ann. § 16-84-201(a)(1)(B) (Supp. 1997). The statute also provides that no judgment of forfeiture can be entered if the defendant is apprehended within 120 days from the date of the receipt of written notice. Ark. Code Ann. § 16-84-201(c)(2) (Supp. 1997). Under the law, there could be no forfeiture of the bond in the case at bar.

Reversed and dismissed.

STROUD and CRABTREE, JJ., agree.

Patrick E. ATCHLEY *v.* STATE of Arkansas

CA CR 99-351 2 S.W.3d 86

Court of Appeals of Arkansas
Division II
Opinion delivered October 20, 1999

Laws & Murdoch, P.A., by: *Hugh Richardson Laws*, for appellant.

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

JOSEPHINE LINKER HART, Judge. The State charged appellant Patrick E. Atchley with the crime of engaging children in sexually explicit conduct for use in visual or print medium. *See* Ark. Code Ann. § 5-27-303 (Repl. 1997). At trial, the court declared a mistrial at the request of the appellant. After the case was set for retrial, the State amended the information to add two additional charges, pandering or possessing visual or print medium depicting sexually explicit conduct involving a child, *see* Ark. Code Ann. § 5-27-304 (Repl. 1997), and second-degree endangering the welfare of a minor, *see* Ark. Code Ann. § 5-27-204 (Repl. 1997). The appellant moved to dismiss the charges against him, alleging that because the State had goaded him into moving for a mistrial at his first trial, application of the Double Jeopardy Clause precludes retrial. The trial court denied his motion. He raises this argument again on appeal and further argues that we should apply a stricter standard to such cases than the standard applied in *Oregon v. Kennedy*, 456 U.S. 667 (1982). We affirm.

Prior to trial, the appellant sought to preclude the State from introducing testimony that he furnished alcohol to a minor. At a pretrial hearing, the appellant's counsel stated that the State had agreed not to introduce this testimony. The prosecutor stated:

> Your Honor, the photographs depict the girls with alcohol bottles.... Statements also say that they went to his house and they consumed alcohol. Now, I believe there's also gonna be some testimony that he didn't give it to them. Whether he did or not, I'm not intending to go into that, technically. If it's opened, I'm gonna go into it, but whether he furnished alcohol or not, I don't care.

The prosecutor further stated that the photographs showed the minors with alcohol bottles, and he argued that those photographs were admissible. The court then agreed with the prosecutor that certain photographs showing the minors with alcohol were admissible.

However, at a subsequent hearing the court reconsidered its ruling regarding the admissibility of the photographs. The court

stated that if the appellant was endangering the welfare of a minor or providing alcohol to a minor, then he should have been charged with those offenses. The prosecutor explained that although the appellant had provided alcohol to the girls, he did not intend "to go into the alcohol realm in my case in chief, but that was based on the photographs coming in." The trial court noted the earlier stipulation and excluded the photographs showing the minors with alcohol. The prosecutor remarked:

> Then if that's the case... I will back up. I hate to do that but that's an element... of the charge. And that's an element. It's in all the statements. But... I wasn't intending to go into testimony just to introduce photographs and let them speak for themselves which is exactly what I said on the record. But, without the photographs, I've got to back up and say we do intend to use it because they said that. And, I said that on the record. That was — that we's gonna let the photographs speak for themselves. Without the photograph, we have no testimony.

The prosecutor further remarked:

> I don't care about whether they say he drank alcohol or not, [b]ut, the fact is he's providing these items for the pictures. You know I don't care if they consumed it. I don't care what they say about drinking it. But, the essence of the charge is that he enticed, he provided. These are all things that he gave them that was part of the picture that he's back behind the camera directing them.

The trial court stated that the State had specifically agreed that it did not intend to offer any evidence that the appellant provided alcohol and that if there was "no testimony being offered to that effect, then the pictures shouldn't be offered and create an implication that he did this." The court, however, further stated, "I'm granting the [m]otion in [l]imine at this point, unless the State through testimony, can offer testimony to somehow tie it — lay the foundation for those photographs to show that they are relevant to the charges we're talking about."

At trial, the State called N.T., who was seventeen, as a witness. N.T., who was in some of the pictures, replied affirmatively when asked by the State if the appellant had supplied any props, toys, or other items to use in the photographs. The State then handed N.T. photographs showing the minors with alcohol. The trial court remarked that the pictures would not be shown until the State laid a

foundation to show that the items were used to induce, encourage, or entice and further asked the State not to refer to what was in the pictures. The State then cautioned N.T., "Now, during this time, did Pat give you — I don't want to get what it was, but were you given anything to use in the photographs — props, anything to hold, to show up, or whatever? Just say yes or no." N.T. examined the photographs and responded affirmatively. The State asked if the items were given to her so that they could be used in the photographs. N.T. denied this, and the State asked why they were given. N.T. replied, "We already had the liquor and Megan wanted to see the gun- ." Without prompting from the appellant, the court held a sidebar conference and cautioned the State to stay away from the photographs.

The State then called M.C., who was also seventeen, as a witness. The prosecutor asked, "Did he provide you — did he ever buy you anything or provide you with anything?" M.C. responded, "Yeah, we'd go to his house — we'd get drunk and stuff and he gave us money. We bought pot and he took us places--." The court held a bench conference, and the appellant's counsel remarked, "This is what we moved in [l]imine about he — wasn't charged with anything contributing—." The prosecutor, however, stated that he "didn't expect that," but that he would "get her away from that." The prosecutor noted, "I asked her if he provided anything — I expected and she'd say, you know, he's bought clothes and stuff like that." The appellant's counsel moved for a mistrial. The prosecutor replied that "the actual court ruling was that if we could lay a foundation the alcohol could come in. And, the only way to lay a foundation is for something to come out. I didn't expect it to come out then." The court noted that the State had stipulated that it did not intend to introduce testimony regarding the appellant providing alcohol to minors and that the court had said it would reconsider its ruling regarding the admissibility of the photographs if the State laid a foundation. The court further stated as follows:

> [T]he State made a stipulation. It was an agreement. That's an agreement between counsel before I ever got involved that they had no intention of going into the subject of him providing alcohol to these minors. .... That was an agreement. There's no question about that, before we ever got the pictures. When I got the pictures, and I saw an alcohol bottle in their hands — fully clothed children — young people, with an alcohol bottle, I based my

> ruling on those pictures in part on the stipulation. Since the State had stipulated that they were not gonna put alcohol and him providing alcohol into the case, I didn't see any fairness in allowing a picture of a fully clothed young person with an alcohol bottle in their hand, into — into this case involving these charges. For the very reason, that this — I didn't want the jury to conclude that he was somehow involved with providing alcohol, if the State was not gonna prove that.
>
> So, you're kind of getting ahead of yourself a little bit on proving something. I realize you would like to put the picture with a child — with a young person with an alcohol bottle in their hand, and let the jury conclude from that. That he was somehow involved in that. But, that is in direct violation of your stipulation that you made earlier, before we got to the pictures. That you did not intend to impose alcohol into this case, and him providing it. So, for that reason, the [m]otion in [l]imine was granted on that — on a stipulation. The subject — the State will stay away from the subject that him providing alcohol to these minors. That's based on your own agreement.....
>
> We're gonna try this case on the merits of the charge that the State brought, and the pictures that deal with the subject. I don't know how many there are. There's about [eleven] pictures of nude or partially clothed, sixteen[-]year-old girls, apparently that the State has access to that are relative to this charge. The State — those cases — those pictures that involve the gun, with their clothes, those pictures that involve alcohol bottles with their clothes, as far as I'm concerned, based on the State's stipulation, uh, have no relevance involved in this case. That's my ruling and that's what I said earlier.

The trial court, however, did recall that it had told the State that it could lay a foundation on the picture to show how it was involved in the case. The prosecutor replied that the witness "got ahead of me," and apologized, stating that he "wouldn't have got to that point if I hadn't been understanding I could lay a foundation."

An in camera hearing was then held with M.C. M.C. was shown the photographs. She then testified that the appellant had provided her and other minors with alcohol. Afterwards, the court stated that it would hold the State to its stipulation. The court, however, denied the appellant's motion for a mistrial. The prosecutor reported that the witness was being instructed to "stay away" from the subject. The prosecutor further stated, "I'm not gonna get

back into that. I understand. I just was under the understanding I could lay a foundation. No problems. Don't worry about it."

When the jury returned to the courtroom, the court instructed it "to disregard the witness'[s] last statement." The State asked M.C., "Now, these — during this time frame that the photographs were taken, what was going on — what were y'all doing?" M.C. replied, "Drinking." The appellant again moved for a mistrial. The court asked, "I thought you instructed your witness to stay away." The prosecutor replied, "We did. We did tell her that. We told her to stay away from that." The court granted the appellant's motion.

The appellant subsequently filed a motion seeking to dismiss the case, arguing that the State had goaded him into moving for a mistrial and that a retrial was thus precluded by application of the Double Jeopardy Clause. The court held a hearing on this motion. The appellant's counsel noted that the State had filed additional charges. The prosecutor stated that he filed additional charges against the appellant because the appellant had driven around the victim's house five times on the day after the mistrial was granted, and he felt that additional charges needed to be filed. The prosecutor further stated that he filed additional charges so his witnesses would not have to "separate the facts."

After restating what happened at trial, the court stated as follows:

> I don't think this was intentional. I think that what created the confusion, I think the State was wanting to get those photographs in. I mean, they wanted to get the photographs in. My ruling was that in light of what I was seeing, the charges and the motion in limine involving the alcohol and what he was charged with, that I didn't see the picture of the gun — with the gun and the picture of the bottle of alcohol, I thought would create more prejudice than probative value on the case. And, so, I ruled that it was out. And the State was anxious to get the pictures in.
>
> I do remember, I'm assuming we were on the record. I don't remember. But I do remember talking to counsel outside the hearing of the jury and saying that if the State can lay a foundation and show that they're somehow relevant to this case, I'll reconsider. I believe... that's what I said.....

> And, then the State, I think, put the pictures back up there with the witness, and I think in part that created some of the problem, because the witnesses were then trying to deal with that and they were having a difficult time staying away from alcohol with that picture there. But, again, I go back — we can't get around the original first thing that happened, the pretrial stipulation to stay away from that subject. It wasn't something I ordered, it was something that was agreed to.
>
> But, my find[ing] is it was not intentional. I think it's just one of those things that come up in a trial. Confusion, whatever else. I don't think it was prosecutorial misconduct. I think it was just confusion. I granted the mistrial. I think by the time I granted it I certainly got the impression everyone agreed that in light of what was happening there was no way we could proceed. I don't know if the record reflects that, but [d]efense moved for a mistrial and the State was that we have done our best to talk to these witnesses. They just can't seem to stay away from it.

The trial court denied the appellant's motion to dismiss.

The United States Supreme Court stated in *Oregon v. Kennedy*, 456 U.S. 667 (1982), that there is a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial if the defendant moves for and is granted a mistrial. *Id.* at 673. The Court held that "the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id.* at 679. In other words, "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first trial on his own motion." *Id.* at 676. This standard requires that the trial court make a "finding of fact" and "[i]nfer[ ] the existence or nonexistence of intent from objective facts and circumstances...." *Id.* at 675. In *Jackson v. State*, 322 Ark. 710, 713, 911 S.W.2d 578, 580 (1995), and *Espinsoa v. State*, 317 Ark. 198, 876 S.W.2d 569 (1994), the Arkansas Supreme Court adopted the standard set forth in *Kennedy*. Thus, we decline the appellant's invitation to apply a stricter standard.

As is apparent from the above-quoted excerpts from the record, the prosecutor was confused by the court's rulings, conclud-

ing that he could lay a foundation for the photographs depicting the minors with alcohol while at the same time abiding by the stipulation not to introduce testimony that the appellant provided alcohol to minors. And despite the prosecutor's attempts to prevent the State's witnesses from testifying about alcohol, the witnesses continued to do so. Moreover, the trial court accepted the prosecutor's assertion that he had not intended to cause the mistrial. Thus, we cannot say that the record does not support the trial court's finding that the State did not goad the appellant into asking for a mistrial.

Affirmed.

CRABTREE and MEADS, JJ., agree.

Bobby J. OLIVER *v.* GUARDSMARK, INC.

CA 99-96 3 S.W.3d 336

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 27, 1999

Dowd, Harrelson, Moore & Giles, by: *Greg Giles*, for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Frank B. Newell*, for appellee.

SAM BIRD, Judge. Appellant Bobby Joe Oliver appeals a decision of the Workers' Compensation Commission that denied him additional benefits. On May 23, 1989, appellant suffered a compensable back injury. After two previous hearings, appellant's healing period was determined to have ended on May 20, 1991, and he was awarded an 18 percent permanent partial impairment rating and an additional 30 percent wage-loss disability. Appellant then sought additional temporary total disability benefits from February 26, 1997, to a date yet to be determined; evaluation by a specialist in regard to gastric bypass surgery; and a determination as to whether the 1989 back injury aggravated his preexisting propensity for obesity. The administrative law judge found that appellant had failed to prove by a preponderance of the credible evidence that he was entitled to additional benefits. The Commission affirmed and adopted the opinion of the administrative law judge. On appeal, appellant argues that the Commission committed an error of law in determining that his back injury did not aggravate a preexisting condition (a "propensity to obesity'), and that the Commission's conclusions that he was not entitled to an evaluation for weight-loss surgery and additional temporary total disability benefits are not supported by substantial evidence. We find no error and affirm.

When we review appeals from decisions of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if those findings are supported by substantial evidence. *Morelock v. Kearney Co.*, 48 Ark. App. 227, 894 S.W.2d 603 (1995). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). Where a claim is denied because the claimant has failed

to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for the denial of the relief sought. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998); *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987).

In 1986, appellant weighed more than 300 pounds and underwent a surgical stomach-stapling procedure. Following that surgery, he began to walk for exercise, eventually increasing the distance of his daily walk to five miles. As a result of the surgery and the exercise, appellant reduced his weight to 165-175 pounds, where he maintained it until May 1989, when he injured his back. Since his injury, appellant has regained all of the weight he lost, plus some. Appellant sought additional workers' compensation benefits for another invasive stomach-reducing procedure, a gastric bypass, so he could lose enough weight to be able to have the back surgery he says he has needed since 1989.

Appellant contended before the Commission that he regained the weight because he could not continue to walk five miles a day and that he could not walk because of his back injury. In his office notes, Dr. Jim J. Moore, a neurosurgeon, recorded appellant's steady weight gain of more than a pound per week after his back injury. Appellant told Dr. Moore that it took him two meals to eat the equivalent of a can of soup, and that he could gain weight on one piece of bacon, a chicken leg and one-half of a hamburger daily. However, appellant's psychological profile revealed that he had a need to exaggerate his symptoms, that he tended toward hysteria and hypochondria, and that he had an addictive personality. Dr. Moore doubted the truthfulness of appellant's statements about the amount of his food intake.

At the most recent hearing, the appellant explained that he had been unable to work since February 1997 and had lost his home. He then moved into his mother's home, a trailer in Branson, Missouri, along with his wife, and three sons. His wife and mother work, while appellant "home-schools" the boys. Appellant said that in November or December 1995 he had gone to work at McDonald's in Ashdown part-time, "flipping hamburgers" during the lunch rush. In December 1995, he went to work in sales for Millwood Landing, a resort facility. He used a golf cart to show

customers around. He left that job when, because of a management change, he was no longer able to use the golf cart to show the customers around, and he was not able to walk. In August 1996, appellant said he went back to work for Millwood as a security guard for minimum wage. Appellant disclosed that in December 1996 his father died, which required him to be away from the job for several weeks, and again he lost his job. Appellant related that he has sharp pains and swelling in his lower back and spends about half of his day reclining. Appellant said he had attempted to get social security disability, it had been denied, and he had filed again.

At the time of the hearing from which this appeal resulted, appellant's weight was in excess of 324 pounds. Appellant testified that he had been on numerous diets throughout his life for his obesity problem, including one six-month stay at an inpatient clinic, but nothing had worked except the stomach stapling and walking five miles a day. Dr. Moore agreed that appellant was unable to work. However, he attributed it more to his obesity than to his continuing back problems. In fact, Dr. Moore said if appellant would lose weight he probably would not need the back surgery. Although appellant argues that his back injury prevented him from walking, and that this lack of exercise caused the weight gain, Dr. Moore was of the opinion that it was caused by appellant's failure to reduce his caloric intake in response to his sedentary lifestyle.

It is well settled that the employer takes the employee as he finds him, *St. Vincent Infirmary Medical Center v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996), and that an aggravation of a preexisting noncompensable condition by a compensable injury is, itself, compensable. *Hubley v. Best Western-Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). However, appellant has cited no authority for his position that a tendency toward obesity can be characterized as a preexisting condition, and our research has revealed none. Furthermore, Ark. Code Ann. § 11-9-102(b)(Repl. 1996) provides that if any compensable injury combines with a preexisting condition to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment. It is not at all clear that appellant's compensable injury is the major cause of his present disability. In one of his progress notes, Dr. Moore stated:

> The patient is concerned that it is not felt his weight gain is injury-oriented and points out that he indeed was at the 175 pound weight level prior to injury, but his sedentary activities have since made weight gain. I pointed out to him, however, that this is more a factor of continued caloric intake at a level not necessary for sedentary activities, and thus still would not be a factor, per se, in the injury process.

Additionally, on July 21, 1997, Dr. Moore stated:

> This morbidly obese, non-able bodied individual has several bases for his inability to work and seek employment: 1) his morbid obesity which must be controlled and 2) the disc herniation with root compression which is complicated by number 1.

Dr. Moore's progress notes alone provide sufficient evidence to support the Commission's decision, and constitute a substantial basis for the denial of benefits. Thus, there is a substantial basis to support the Commission's denial of additional benefits.

Affirmed.

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

HART and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I believe that Bobbie Oliver suffered an aggravation of his preexisting condition of the "tendency towards obesity" and would reverse the Commission's denial of benefits on this point.

It is undisputed that Oliver had never been able to control his weight prior to his stomach-stapling procedure, and that he had reduced his weight after the surgery from approximately 310 pounds to 175 pounds with the additional help of a walking regimen prior to his 1989 compensable back injury. This fact distinguishes his case from those in which benefits were denied because the claimant's obesity was deemed "volitional," because the claimant had previously been able to control his weight through diet programs, or the claimant was already obese at the time of a leg injury and her disability was solely due to obesity and hypertension. *See Hammer v. Intermed Northwest*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Shepherd v. Van Ohlen*, 49 Ark. App. 36, 895 S.W.2d 945 (1995).

In *Conway Convalescent Center v. Murphree*, 266 Ark. 985, 588 S.W.2d 462 (1972), the court held that appellee's "weakness" of obesity could not be fairly separated from the back injury. Murphree suffered a back injury when she attempted to lift a patient in the course of her employment. According to the evidence, she was obese all of her adult life. However, her excessive weight did not prevent her from being an active person, and her doctors agreed that she hurt her back on the job and that she was totally disabled. Like Oliver, pain from the injury caused her to be immobile, and her immobility caused an increase in her weight; the court stated: "The obesity aggravates her condition, which causes pain, which keeps her immobile." Her doctors opined that her disability was due to the obesity and not her compensable back injury. However, the court, in affirming the Commission, stated: "The Workers' Compensation Commission rightly held the back problem and the obesity are now inseparably intertwined in the so-called "vicious cycle." The individual weakness of obesity cannot be fairly separated from the injury." According to the court, the insurance carrier accepted the employee as a workers' compensation risk at the time of her employment and throughout her employment because "[H]er weakness, obesity, was obvious at the time she was hired."

Here, according to Dr. Jim Moore, Oliver's "tendency towards obesity" was a preexisting condition. Other than Oliver's testimony about his eating habits, there is no indication in the record and it indeed defies logic to assume that Oliver's obesity was not the result of caloric intake. In fact, the Commission specifically found that Oliver was "not able to change his lifestyle in the past nine years." However, after Oliver's previous surgery to help his condition, he became very active and was able to maintain his weight. When the pain from his injury caused him to be immobile, he gained the weight back. Oliver's back problems and obesity are now inseparably intertwined in a 'vicious cycle' because he cannot have surgery to correct the back problem until he loses weight. As in *Conway*, the insurance carrier accepted this individual as a workers' compensation risk at the time of his employment and throughout his employment. *See also Perry v. Leisure Lodges, Inc.*, 19 Ark. App. 143, 718 S.W.2d 114 (1986).

Here, Oliver's obesity was not "volitional" as defined in *Shepherd*, and his obesity recurred immediately after his back injury and

resulting immobility. The Commission has disregarded its own prior holdings in penalizing him for his condition. Oliver's need for treatment should be a compensable consequence of the original 1989 injury, and I would reverse and remand for an award of benefits.

HART, J., joins.

HEARTLAND COMMUNITY BANK *v.*
Edward P. HOLT and Betty Jo Holt

CA 99-360 3 S.W.3d 694

Court of Appeals of Arkansas
Division III
Opinion delivered November 3, 1999
[Petition for rehearing denied December 15, 1999.]

Robert S. Laney, for appellant.

Cuffman and Phillips, by: *James H. Phillips*, for appellees.

JOHN B. ROBBINS, Chief Judge. Appellant Heartland Community Bank, formerly known as First Federal Savings & Loan Association of Camden, appeals the judgment entered in favor of appellees Edward and Betty Jo Holt for breach of contract. Appellees sued appellant in Dallas County Circuit Court, and the case was tried to the bench. The contract between the parties was an option to purchase land owned by the bank located at 1001 West Fourth Street in Fordyce, Arkansas. Because appellant later sold a part of the original property without first offering it to appellees, the trial judge entered judgment for appellees in the amount of $78,000, plus prejudgment interest and court costs. This appeal resulted.

Appellant argues that the trial court erred in finding (1) that there was a valid contract between the parties, (2) that there was a breach of the contract, and (3) that appellees were entitled to $78,000 in damages. Appellees' cross appeal concerning the trial

court's denial of their motion for attorney's fees was withdrawn. We reverse.

The standard that we apply when we review a judgment entered by a circuit court after a bench trial is well established. We do not reverse such a judgment unless we determine that the circuit court erred as a matter of law or we decide that its findings were clearly against the preponderance of the evidence. *Santifer v. Arkansas Pulpwood Co., Inc.*, 66 Ark. App. 145, 991 S.W.2d 130 (1999); *Riffle v. United General Title Ins. Co.*, 64 Ark. App. 185, 984 S.W.2d 47 (1998). Disputed facts and determination of the credibility of witnesses are within the province of the circuit court, sitting as trier of fact. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998); *Santifer, supra; see also Country Corner Food and Drug, Inc. v. Reiss*, 22 Ark. App. 222, 737 S.W.2d 672 (1987).

A more detailed explanation of the evidence presented at trial is necessary for an understanding of this case. Appellant had a branch bank office in Fordyce located at 1001 West Fourth Street. In 1992, appellant, through its officers and board of directors, began considering renovating the building or moving the bank to another location. In 1993, appellee Mr. Holt approached appellant's president suggesting that he had property that would be suitable for the new bank location. Mr. Holt's property was also on West Fourth Street. Nothing came of this suggestion. On May 10, 1994, appellant purchased additional property from Mr. Fred Smith for $20,000, less some transaction expenses. This property was adjacent to the bank's existing location and was purchased in anticipation of an expansion. However, appellant later decided that renovation was not feasible. Thereafter, appellant and appellee Mr. Holt met to discuss the possible sale of appellees' property or perhaps a swap of appellees' property for that belonging to appellant. Ultimately, on March 2, 1995, an offer and acceptance pertaining to appellees' property was executed by appellant and appellees. Pursuant to that contract, appellant purchased appellees' property located at 610 West Fourth Street for $50,000, subject to nine conditions. The two conditions that are relevant on this appeal provided (1) that appellant retained the right to occupy its present location rent-free until construction of its new building was completed, and (2) that appellees had the first option to purchase appellant's present location at 1001 West Fourth Street.

Purporting to act on this option, on November 28, 1995, appellees sent to appellant an offer-and-acceptance contract to buy appellant's property located at 1001 West Fourth Street for the price of $50,000, of which $20,000 would be paid in cash and the $30,000 balance would be paid in monthly installments over a four-year period, and expressly providing that appellant would pay appellees $600 per month rent until the property was vacated. Appellees tendered a $5,000 earnest money check with the offer and acceptance. On December 13, 1995, appellant sent a rejection letter to appellees and returned the earnest money check. The letter contained a comment that appellees should refer to the conditions in the purchase contract of the 610 West Fourth Street property that specified that appellant would occupy the building with no rent until the new building was completed and "that you, Edward P. and Betty Jo Holt, has *sic* a first option to purchase property located 1001 W. 4th Street." There was no dispute raised as to timeliness, no question regarding the price, and no question about what property was at issue.

On June 4, 1996, without notifying appellees, appellant sold the strip of land that lay adjacent to the bank back to Mr. Smith from whom it had been purchased. On August 8, 1996, appellant wrote a letter to appellee Mr. Holt stating that it would sell the property that it owned for $75,000, even though an appraisal dated July 18, 1996, found the market value of the property to be $108,000. Appellant stated that since a swap was not consummated, it felt that an appraisal was in order. Appellant also noted in the letter that it had sold the adjacent property back to its original owner. Appellees did not respond, so on August 22 appellant notified appellees that it would have to have appellees' decision by August 31, 1996. Appellees countered by requesting to exercise their option to buy the property for $50,000, and expressed shock that appellant had already sold part of the property to Mr. Smith. Appellant accepted this offer with a closing date of September 30, 1996, and explained that only the parcel of land that had been bought from Mr. Smith had been sold back to him. The deadline passed without the deal being consummated. On June 26, 1997, appellees filed this action for breach of contract.

After the bench trial, the trial court found in appellees' favor. The order stated that appellees had acquired an option to purchase appellant's property on March 2, 1995, for $50,000, the same price

that appellant paid for appellees' property; that the property which was subject to the option was the property that appellant owned at that time, including the adjacent land that had been subsequently sold back to Mr. Smith; that because there was no specified time within which the option could be exercised, it therefore must be within a "reasonable" period of time; that exercising the option eight months after the option right was created was a reasonable time; that appellant could not argue that the exercise was not timely when appellant offered the property to appellees pursuant to the option eight months after it had rejected appellees' first attempt to exercise their option; that the breach occurred when appellant offered less than all of the property to appellees on August 8, 1996; and that appellees' damages were $78,000 because the property (including the adjacent property) had an appraised value of $128,000 while appellees had the option right to purchase the land for $50,000, the difference being the amount of damages.

Appellant's contention that there was no valid option contract is not persuasive. Its arguments on appeal are that there are conflicts in Mr. Holt's testimony and that there was no consideration given for the option. However, appellant never specifically pleaded failure of consideration in its answer to the complaint for breach of contract. This is an affirmative defense that must be pleaded. Therefore, this argument is waived. Ark. R. Civ. P. 8(c); *see Medlock v. Burden*, 321 Ark. 269, 900 S.W.2d 552 (1995). We recognize that pursuant to Ark. R. Civ. P. 15(b), when issues are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been pleaded. However, we will not imply consent to conforming the pleadings to the proof merely because evidence relevant to a properly pled issue incidentally tends to establish an unpled one. *Pineview Farms, Inc. v. A. O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989); *Ward v. Russell*, 32 Ark. App. 86, 796 S.W.2d 588 (1990). We find nothing to indicate that either the parties or the trial judge considered the case as having been tried on the theory of failure of consideration or to indicate that the evidence upon which appellant now relies to establish failure of consideration was not relevant to and directed toward issues that had been properly pleaded. *See Ward, supra.*

The trial court has the duty to weigh the evidence and resolve any conflicts in testimony. *Santifer, supra.* The contract, as it pertained to the option, was admitted by both parties to be ambigu-

ous, and therefore required the trial court to take parol evidence in order to determine the intent of the parties. This is a question of fact for the fact-finder. *Lee v. Hot Springs Village Golf School*, 58 Ark. App. 297-A, 951 S.W.2d 315 (1997); *Wedin v. Wedin*, 57 Ark. App. 203, 944 S.W.2d 847 (1997). The trial court did so, and its findings conform to the parties' intent by their words and actions. Appellant's argument is focused on conflicts and competing inferences deducible from the evidence regarding the fixed time and fixed price. Because that is a task left solely to the fact-finder, we find no clear error on this point.

Next, appellant argues that if there was a valid contract, then there was no breach. We find merit to this argument. When appellees attempted to exercise their option to purchase the property for the agreed $50,000, they changed the terms of the appellant's offer that the option contract held open. A purported acceptance of an offer that changes the terms of the offer constitutes a rejection of the offer. *See Tucker Duck & Rubber Co. v. Byram*, 206 Ark. 828, 177 S.W.2d 759 (1944). An option is merely an offer by one party to sell within a limited period of time and a right acquired by the other party to accept or reject such offer within such time. *See Swift v. Erwin*, 104 Ark. 459, 148 S.W. 267 (1912).

> The acceptance of an option to purchase realty must be absolute and unconditional, in accordance with the offer made, and without modification or the imposition of new terms in order to constitute a valid exercise of the option and thereby impose a duty on the vendor to convey. The rule of substantial compliance with the terms of the contract, which is applicable to bilateral contracts whereby both parties are already bound, is not applicable to the exercise of an option, since an option is a continuing offer to make a bilateral contract and thus must be accepted precisely according to the terms of the offer. If the optionee attaches conditions to his or her acceptance or notice of his or her election to buy which are not warranted by the terms of the option, such a response amounts to a rejection of the option, unless the acceptance is in the first instance unconditional, and the additional term is a mere request for a departure from the terms of the option as to the time and place of completing the transaction, or for additional or different terms.

77 AM. JUR. 2d *Vendor and Purchaser* § 49 (1997). *See e.g. Russell v. Hill*, 237 Ark. 712, 375 S.W.2d 661 (1964); *see also Chournos v.*

Evona Investment Co., 97 Utah 346, 94 P.2d 470 (1939); *Weadock v. Champe*, 193 Mich. 553, 160 N.W. 564 (1916). The United States Supreme Court has similarly held that an offer by one who has secured an option for the purchase of real property that departs from the terms of the option as to the time of payment of the purchase price amounts to a rejection of the option, and such option may not be revived by a subsequent unconditional acceptance. *Beaumont v. Prieto*, 249 U.S. 554 (1919).

The insertion of new terms regarding deferring payment of the purchase price and providing for rent to be paid by appellant upon purchase of appellant's property directly contradicted the terms of the option and thereby constituted a rejection. Appellant recognized this in its letter returning appellee's contract and earnest money when it referred to appellees' proposal as a "new offer." We believe that the trial court clearly erred in holding otherwise. Any further negotiations and offers were new and independent of the option because that option had been terminated. Because we reverse on this issue, appellant's last point on appeal regarding the amount of damages is moot.

Reversed and dismissed.

GRIFFEN, J., and HAYS, S.J., agree.

Benjamin Andrew BARNETT *v.* STATE of Arkansas

CA CR 99-117 3 S.W.3d 344

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered November 3, 1999

William R. Simpson, Jr., Public Defender, by: *Ashley Riffel*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

TERRY CRABTREE, Judge. The Pulaski County Circuit Court convicted the appellant, Benjamin Andrew Barnett, at a bench trial of criminal attempt to possess crack cocaine in

violation of Ark. Code Ann. § 5-3-201 (Repl. 1997) and sentenced him to a term of six years in the Arkansas Department of Correction. On appeal, appellant challenges the sufficiency of the evidence. We affirm.

In reviewing the sufficiency of the evidence, this court reviews the proof in the light most favorable to the State, considering only that evidence that tends to support the conviction. *Smith v. State*, 65 Ark. App. 216, 986 S.W.2d 137 (1999). This court will affirm if there is any substantial evidence to support the verdict. *White v. State*, 47 Ark. App. 127, 886 S.W.2d 876 (1994). The evidence, whether direct or circumstantial, must be of sufficient force that it compels a conclusion with reasonable and material certainty. *Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991).

At the close of the State's case and again at the close of all the evidence, appellant moved for a directed verdict. He asserted that the State had only presented evidence that he wanted a "thirty" and that he was arrested because he had $30 in his possession. The lower court denied the motion.

At trial, two witnesses testified; both were narcotics detectives. Detective Thomas testified that he was posing as a street-level cocaine dealer on May 1, 1997, when appellant approached him and asked for a "thirty." Thomas told appellant to drive around the block and that he would have "it" when appellant returned. Detective Koger testified that on that same day he pulled over appellant after receiving a description of the vehicle driven by appellant. Koger searched appellant and found $30 in his possession.

Pursuant to Ark. Code Ann. § 5-3-201 (a)(2) a person attempts to commit an offense if he "[p]urposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be." In this case, we believe that appellant took a substantial step to purchase crack cocaine when he requested a "thirty" from a detective posing as a drug dealer.

Because intent cannot be proven by direct evidence, the fact finder is allowed to draw upon his own common knowledge and experience, and the presumption that a person intends the natural and probable consequences of his acts, to infer intent from

the circumstances. *Kendrick v. State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992). Here, Detective Thomas testified that he had been a narcotics officer for four and a half years and had previously posed as a street dealer. He also testified that based on his experience in the area, the term "thirty" meant $30 worth of crack cocaine. We do not believe that the trial judge needed to speculate to find that appellant sought to purchase $30 worth of crack cocaine. Consequently, the State provided sufficient evidence to sustain appellant's conviction.

Affirmed.

BIRD, MEADS, JJ., and HAYS, S.J., agree.

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

JOHN B. ROBBINS, Chief Judge, dissenting. Mr. Benjamin Barnett has been sentenced to six years in prison for speaking these words through the open window of his pickup truck: "Let me get a thirty" — and then driving away. In my view, this proof falls woefully short of constituting substantial evidence of criminal attempt to possess a controlled substance.

Officer Thomas acknowledged on cross-examination that he and appellant "never discussed drugs or said anything specific about drugs, including cocaine." But, based on his experience in "dealing with individuals in that area and purchasing narcotics in that area," he "presumed" that a "thirty" was $30.00 worth of crack cocaine. After appellant stated, "Let me get a thirty," Officer Thomas instructed him to drive around the block, and appellant drove away.

After appellant's discussion with Officer Thomas, his truck was stopped by Officer Koger, and he was searched and arrested. Officer Koger's testimony indicated that appellant was stopped on the same street where Officer Thomas was working undercover. This differed from the testimony of Officer Thomas, who testified that appellant made a left turn before the stop. However, in either case the evidence failed to establish that appellant was returning to the location of the anticipated drug transaction; instead, he was still driving away from Officer Thomas when he was stopped.

In this case, the evidence viewed in the light most favorable to the State was that appellant was driving his truck and stated "Let me

get a thirty" to an undercover officer, after which he drove away and was found to possess $30.00 in currency. Even though the officer presumed that appellant's comments indicated appellant's desire to buy crack cocaine, there was no evidence that appellant was from the local area, or was familiar with the vernacular of the drug culture. I submit that the proof presented by the State was insufficient to support the conviction for criminal attempt to possess a controlled substance. In my opinion, the conviction was based on speculation and conjecture, which does not constitute substantial evidence. *See Stewart v. State*, 67 Ark. App. 1, 992 S.W.2d 147 (1999). I would reverse.

ROAF, J., joins in this dissent.

Thomas Rackley TACKETT *v.* McDONALD'S CORPORATION and McDonald's of Russellville, Inc.

CA 99-143 3 S.W.3d 340

Court of Appeals of Arkansas
Division I
Opinion delivered November 3, 1999

The Dennis C. Sutterfield Law Firm, P.A., by: *Dennis C. Sutterfield*, for appellant.

Laws & Murdoch, P.A., by: *Hugh R. Laws* and *Ike Allen Laws, Jr.* and *Latham & Watkins*, by: *David S. Foster* and *Kevin C. May*, for appellees.

TERRY CRABTREE, Judge. In a complaint filed in the Pope County Circuit Court, the appellant alleged that on April 11, 1998, he purchased food at McDonald's restaurant in Russellville, Arkansas, and that the restaurant was participating in a national promotion referred to as the "Monopoly Game." He asserted that a monopoly game piece was attached to his food purchase that denoted "$200,000 Dream Home Cash" and "Instant." In addition, appellant claims that he properly submitted the form for redemption of the game piece; that McDonald's refused to honor the game piece and as a result breached the contract between McDonald's and the appellant, entitling the appellant to judgment in the amount of $200,000, plus interest, attorney fees, and costs.

Count II of appellant's complaint involved a game piece for a "Chevy Blazer and Sea Doo Watercraft" that had "Instant Winner" printed on it and was received on the same day as the game piece in count one. The appellant submitted the proper form for redemption of the Chevy Blazer and Sea Doo, but McDonald's refused to honor the game piece. The appellant asserted that he was entitled to judgment in the amount of $35,820.00 plus interest, attorney fees, and costs.

In Counts III and IV of appellant's complaint, he alleged that he had an ownership interest in the $200,000 cash prize, as printed on the first game piece referred to in Count I, and a $35,820 ownership interest in the Chevy Blazer and Sea Doo, as printed on the second game piece, of which the appellee had a duty to deliver to the appellant. The appellant asked for damages in the amount of $200,000 plus punitive damages in the amount of $5,000,000 in Count III and $35,820 plus punitive damages in the amount of $5,000,000 in Count IV.

In a motion to dismiss, the appellees moved the court to dismiss the conversion claims in Count III and IV, and filed an answer in regards to Counts I and II. On September 21, 1998, the appellees moved for summary judgment on Counts I and II with affidavits and exhibits. The appellant filed a response to the motion

for summary judgment on September 30, 1998, followed by a reply brief filed by appellant on October 12, 1998.

By an order dated September 30, 1998, and filed of record October 9, 1998, the trial court granted appellees' motion to dismiss the conversion claims in Counts III and IV, without a hearing. On November 9, 1998, the trial court granted the appellees' motion for summary judgment and dismissed the remaining counts in the complaint. From the order dismissing Counts III and IV, and the order granting appellees' motion for summary judgment on Counts I and II and dismissing the appellant's complaint, appellant brings this appeal.

Summary judgment is properly granted by the trial court when it is clear that there is no genuine issue of material fact to be tried. *Tyson Foods, Inc. v. Adams*, 326 Ark. 300, 930 S.W.2d 374 (1996). We view pleadings, affidavits, documents, and exhibits filed in support of a motion for summary judgment in the light most favorable to the party against whom the motion is filed. *Raynor v. Kyser*, 338 Ark. 366, 993 S.W.2d 913 (1999).

In his first issue, the appellant argues that the trial court erred in granting the appellees' motion for summary judgment in two respects. First, he argues that the court erred by granting the motion without conducting a hearing. Rule 56(c) of Ark. R. Civ. P. states:

> (c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party, prior to the date of the hearing, may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The appellant cites us to *Campbell v. Bard*, 315 Ark. 366, 868 S.W.2d 62 (1983), for authority that a hearing is required before an order is issued on a summary judgment motion. The *Campbell* case certainly states that the rule contemplates that a hearing will be held before an order is entered ruling on a motion for summary judg-

ment. However, the appellate court will not reverse the trial court's order granting a motion for summary judgment if the appellant fails to demonstrate prejudice. After reviewing the pleadings, documents, affidavits, and exhibits in this case, we are convinced that the appellant was not prejudiced by the trial court's order granting summary judgment.

The appellant forcefully asserts that had the court set the motion for hearing, he could have produced affidavits in opposition to those submitted by the appellees before the hearing. As the appellees point out, there was a substantial period of time between the filing of the appellees' reply brief and the court's order granting the summary judgment. Appellant had sufficient time to file additional affidavits. Further, the appellant does not provide specifics as to who would submit the affidavits and the specific information that would be contained in the affidavits. We simply do not believe the appellant has demonstrated prejudice.

Second, the appellant asserts that it was error for the trial court to grant the motion for summary judgment without affording the appellant the opportunity to complete discovery. Admittedly, the better practice is to afford the parties time to complete discovery and schedule the motion for a hearing, but, in the absence of a hearing, the court must rule on the pleadings, documents, exhibits, and affidavits before it at the time, and need not wait for completion of discovery to consider the motion for summary judgment.

The appellant also argues the award of summary judgment in this case was in error because a genuine issue of material fact remained. The appellant asserts that the game rules are ambiguous and therefore should be construed against the party who drafted them, *Ford Motor Credit Company v. Twin City Bank*, 320 Ark. 231, 895 S.W.2d 545 (1995), and because the game rules are ambiguous, a genuine issue of material fact exists as to their interpretation and application. In the first instance, the court determines whether or not a contract is ambiguous; if the trial court finds that the contract is not ambiguous, its construction is a matter of law. *Kanning v. Allstate Insurance Co.*, 67 Ark. App. 135, 992 S.W.2d 831 (1999). In *Kanning*, we stated, "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." The game rules in this case stated:

> 7. VERIFICATION: All game materials are subject to verification at a participating McDonald's or the Redemption Center, whichever is applicable. Game materials are null and void and will be rejected if not obtained through authorized, legitimate channels, or if they are from other games, and may be rejected if any part is counterfeited, illegible, mutilated, or tampered with in any way (except for the signed initials of the potential winner), or if they contain printing, typographical, mechanical, or other errors. All decisions of McDonald's and the Redemption Center are final, binding, and conclusive in all matters.

The game rules clearly state that game pieces are void if they contain errors. The trial court found the language unambiguous, and we agree with its analysis. Further, the language is susceptible to only one reasonable construction; if a game piece contains an error, it is void. The trial court reasonably concluded that the logical effect of the language of the game rules was to make the games pieces void. Consequently, the trial court did not err in granting summary judgment to appellees on Counts I and II.

For the second point, the appellant asserts that the trial court erroneously dismissed the conversion claims (Counts III and IV) of his complaint. The trial court did not err. In *Grayson v. Bank of Little Rock*, 334 Ark. 180, 188, 971 S.W.2d 788, 792 (1998), the supreme court set out the elements of conversion as follows:

> Conversion is the exercise of dominion over property in violation of the rights of the owner or person entitled to possession. Conversion can only result from conduct intended to affect property. The intent required is not conscious wrongdoing but rather an intent to exercise dominion or control over the goods that is in fact inconsistent with the plaintiff's rights.

Count III of the appellant's complaint alleged that the appellees exercised dominion over his ownership interest in the $200,000 cash prize which was created instantly when he submitted the winning game piece for redemption. Clearly, an ownership interest was not created until his game piece was validated as the winning game piece. Even then, the appellees would have a reasonable time to produce the money. The same logic applies to Count IV. The appellant simply had no ownership interest in the Blazer or Sea Doo.

Affirmed.

ROBBINS, C.J., agrees, and BIRD, J., concurs.

Frank WATTS II *v.* STATE of Arkansas

CA CR 98-690 8 S.W.3d 563

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered November 10, 1999
[Substituted Opinion on Grant of Rehearing
delivered January 5, 2000.]
[Petition for rehearing denied February 2, 2000.]

Appellant, pro se.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Judge. In its petition for rehearing, appellee, the State of Arkansas, brings to our attention the case of *Dean v. State*, 339 Ark. 105, 3 S.W.3d 328 (1999), a supreme court opinion that was handed down less than one week prior to our decision in *Watts v. State* (November 10, 1999). The State contends that in light of *Dean*, this court made an error of law in *Watts, supra*, reversing and dismissing, on speedy-trial grounds, the convictions of appellant, Frank Watts II. We must agree. We therefore grant appellee's petition for rehearing and issue this substituted opinion.

Appellant was tried by a jury and found guilty of the following offenses: one count of possession of a controlled substance with intent to deliver (cocaine), two counts of possession of drug paraphernalia, and one count of possession of a controlled substance (marijuana). He was sentenced to sixty years in the Arkansas Department of Correction on the cocaine charge, six years on each of the two counts of possession of drug paraphernalia, and one year on the possession of marijuana charge, with the sentences to be served concurrently. Appellant represented himself during the trial with the aid of "stand-by counsel," and he brings this appeal *pro se*. He raises thirteen points of appeal. We find no error and affirm.

For his first point of appeal, appellant challenges the legality of his arrest. In making his argument, he claims to have raised this issue in his October 29, 1996, motion to suppress evidence, and in his August 1, 1997, renewed motion to suppress search warrant and evidence. He designates transcript pages 87-88 and 102-108 as the location of these motions in the record. We do not address his argument because 1) the designated portions of the transcript were not abstracted, and 2) the issue was not properly raised before the trial court.

The abstracting deficiency alone is sufficient for us not to consider this point. The record on appeal is confined to that which is abstracted, and *pro se* litigants are held to the same abstracting standards as licensed attorneys. *Hooker v. Farm Plan Corp.*, 331 Ark. 418, 962 S.W.2d 353 (1998). Moreover, the record reveals that the two motions appellant relies upon as preserving this point for appeal merely reference the validity of the arrest, with no further discussion, and are clearly focused on the validity of the search warrant, not the arrest. The trial court denied the October 1996 motion as untimely but, in making a record on the motion, appellant's stand-by counsel explained that "the basis of [the motion] is that the information supplied by the confidential informant was stale" by the time the searches were actually conducted. No argument was made that the arrest was illegal. A party cannot change the grounds for an objection or motion on appeal but is bound by the scope and nature of the argument made at trial. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

For his second point of appeal, appellant contends that his "Fifth Amendment privilege against self-incrimination was violated below when and/or where the Detectives forced appellant into a plea agreement in which appellant had to sign this agreement as being guilty in order to be recruited as a confidential informant." Once again, we find nothing in the abstract showing that appellant asserted at trial that his privilege against self-incrimination had been violated. Consequently, he cannot raise the argument for the first time on appeal. *Id.*

Appellant's third and fourth points of appeal can best be discussed together. The third point is captioned, "Coerced Confession," and in it he contends that "[a]ppellant had to plea guilty and/or confess to the charges, and then sign a plea agreement." The

fourth point is captioned, "Unlawful Induced Plea," and in it he contends in pertinent part that the "[f]air administration of the criminal process and the interests of justice do not permit the prosecution to violate . . . promises made in negotiation of guilty pleas." The problem with these two points of appeal is that the abstract does not demonstrate that appellant gave a confession or that he entered a plea agreement. There is no abstracted testimony about a confession by appellant. Moreover, he clearly did not enter a guilty plea because he was tried and found guilty by a jury. Rather, it seems as though appellant has confused his purported discussions with the police about working as a confidential informant with negotiated agreements to plead guilty. Even if those discussions could be construed as a negotiated agreement to plead guilty, such an agreement clearly never became effective. "The parties have no power to bind the court, and thus it is illusory to say the State is bound by such an agreement before it is consummated by the acceptance of a guilty plea by the court." *Caldwell v. State*, 295 Ark. 149, 152, 747 S.W.2d 99, 101 (1988). Consequently, neither of these points provides a basis for reversal.

For his fifth point of appeal, appellant challenges the validity of the search warrant based upon his contention that the information provided by the confidential informant was stale. As mentioned previously under the first point, the trial court denied the October 1996 motion to suppress on the ground that it was not timely. Appellant had presented the motion on a day that he was originally scheduled for trial and the State moved to strike the motion as untimely. Although the trial court allowed appellant's stand-by counsel to make a record on the "staleness" argument, the denial was based on timeliness, not the substance of the motion. Moreover, in addressing motions just prior to the trial of December 2, 1997, the court denied appellant's renewed motion to suppress the search warrant and evidence, stating "[t]hat's denied as previously ruled upon." Neither appellant nor his stand-by counsel pursued the fact that the previous denial was based on the untimeliness of the motion rather than on its substance. The movant bears the burden of obtaining a ruling, and unresolved questions and objections are waived and may not be relied upon on appeal. *Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997). Consequently, we do not address the merits of this point of appeal because the issue was never ruled upon at trial.

For his sixth point of appeal, appellant contends that his Fifth Amendment protection against double jeopardy was violated. While it is clear that appellant is confused about the concept of double jeopardy, we do not address the merits of his argument because the abstract does not demonstrate that this argument was raised to the trial court. A claim that the State has violated a defendant's rights against double jeopardy must be raised in the trial court before it can be considered on appeal. *Adams v. State*, 319 Ark. 381, 892 S.W.2d 455 (1995). Even constitutional arguments must be raised at trial in order to be considered on appeal. *Id.*

Appellant's seventh point of appeal is captioned, "Failure to Disclose." It contends in part that "[e]ven though the prosecution has an open file policy, it did not fulfill its discovery obligation when appellant representing [himself] 'Pro-Se' was incarcerated at the time of trial and was required to himself examine appellant's Penal Institution Records during the trial itself." He further contends, "The prosecution never disclosed the agreement that was signed by appellant for same to become a confidential informant." Again, the abstract does not demonstrate that appellant raised this failure-to-disclose argument below. Moreover, the record shows that when the State offered the "pen pack" as an exhibit, appellant's stand-by counsel asked appellant if he had any objection to it. Appellant responded, "They're going to use it anyway. It don't make no difference if I object or not." A timely objection is required to preserve an alleged discovery violation for appellate review. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). Finally, even if we were to address the argument on its merits, appellant has not shown that he was prejudiced by any alleged discovery violation. An appellant bears the burden of demonstrating that the discovery violation was sufficient to undermine confidence in the outcome of the trial. *Rychtarik v. State*, 334 Ark. 492, 976 S.W.2d 374 (1998).

In his eighth point of appeal, appellant claims ineffective assistance of counsel. In order for us to consider a claim of ineffective assistance of counsel on direct appeal, it must have been considered by the trial court. *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993). The abstract does not demonstrate that this issue was presented to the trial court. Consequently, we do not address it on appeal.

For his ninth point of appeal, appellant contends that he was denied a speedy trial. As we noted at the outset of this substituted opinion, we originally found merit in appellant's contention. However, in light of the supreme court's recent decision in *Dean v. State*, 339 Ark. 105, 3 S.W.3d 328 (1999), handed down prior to our original opinion, we can no longer do so.

Rule 28.1 of the Arkansas Rules of Criminal Procedure provides in pertinent part that a defendant "is entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3."

Rule 28.2 provides in pertinent part:

> The time for trial shall commence running, without demand by the defendant, from the following dates:
>
> . . . .
>
> (c) if the defendant is to be retried following a mistrial, an order granting a new trial, or an appeal or collateral attack, the time for trial shall commence running from the date of mistrial, order granting a new trial or remand.

The felony information in this case was filed on May 30, 1996. Appellant first went to trial on these charges in October 1996, but a mistrial was declared *sua sponte* by the trial court. Consequently, in accordance with Rule 28.2 (c), the time for trial began running anew from the date of mistrial, October 22, 1996. However, appellant was not brought to trial again until December 2, 1997, forty-one days beyond the twelve-month limit.

The docket entries as abstracted by the State provide:

10/22/96	Case called for trial . . . . Mistrial declared due to discussion of D's not allowing the atty to handle the case.
7/1/97	Pass on D's motion: j.t. 7/22/99 [sic] at 9:30; j.n. 7/18/97 at 11. Speedy trial tolled from 7/1/97 to 7/22/97.
7/22/97	Pass on Ct's motion due to congested docket: j.t. 9/30/97 at 9:30; j.n. 9/26/97 at 11. Speedy trial tolled from 7/1/97 to 9/30/97.

9/30/97 Pass on Ct's motion: j.t. 12/2/97 at 9:30.

12/2/97 Case called for trial.

Thus, the three periods of time tolled by the trial court were July 1 to July 22, 1997; July 22 to September 30, 1997; and September 30 to December 2, 1997.

July 1 to July 22, 1997

The State contends that the period from July 1 to July 22, 1997, is properly excluded because the trial was continued on appellant's motion. We agree.

Rule 28.3(c) of the Arkansas Rules of Criminal Procedure provides:

> (c) The period of delay resulting from a continuance granted at the request of the defendant or his counsel. All continuances granted at the request of the defendant or his counsel shall be to a day certain, and the period of delay shall be from the date the continuance is granted until such subsequent date contained in the order or docket entry granting the continuance.

The colloquy at the July 1, 1997, hearing surrounding this period of delay was as follows:

> THE DEFENDANT: Good morning, Judge Humphrey.
>
> THE COURT: Do you have a motion today?
>
> MR. TARVER: *Your Honor, we'd ask for a continuance.* Mr. Watts is in the Pulaski County jail. He doesn't have any clothes other than some scrub gear from a hospital.
>
> Also, he doesn't have his file. An associate has that property of his and I'm trying to locate that associate and get that property back.
>
> . . . .
>
> THE COURT: Well, we'll just pass it.
>
> . . . .
>
> THE COURT: Jury trial set for July twenty-second at nine thirty. Jury notice July eighteenth at eleven o'clock.

> Speedy trial is tolled from today until July twenty-second.

(Emphasis added.) Accordingly, the period of delay from July 1 to July 22, 1997, is properly excluded as one "granted at the request of the defendant or his counsel" pursuant to Rule 28.3(c).

July 22 to September 30, 1997

According to the State, the period of delay from July 22 to September 30, 1997, is properly excluded because it was due to a congested docket, because appellant was present and did not object to the delay, and because it was attributable to the continuance obtained by appellant on July 1, 1997. In light of *Dean, supra,* we now agree that this period of delay can be properly excluded because appellant was present and did not object to the delay. In *Dean,* the supreme court explained:

> It is thus clear from these holdings that a contemporaneous objection to the excluded period is necessary to preserve the argument in a subsequent speedy-trial motion. The need for such a contemporaneous objection was perhaps best explained in the concurring opinion in *Tanner*:
>
> Speedy-trial objections must be raised in the trial court and prior to the trial date in order to preserve the issue for review. This issue is not an exception to the contemporaneous-objection rule.
>
> The reason for our contemporaneous-objection rule is that a trial court should be given an opportunity to know the reason for disagreement with its proposed action prior to making its decision or at the time the ruling occurs. It is understandable that a defendant would not wish to call the trial court's attention to an erroneous ruling on the excludability of time for purposes of speedy trial; however, *Mack, supra,* requires that a defendant do so[.]

339 Ark. at 110, 3 S.W.3d at 331.

Here, as noted previously, the docket entry on July 22, 1997, provides: "Pass on Ct's motion due to congested docket: j.t. 9/30/97 at 9:30; j.n. 9/26/97 at 11. Speedy trial tolled from 7/1/97 to 9/30/97." The colloquy at the July 22, 1997, hearing surrounding this period of delay was as follows:

THE COURT: How much time do we have left on his? This will be passed on the court's motion.

DEPUTY PROSECUTING ATTORNEY MARY JONES: Your Honor, I show the mistrial occurred on October 22nd, '96.

THE COURT: And I am going to make a record. This is due to congested docket. Jury trial is set for September 30th at 9:30. Jury notice September 26th at 11:00.

And he is filing with the court a renewed motion for dismissal.

. . . .

THE COURT: The court is going to toll speedy trial again. It's already tolled from July 1st until today. I'll extend that until September 30th.

Appellant was present and acting *pro se*. He did not object to the delay. According to *Dean, supra*, appellant thereby waived his right to challenge whether this period of time was properly excluded. Consequently, the period of delay from July 22 to September 30, 1997, can be excluded in calculating the time for speedy trial.

September 30 to December 2, 1997

The two periods of time just discussed, July 1 to July 22, 1997, and July 22 to September 30, 1997, are greater than the forty-one days by which appellant's trial exceeded the twelve-month limit. It is therefore not necessary to examine the period of delay from September 30 to the date of trial on December 2, 1997.

In summary, appellant was tried forty-one days beyond the twelve-month period of limitation. At least two periods of delay are properly excludable, the delay from July 1 to July 22, 1997, and the delay from July 22 to September 30, 1997. These excluded periods of time are sufficient to bring appellant's trial within the limits required by law.

Appellant's tenth point of appeal is captioned, "Unconstitutionally Selected and Impaneled Jury," and he contends in part that "98% of the entire courtroom of prospective jurors were in one form or the other POLICEMEN." We find nothing in the abstract to

support his description of the prospective jurors. More importantly, the abstract does not demonstrate that he raised this issue before the trial court. Rather, following *voir dire* and the impanelment of the jury, the court asked appellant if the panel was good for the defense. Appellant responded, "Yes, Your Honor." "In order to preserve objections regarding any irregularities affecting the selection or summoning of the jury panel, a timely objection must be made." *O'Neal v. State*, 321 Ark. 626, 632, 907 S.W.2d 116, 119 (1995). Consequently, appellant cannot now challenge the jury selection on appeal.

Appellant's eleventh point of appeal contends that the trial court used an improper jury instruction with respect to defining actual and constructive possession of a controlled substance. The following colloquy occurred at trial:

> APPELLANT: While he's doing that, Your Honor, I'm also in disagreement with the definition of possession here. I mean to me it just gives a partial definition of it. It doesn't state nowhere of being of the knowledge of the actual presence of the substance.
>
> THE COURT: The court's using AMCI.
>
> APPELLANT: Sir?
>
> THE COURT: The Court's using the definition in the AMCI instructions.

Appellant did not pursue further discussion of the issue, and the instructions used by the court to define actual and constructive possession were based upon AMCI 2d 6404. Appellant has simply not demonstrated that the trial court erred in this regard.

Appellant's twelfth point of appeal contends that an affidavit he proffered to the trial court should have been admitted into evidence. The affidavit itself is abstracted; however, there is nothing in the abstract demonstrating that appellant attempted to introduce it or how the trial court ruled on the issue. Consequently, we do not address the merits of this issue. The record on appeal is confined to that which is abstracted, and *pro se* litigants are held to the same abstracting standards as licensed attorneys. *Hooker v. Farm Plan Corp.*, 331 Ark. 418, 962 S.W.2d 353 (1998).

Appellant's final point of appeal is captioned, "Sufficience of Evidence"; however, the substance of his argument under this point again challenges the trial court's denial of his motions to suppress, which has already been addressed under his fifth point of appeal.

Affirmed.

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

Frank WIMBLEY *v.* STATE of Arkansas

CA CR 99-434 3 S.W.3d 709

Court of Appeals of Arkansas
Division II
Opinion delivered November 10, 1999

Daniel G. Ritchey, for appellant.

Mark Pryor, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Asst. Att'y Gen., for appellee.

TERRY CRABTREE, Judge. The Mississippi County Circuit Court convicted the appellant, Frank Wimbley, of possession of a controlled substance, cocaine, and sentenced him to three years in the Arkansas Department of Correction, followed by seven years' suspended imposition of sentence. In addition, the court found appellant guilty of misdemeanor possession of marijuana and fined him $1,000. On appeal, appellant claims that the

circuit judge erred by denying his motion to suppress evidence. We agree and reverse.

The Blytheville Police Department arrested appellant on April 28, 1998, shortly after noon in the parking lot of the Best Western Motel in Blytheville, Arkansas. The police went to the motel in response to a suspicious-vehicle report. The motel's clerk told Officer Gary Conyers that a truck had been parked all night in front of a rented, but unoccupied, room. Officer Conyers inspected a new Ford F-150 that the motel employee had reported and saw that it did not have a license plate. Officer Conyers then used the motel's telephone to call the police department's dispatcher and report the truck's vehicle identification number (VIN). The dispatcher informed Officer Conyers that there was no registration information for the truck.

At that time, Officer Randy Sipes saw a red Toyota car arrive in the parking lot. He told Officer Conyers that two of the four people in the car were getting out of the car and into the truck. The two officers went outside, and the car began to drive away, but a third officer, Detective David Flora, stopped it. Officer Conyers went to assist Detective Flora while the truck drove around the motel, which was not the most direct route out of the parking lot. Officer Sipes thought that the truck's route was suspicious because it was as if the truck's occupants were trying to avoid the officers. Officer Sipes stopped the truck as it passed the motel's lobby. Officer Sipes stated that he stopped the truck because it did not have a license plate and had not been registered. Moreover, Officer Sipes suspected that the truck had been stolen because the clerk had reported that it had been in the motel's parking lot all night, and the officers recovered "a lot of stolen vehicles from motel lots."

Detective Flora suggested that Officer Conyers assist Officer Sipes, who was getting the driver out of the truck. Officer Conyers approached the truck and told appellant, who was the passenger, to get out of the truck. As appellant got out, Officer Conyers told appellant to put his hands on the truck. Officer Conyers began to search appellant for weapons because he was concerned that the truck was stolen and wanted to protect himself. As Officer Conyers began to search appellant, Officer Conyers heard Officer Sipes say, "What was that?" and "Drop it." Officer Conyers, not knowing what appellant had in his hand, stepped back and saw appellant

throw an object away from the truck. During the suppression hearing, Officer Sipes testified that appellant dropped a plastic baggie into the bed of the truck and, when asked about what he had dropped, picked up the baggie and threw it into the parking lot. Officer Sipes asked another officer to retrieve the baggie, which contained a controlled substance, cocaine. Officer Conyers continued to search appellant and found a bag of marijuana in the front of his coveralls.

On review of a trial court's denial of a motion to suppress, this court makes an independent examination based on the totality of the circumstances, and will reverse only if the trial court's ruling was clearly against a preponderance of the evidence. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999). In making that decision, the Court reviews the evidence in the light most favorable to the State. *Id.*

Arkansas Rule of Criminal Procedure 4.1 (a)(iii) provides that a law enforcement officer may make a warrantless arrest of a person when the officer has reasonable cause to believe that the person has committed any violation of law in the officer's presence, including traffic offenses. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998). Here, the officers had reasonable cause to believe that the driver of the truck was violating Ark. Code Ann. § 27-14-304 (Repl. 1994), by operating a vehicle without a license plate, which is an unclassified misdemeanor. Although the driver might have had a valid defense if he had been charged with violating this statute, the officers nevertheless had reasonable cause to stop him. "[T]he question of whether an officer has probable cause to make a traffic stop does not depend upon whether the defendant is actually guilty of the violation that was the basis of the stop." *Travis*, 331 Ark. at 10, 959 S.W.2d at 34. The officers saw the driver operating the truck without a license plate and thus had reasonable cause to stop him.

After the police stopped the truck, Officer Sipes asked the driver to produce his driver's license, and the driver did so. Upon request, the driver also showed Officer Sipes papers to verify that he had just purchased the truck. Officer Sipes told the driver to step out of the truck. Then, Officer Conyers approached the truck and ordered appellant to get out. In *Maryland v. Wilson*, 519 U.S. 408, 415 (1997), the United States Supreme Court held that "an officer

making a traffic stop may order passengers to get out of the car pending completion of the stop." Officer Conyers told appellant to place his hands on the truck while he searched appellant. Once an officer is lawfully in a person's presence, he may search the person for weapons if he has a reasonable suspicion that the person is armed and dangerous. *See, e.g., Wright v. State*, 300 Ark. 259, 778 S.W.2d 944 (1989); Ark. R. Crim. P. 3.4. Officer Conyers testified that he searched appellant for weapons because the officers "had a concern that this vehicle was stolen." The motel clerk had told Officer Conyers that the truck had been parked in the motel's parking lot all night, and Officer Conyers knew that the truck did not have a license plate and that many stolen vehicles had been recovered from motel parking lots. Moreover, the truck appeared to be avoiding the officers when it drove around the motel after Detective Flora stopped the red car.

On the other hand, before Officer Conyers searched appellant, the officer knew that the truck was not stolen because the driver produced papers verifying his recent purchase. Officer Conyers needed "reasonable suspicion" that appellant was carrying a weapon before he could search appellant. *See Wright, supra.* "Reasonable suspicion" is defined by our rules of criminal procedure as:

> [A] suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Ark. R. Crim. P. 2.1.

Officer Conyers testified that when he first approached the unoccupied truck at the motel that he "did not find anything suspicious" in it. He stated that "[t]he truck was pretty clean." He also testified that the truck was parked in front of the rented, unoccupied room and that the curtains to the room were open so that he could see in the room. Conyers did not report that he saw anything suspicious in the room from outside the window. Furthermore, Officer Conyers conducted his search of appellant at noon, clearly during daylight hours. Based upon the totality of the circumstances, we believe that Officer Conyers lacked the requisite reasonable suspicion to search appellant for weapons. The question

as to whether the truck had been stolen was answered upon Officer Sipes's encounter with the driver before Officer Conyers even approached the passenger's side of the truck. Knowing that the truck was not stolen and having no other reason to believe that appellant was armed, Officer Conyers exceeded his authority by searching appellant.

After Officer Conyers began his frisk of appellant, appellant tossed a baggie, which contained a controlled substance, into the truck bed and then into the parking lot. The officers seized the baggie from the parking lot. Then Officer Conyers continued to search appellant and found a bag of marijuana in the front of his coveralls. These events resulted in appellant's arrest.

In conclusion, we hold that the police acted reasonably in responding to the motel employee's report of a suspicious truck and in stopping and detaining the truck and its two occupants to determine whether the vehicle was stolen. However, our independent review leads us to conclude that Officer Conyers lacked reasonable suspicion to conduct a search of appellant. Therefore, the circuit court should have granted appellant's motion to suppress, and we reverse appellant's conviction and sentence.

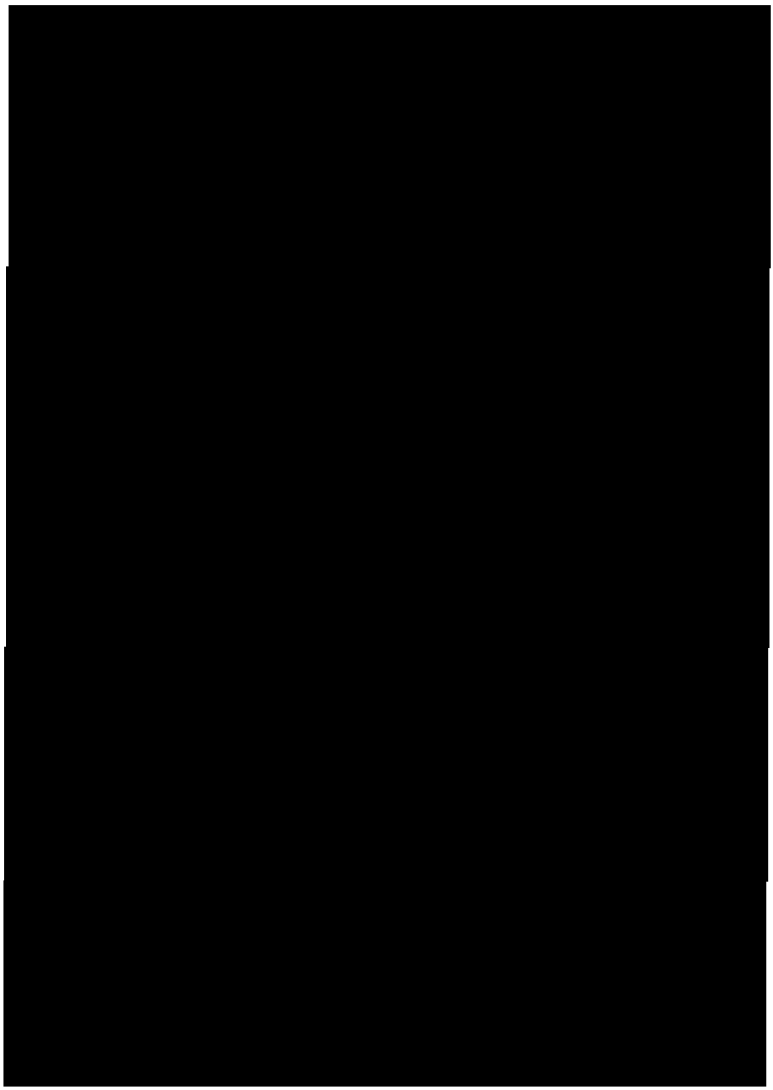
Reversed.

HART and MEADS, JJ., agree.

Rebekah Priest CYPHERS *v.* UNITED PARCEL SERVICE

CA 98-498 3 S.W.3d 698

Court of Appeals of Arkansas
Division II
Opinion delivered November 10, 1999



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

Friday, Eldredge & Clark, by: *James C. Baker* and *Betty J. Demory*, for appellee.

MARGARET MEADS, Judge. This is the third time this issue has been before us. Appellant again challenges the Commission's determination, based upon an independent medical examination report by Dr. Jim Moore, that she sustained a five-percent permanent physical impairment to the body as a whole. She argues that she was denied her due process right to cross-

examine Dr. Moore when the Commission failed to issue a requested subpoena.

In the first appeal, *Priest v. United Parcel Serv.*, 58 Ark. App. 282, 950 S.W.2d 476 (1997), we held that we could not reach the merits of appellant's due-process argument because the Commission failed to make findings of fact in support of its conclusion that appellant was not denied due process, and we remanded for the Commission to make specific findings of fact on the issue. On remand, the Commission again held that appellant's due process rights were not violated. In the second appeal, *Cyphers (Priest) v. United Parcel Serv.*, 65 Ark. App. 107, 985 S.W.2d 330 (1999), we were unable to reach the merits of appellant's due-process argument because appellant failed to comply with the briefing requirements of Ark. Sup. Ct. R. 4-2(a)(6), and we remanded for rebriefing to allow appellant to file a new brief conforming to Rule 4-2. Appellant's new brief was filed April 20, 1999, and the case is now before us for decision.

Appellant sustained a compensable injury to her back on November 2, 1990. Dr. Phillip Johnson, appellant's primary treating physician, assigned a fifteen-percent permanent physical impairment rating to the body as a whole. Subsequently and at appellee's request, appellant agreed to an independent medical evaluation by Dr. Jim Moore, who examined appellant on September 13, 1993, and assigned appellant a physical impairment rating of five percent to the body as a whole. After receiving Dr. Moore's independent medical examination report, appellant wrote to Dr. Moore requesting clarification and stating that she would like to depose him in regard to his report. Appellee's attorney scheduled Dr. Moore's deposition and informed appellant that Dr. Moore's deposition fee was $450 for the first hour and $250 per hour for every hour after that. In a letter to the administrative law judge dated March 14, 1994, appellant contended that Dr. Moore's compensation was limited under Workers' Comp. Comm. R. 30 to $25 per quarter hour. On March 30, 1994, the law judge wrote counsel for both parties that Rule 30 Part I A.4 provides that an independent medical examination is exempt from Rule 30. The law judge also said that he had talked with Dr. Moore's office in an attempt to persuade him to charge a more reasonable fee, but he was unsuccessful. No change was made to Dr. Moore's fee, and appellant canceled the deposition. On March 31, 1994, on the assumption that appellee

intended to introduce Dr. Moore's report, appellant wrote the law judge requesting that appellee produce Dr. Moore at the hearing for cross-examination by way of subpoena pursuant to Workers' Comp. Comm. R. 20 and Ark. Code Ann. § 11-9-705(c)(2)(B) (Repl. 1996). Appellee refused, and appellant sought a subpoena for Dr. Moore pursuant to Ark. Code Ann. § 11-9-706(a)(Repl. 1996). The law judge refused to issue the subpoena.

At the hearing held August 17, 1994, appellant objected to the introduction of Dr. Moore's report on the basis that appellee failed to produce Dr. Moore for cross-examination after being requested to do so and that the law judge refused to subpoena Dr. Moore to the hearing. Appellant argued that she was denied due process because she was unable to cross-examine Dr. Moore. Appellee contended that it made Dr. Moore available for deposition and that Rule 30 cost-containment procedures did not apply to Dr. Moore, an independent medical evaluation physician. Appellant responded that if that were so, she was deprived of her due process right of cross-examination because she could not afford to pay Dr. Moore's charges. Appellant stated further that Dr. Moore said that he had been furnished with additional information, that she did not know what that information was, and that was one of the things about which she wanted to depose Dr. Moore. The administrative law judge concluded that appellant was not denied due process by the admission of Dr. Moore's report; that Dr. Moore's rating was more accurate than that of Dr. Johnson; and awarded appellant an anatomical impairment rating of five percent to the body as a whole. The opinion was silent in regard to the fee issue. The full Commission affirmed and adopted the decision of the law judge.

On remand after the first appeal for the Commission to make specific findings of fact, the Commission again held that appellant's due process rights were not violated and that appellant was not denied the right of cross-examination when the administrative law judge refused to issue a subpoena for Dr. Moore. The Commission held that Dr. Moore was made available to appellant pursuant to Workers' Comp. Comm. R. 20; that the rule provided that appellant pay the attendance fee charged for a deposition or a hearing; and that appellant canceled the deposition because she did not want to pay Dr. Moore's fee. The Commission concluded that even if a subpoena had been issued, appellant would have to pay Dr. Moore's attendance fee of $450 pursuant to Rule 20, which appellant had

already refused to do. The Commission in effect held that appellant had "waived" her right to cross-examination and that the law judge made the correct decision in refusing to issue the subpoena.

In the appeal before us, appellant argues, as in the prior appeal, that she was denied due process. Appellant argues that the Commission erred in holding that Rule 20 allowed Dr. Moore to charge his regular attendance fee for either a deposition or a hearing, and in holding that even if a subpoena had been issued appellant would have had to pay Dr. Moore's attendance fee of $450. Appellant contends that fee is prohibited by Rule 30, which limits the fee to $25.67 per quarter hour including preparation time, and that the Commission effectively denied her due process by its interpretation of Rule 20 "*vis-a-vis*" Rule 30. We agree.

Arkansas Code Annotated section 11-9-205(a)(1)(A) (Repl. 1996) provides that the Commission may make such rules and regulations as may be found necessary. Workers' Compensation Commission Rule 20 provides:

> In the event a written report of a physician, osteopath, or chiropractor is offered in evidence and the right of cross-examination is requested, it will be granted. The party offering the report must produce the author of the report for cross-examination, but the attendance fee or charge of the witness is the liability of the party requesting cross-examination.

Workers' Compensation Commission Rule 30, promulgated pursuant to Ark. Code Ann. § 11-9-517 (1987), established a medical-cost-containment program; it contains six parts and is a comprehensive measure with extensive provisions regarding proper procedures for payment of medical costs. *Burlington Indus. v. Pickett*, 336 Ark. 515, 988 S.W.2d 3 (1999). The rule provides:

> PART I GENERAL PROVISIONS
>
> Pursuant to Ark. Code Ann. § 11-9-517 (1987) the following rule is hereby established in order to implement a medical cost containment program.
>
> A. Scope.
>
> 1. This rule does all of the following:
>
> . . .

(b) Establishes schedules of maximum fees by a health facility or health care provider for such treatment or attendance, service, device, apparatus, or medicine.

. . .

4. An independent medical examination performed to evaluate legal liability of a case, or for purposes of litigation of a case, shall be exempt from this rule.

. . .

F. Definitions.

As used in these rules:

30. "Independent medical examination" means an examination and evaluation conducted by a practitioner different from the practitioner providing care.

. . .

H. Independent medical examination to evaluate medical aspects of case.

1. An independent medical examination shall include a study of previous history and medical care information, diagnostic studies, diagnostic x-rays, and laboratory studies, as well as an examination and evaluation. This service may be necessary in order to make a judgment regarding the current status of the injured or ill worker, or to determine the need for further health care.

2. An independent medical examination, performed to evaluate the medical aspects of a case, shall be billed using the independent medical examination procedure code 99199 (BR), and shall include the practitioner's time only. The office visit charge is included with the code 99199 and may not be billed separately.

3. Any laboratory procedure, x-ray procedure, and any other test which is needed to establish the worker's ability to return to work shall be identified by the appropriate procedure code established by this rule.

. . .

P. Deposition/Witness fee limitation.

1. Any health care provider who gives a deposition shall be allowed a witness fee.

2. Procedure Code 99075 must be used to bill for a deposition.

3. Reimbursement for a deposition is limited to $25.67 per quarter hour (includes preparation time).

4. This limitation does not apply to an expert witness who has never provided direct professional services to a party or who has provided only direct professional services which were unrelated to the Workers' Compensation case.

When reviewing the Commission's interpretation and application of its rules, we give the Commission's interpretation great weight; however, if an administrative agency's interpretation of its own rules is irreconcilably contrary to the plain meaning of the regulation itself, it may be rejected by the courts. *Burlington Indus., supra.* An administrative agency's interpretation of a statute or its own rules will not be overturned unless it is clearly wrong. *Arkansas Dept. Human Serv. v. Hillsboro Manor Nursing Home, Inc.*, 304 Ark. 476, 803 S.W.2d 891 (1991).

Here, the Commission erred in rejecting appellant's argument that Dr. Moore's fee is limited by Rule 30. Rule 30 Part I A.4 provides that "an independent medical examination performed to evaluate legal liability of a case, or for purposes of litigation of a case shall be exempt from this rule." Subpart F defines an independent medical examination as "an examination and evaluation conducted by a practitioner different from the practitioner providing care." Subpart H defines what an independent medical examination includes, and provides that it should be billed using the independent medical examination procedure code 99199. Neither attendance at a hearing nor attendance at a deposition is included in the definition of an independent medical examination. Moreover, subpart P provides a limitation of $25.67 per quarter hour on deposition/witness fees and states that procedure code 99075 must be used to bill for a deposition. If the deposition/witness fee were an "independent medical examination" under the rule, there would be no need for a separate procedure code for billing purposes. Thus, under the clear wording of the rule, attendance at a hearing or deposition is not an "independent medical examination" exempt from Rule 30.

Here, the Commission found that appellant would have had to pay Dr. Moore's attendance fee of $450 pursuant to Rule 20 even if a subpoena were issued, thus implicitly finding that Rule 30 did not apply to Dr. Moore's fee. This finding was clearly wrong.

Although the Workers' Compensation Commission is not bound by technical or statutory rules of evidence or by technical or formal rules of procedure, Ark. Code Ann. § 11-9-705(a)(1)(Repl. 1996), the right to cross-examine adverse witnesses extends to parties appearing before the Commission. *Davis v. Arkansas Best Freight Sys.*, 239 Ark. 632, 393 S.W.2d 237 (1965). The Commission has the power to issue subpoenas to compel attendance and testimony of witnesses, Ark. Code Ann. § 11-9-706(a), and has adopted Rule 20 which provides that if the right of cross-examination is requested, "it will be granted."

The Commission's power to issue subpoenas cannot be exercised in such a way that a party is denied a reasonable opportunity to cross-examine an adverse witness. *Cf. Smith v. Everett, Dir.*, 276 Ark. 430, 432, 637 S.W.2d 537, 538 (1982) (in a proceeding before the Appeal Tribunal, the opportunity to subpoena and cross-examine witnesses is a component of due process). In *Smith*, our supreme court stated that "[t]he United States Supreme Court, in interpreting the rights of an individual in adjudicatory administrative proceedings, has held that before state-granted benefits (welfare) can be taken away the claimant must be given an opportunity to confront and cross-examine adverse witnesses at an evidentiary hearing." Further,

> Where reliance is placed by an administrative agency upon testimony of certain witnesses in making a critical factual determination, it will be an abuse of discretion to fail to hear material evidence which might impeach, not only the testimony, but the findings made by the agency as well. (Citation omitted.)

Arkansas Pub. Ser. Comm'n. v. Continental Tel. Co., 262 Ark. 821, 838, 561 S.W.2d 645, 655 (1978). Although these decisions involved administrative agencies other than the Workers' Compensation Commission, we find them analogous and persuasive with regard to the issue before us.

We hold that the Commission erred in refusing to issue a subpoena for Dr. Moore as requested. Not only did the Commis-

sion erroneously interpret Rule 30, but it also ignored the plain language of Rule 20 and denied appellant her right of cross-examination. We therefore reverse and remand to the Commission to allow appellant her right to cross-examination, consistent with this opinion and the cost limitations of Rule 30.

Reversed and remanded.

HART and CRABTREE, JJ., agree.

John LINDSEY *v.* STATE of Arkansas

CA CR 99-558 3 S.W.3d 346

Court of Appeals of Arkansas
Division IV
Opinion delivered November 10, 1999

William R. Simpson, Jr., Public Defender; *Sandra S. Cordi*, Deputy Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *James R. Gowen, Jr.*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. John Lindsey was convicted in a bench trial of theft by receiving, for which he was sentenced as an habitual offender to 180 months in the Arkansas Department of Correction. On appeal, Lindsey argues that the evidence was insufficient to sustain his conviction because the State failed to prove that he was in possession of the stolen white van recovered near where he had been seen driving a white van, because it was reasonable that he could have been driving a white van other than the one that was stolen. We agree that the evidence was insufficient to sustain the conviction and reverse.

The following evidence was introduced by the State at Lindsey's trial. Burt Park, chairman of the board of Democrat Printing and Lithographing Company, testified that in September of 1997, a 1997 white Ford van was stolen after working hours from Democrat Printing. The theft was discovered at 6:00 a.m. Later that morning, after the theft had been reported to police, the van was recovered. Police had found the vehicle at Ives Walk, a housing development off Roosevelt Road just west of the interstate.

Dorothy Brown Walker, who lived at No. 4 Ives Walk, testified that on September 9, 1997, at approximately 2:00 a.m., she observed Lindsey drive a white van behind the empty, boarded-up apartment next door at No. 2 Ives Walk, back up to the apartment,

and then drive off. She described the van as "a white utility van" with "no windows on the side." Walker said she recognized Lindsey from his previous visits to his sister who lived next door at No.6 Ives Walk.

Sue Francis of the Little Rock Police Department testified that she was called to Ives Walk on September 9, 1997, to investigate a report that a van was in the development. According to Francis, she found the vehicle behind a duplex at No. 19 Ives Walk and later determined that it was the van that was stolen from Democrat Printing.

Lindsey's sole point on appeal is that the evidence was insufficient to support his conviction. He argues that the State failed to prove that he was in possession of the stolen van. Lindsey contends that it was not sufficient that he was observed driving a white van at 2:30 a.m. and that the stolen white van was discovered in the same housing project later that morning. He asserts that white utility vans are not unique and it is not unreasonable that two white vans could be in the same housing development on the same day. We find Lindsey's argument persuasive.

In reviewing a challenge to the sufficiency of the evidence, this court must view the evidence in a light most favorable to the State and consider only that evidence which supports the verdict. *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (1997). Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Id.* Circumstantial evidence may constitute substantial evidence. *Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993). When circumstantial evidence alone is relied upon, it must indicate the accused's guilt and exclude every other reasonable hypothesis. On review, it is our job to determine if the evidence excludes every other reasonable hypothesis. *Carter v. State*, 324 Ark. 395, 921 S.W.2d 924 (1996). It is only when circumstantial evidence leaves the finder of fact solely to speculation and conjecture that it is insufficient as a matter of law. *Hutcherson v. State*, 34 Ark. App. 113, 806 S.W.2d 29 (1991).

Theft by receiving is codified under Ark. Code Ann. § 5-36-106 (Repl. 1997) as follows:

(a) A person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen.

(b) For purposes of this section, "receiving" means acquiring possession, control, or title or lending on the security of the property.

(c) The unexplained possession or control by a person of recently stolen property or the acquisition by a person of property for a consideration known to be far below its reasonable value shall give rise to a presumption that he knows or believes that the property was stolen.

In the instant case, we cannot find sufficient evidence from which the trier of fact could conclude that Lindsey was in actual physical possession of the stolen utility van. Utility vans are not unique, so the possibility that Lindsey could be present in a white utility van similar to the stolen white utility van that was discovered nearby hours later is not so remote as to render that hypothesis unreasonable. *Cf. Lancaster v. State*, 204 Ark. 176, 161 S.W.2d 201 (1942). We have scoured the record to find sufficient detail in the testimony of the State's other two witnesses to further correlate Dorothy Walker's description of the van that Lindsey was in with the stolen vehicle, but our search has proved unavailing. As noted above, Walker described the van only as a "white utility van" with "no windows on the side." Burt Parks's testimony was silent about the absence of side windows, and while he provided the year and manufacturer of the stolen vehicle, those details are of no significance because Walker made no mention of either in her testimony. The testimony of the State's only other witness, Officer Sue Francis, was even more vague about the physical description of the van, which she simply referred to as a "white utility van." Like Parks, Officer Francis did not mention the only distinguishing characteristic provided by Walker's testimony: the lack of side windows. Our case law is clear that when a case is made entirely on circumstantial evidence, the circumstances relied upon by the State must be so connected and cogent as to show guilt to a moral certainty and must exclude every other reasonable hypothesis than that of the guilt of the accused. *Green v. State*, 269 Ark. 953, 601 S.W.2d 273 (Ark. App. 1980). We simply cannot find a sufficiently strong connection between the white van that Lindsey was sighted in at

2:30 a.m., and the white van that was subsequently discovered at another part of the housing complex hours later. *See Rolax v. State*, 270 Ark. 197, 603 S.W.2d 903 (Ark. App. 1980). Accordingly, we reverse and dismiss.

Reversed and dismissed.

PITTMAN and JENNINGS, JJ., agree.

Michaelangelo REYNOLDS *v.* STATE of Arkansas

CA CR 99-392 4 S.W.3d 508

Court of Appeals of Arkansas
Division IV
Opnion delivered November 17, 1999

Steven M. Harper, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Michaelangelo Reynolds appeals his conviction after a jury trial of delivery of a controlled substance, crack cocaine, for which he received a twenty-five-year prison sentence. He appeals an evidentiary ruling that permitted the jury to hear a tape recording made while secretly attached to a confidential informant wherein appellant was asked to go to a neighbor's house to retrieve crack cocaine for the informant. Because appellant has not brought up a record sufficient to demonstrate error, we affirm.

A brief recitation of the facts follows. A confidential informant, who had pending misdemeanor charges, agreed to work for the police in efforts to apprehend drug dealers in Conway, Arkansas, in exchange for leniency or dismissal of his charges. A microphone was attached to him, and he was given $500 to purchase drugs. Police observed him ride his bicycle into a trailer park and enter the trailer belonging to appellant. Shortly thereafter, appellant exited the trailer, went two trailers over, entered the trailer of a man suspected of dealing crack cocaine, soon exited, and returned to his own trailer. The confidential informant then exited appellant's trailer, met with the police, and turned over a large rock of crack cocaine that weighed 3.4 grams and the $300 that had not been expended for drugs. All of this information came out in the testimony of the police officers, the chemist, and the confidential informant.

An audiotape of this drug deal was made, and over the appellant's objection to its poor quality, it was admitted into evidence as State's Exhibit #1 and played for the jury. The State admitted that there were some portions that were inaudible, but maintained that the tape was helpful because it corroborated the timing of the drug deal and because the audible portion was consistent with the testimony presented on behalf of the State. However, appellant did not abstract the audible portions of the tape, nor did he attach copies of this tape to the briefs submitted to us. Furthermore, the original tape is not included in the record filed with the Clerk of the Supreme Court. The record reflects the following:

STATE'S EXHIBIT NO. 1

(Audio Tape)

[redacted]

[redacted] Appellant argues on appeal that it was error for the trial court to admit this audiotape into evidence for the jury to consider because its quality is so poor that it was untrustworthy and because the State did not lay a proper foundation for its admittance. As to appellant's foundation argument, it was not raised in the trial court and, therefore, is not preserved for our review. In order to preserve an argument for appellate review, it must be raised below. *See Reams v. State*, 322 Ark. 336, 909 S.W.2d 324 (1995). Additionally, we cannot reach the merits of appellant's other arguments concerning the audiotape because we do not have the tape to review. The record on appeal is confined to that which is abstracted, and failure to abstract a critical matter precludes this court from considering the issue on appeal. *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995). It is impossible for this court to review the contents of the tape in order to determine whether the trial court abused its discretion. *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997). Despite the questionable quality, what can be abstracted of the audiotape should be abstracted because the tape was played to the jury, and the contents of the tape comprise the sole subject of appeal. *See Hodge v. State*, 329 Ark. 57, 945 S.W.2d 384 (1997); *see also* Ark. R. Sup. Ct. 4-2(a)(6). Only if the statement is completely incomprehensible should abstracting be deferred, and then only by leave of the appellate court upon motion by appellant. *Hodge, supra*; Ark. R. Sup. Ct. 4-2(a)(6). Because appellant has not demonstrated that the trial court committed reversible error, we affirm his conviction. *See McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997).

Affirmed.

JENNINGS and STROUD, JJ., agree.

T&T MATERIALS, INC. *v.* Willie MOONEY and Northwest Paving Co., Inc.

CA 99-84 4 S.W.3d 512

Court of Appeals of Arkansas
Division I
Opinion delivered November 17, 1999
[Petition for rehearing denied January 5, 2000.]

Hardin & Grace, PA, by: *William T. Terrell*, for appellant.

James & Carter, PLC, by: *Paul J. James*, for appellees.

SAM BIRD, Judge. Appellant, T&T Materials, Inc., brings this appeal contending that the Pulaski County Circuit

Court erred in determining that venue was not proper in its court and that the Van Buren County Circuit Court erred in dismissing its complaint. We find no error, and we affirm.

On January 6, 1997, a consent judgment for $55,023.31, plus interest and costs, was entered in the Crawford County Circuit Court in favor of T&T against appellee Willie Mooney. Mooney is a resident of Crawford County; T&T's principal place of business is in Van Buren County. Subsequent to the entry of the judgment, appellant propounded interrogatories to Mooney, and Mooney filed his responses in Crawford County Circuit Court and forwarded a copy to T&T's counsel in Pulaski County. In his answers to the interrogatories, Mooney stated that he was employed by appellee Northwest Paving Co., Inc. Upon receiving Mooney's answers to the interrogatories, T&T forwarded a writ of garnishment and interrogatories to Northwest, and Northwest timely responded to the writ and answered the interrogatories, stating that Mooney was its employee, disclosing Mooney's weekly wages, and setting forth the amounts of tax and retirement withholdings from Mooney's weekly paycheck. A copy of Northwest's answers to the interrogatories was also forwarded to T&T's counsel in Pulaski County.

Thereafter, in an effort to obtain information he needed to prepare an appropriate order of delivery, T&T's counsel wrote three letters, over a period of approximately two months, to counsel for Northwest, requesting that he provide specific information as to how much money was being withheld from Mooney's weekly paycheck as a result of T&T's garnishment. After receiving no response to his letters from Northwest's counsel, T&T's counsel presented a proposed order of disbursement to the Crawford County circuit judge, ordering Northwest to pay over to T&T "all garnished wages or other amounts" subject to the writ of garnishment. However, three days later, and before the proposed disbursement order was entered, Northwest filed an amended response to the writ of garnishment, stating that Mooney was not its employee, but that he was employed by Certified Systems, Inc., a temporary employment agency in Texas, and stating that Northwest was leasing its employees (including Mooney) from Certified Systems.

After receiving Northwest's amended response to the interrogatories, T&T filed a complaint in Pulaski County, against Mooney

and Northwest, contending that they had fraudulently concealed benefits paid to Mooney by Northwest and that they had fraudulently concealed Mooney's assets. T&T alleged that Ark. Code Ann. § 16-60-113(b)(1987) vested jurisdiction and venue in Pulaski County. Northwest and Mooney filed a motion to dismiss the Pulaski County action, stating that Pulaski County Circuit Court lacked jurisdiction of the parties and the subject matter of the action, that venue was not proper in Pulaski County, and that the complaint failed to state a claim upon which relief could be granted. Before the Pulaski County Circuit Court ruled on Mooney and Northwest's motion, the Crawford County Circuit Court, on motion of T&T, entered an order dismissing the garnishment proceeding against Northwest, without prejudice. Shortly thereafter, the Pulaski County Circuit Court granted Mooney and Northwest's motion to dismiss T&T's complaint for fraud, stating that Pulaski County was not the proper venue, and granted T&T's oral request to transfer the case to Van Buren County Circuit Court.

Thereafter, Van Buren County Circuit Court dismissed T&T's complaint, stating that it did not have subject-matter jurisdiction, and pursuant to Ark. R. Civ. P. 12(b)(6) for failure to state claims upon which relief can be granted. The circuit judge relied upon three statutes:

> Ark. Code Ann. § 16-110-404 (1987): The garnishee shall, on the return day named in the writ, exhibit and file, under his oath full, direct, and true answers to all such allegations and interrogatories as may have been exhibited against him by the plaintiff.
>
> Ark. Code Ann. § 16-110-405(a) (1987): If the garnishee files his answer to the interrogatories exhibited and the plaintiff deems the answers untrue or insufficient, he may deny the answers and cause his denial to be entered on the record.
>
> Ark. Code Ann. § 16-110-405(b) (1987): The court or justice, if neither parties require a jury, shall proceed to try the facts put in issue by the answer of the garnishee and the denial of the plaintiff.

In an amended order, the Van Buren County circuit judge stated, "The Court finds that the Plaintiff's allegations must be addressed to the Crawford County Circuit Court because that is the court in which the writ of garnishment originated." It is from that

order that the appellant brings this appeal asking this court to reverse the court's order of dismissal and remand the case to the Van Buren County Circuit Court with instructions to transfer the case back to Pulaski County Circuit Court.

For its first point on appeal, T&T argues that the Crawford County Circuit Court erred in determining that T&T must pursue its fraud claims against Mooney and Northwest as part of the underlying Crawford County action where the judgment sought to be collected was entered and from which the writ of garnishment was issued. T&T argues that the garnishment statutes referred to by the Van Buren County Circuit Court are not applicable in this case because Northwest's original answer to the writ of garnishment was that Mooney was its employee, an answer that T&T would not have disputed. In the alternative, T&T argues that even if it had filed an objection to Northwest's amended answer (stating that Mooney was not its employee), T&T would have no remedy against Northwest because, in light of Northwest's amended answer stating that Mooney is not its employee, "there never was any amount due from Northwest (as the garnishee) to Willie Mooney (defendant)," and the garnishment statutes do not give the trial court authority to enter judgment against a garnishee for funds that the garnishee never held. Thus, T&T contends that the only way it can recover funds that it would have garnished from Certified Systems (the employment agency in Texas), had Northwest and Mooney not given intentionally false and misleading answers, is through a separate cause of action, such as the fraud action it filed in Pulaski County Circuit Court.

T&T also argues that if this court agrees that it is entitled to maintain the fraud action separate and apart from the garnishment action, then this court must also agree that Pulaski County Circuit Court erred in finding that it did not have venue to hear the case. The basis of T&T's fraud action is that Northwest is "finding other ways to pay Willie Mooney so as to preclude creditor attachment of those wages and is participating in the fraudulent concealment of Mooney's assets." Thus, T&T apparently asserts that Northwest's amended answer, stating Mooney was not an employee and that it was not indebted to Mooney, is false and fraudulent. T&T argues that because Mooney's and Northwest's fraudulent answers were mailed to its attorney in Pulaski County, venue is proper in Pulaski County under Ark. Code Ann. 16-60-113(b), apparently on the

theory that "part of a scheme to defraud ... was communicated ... into ..." Pulaski County. However, because we do not agree with T&T that the fraud action can be maintained separate and apart from the garnishment action, we need not address whether Pulaski County Circuit Court erred in stating that it did not have venue and in transferring the case to Van Buren County Circuit Court. We disagree with T&T's argument because, contrary to its contention, there is a remedy under the garnishment statutes against garnishees who file false answers to writs of garnishments.

The primary rule in the construction of a statute is to ascertain and give effect to the legislative intent. *Woodcock v. First Commercial Bank*, 284 Ark. 490, 683 S.W.2d 605 (1985). It is the duty of this court to reconcile the different provisions of a statute to make them harmonious and sensible. *Id.*; *Shinn v. Heath, Director*, 259 Ark. 577, 535 S.W.2d 57 (1976). The reason, spirit, and intended purposes of the Acts of the General Assembly are basic guideposts in statutory construction. *Woodcock v. First Commercial Bank, supra*. The first thing this court does in construing a statute is to look at the language of the statute and give it its ordinary meaning. *Id.* It is the duty of the courts to give effect to the true intent of the General Assembly even though such intent has not been clearly expressed by the language employed. *Id.*

The presently existing garnishment statutes were enacted as Act 115 of 1889. As originally adopted, sections five and six read as follows:

> Sec. 5. If the garnishee shall file his answer to the interrogatories exhibited, and the plaintiff shall deem such answers untrue or insufficient, he may deny such answer, and cause his denial to be entered on the record; and the court or justice, if neither party require a jury, shall proceed to try the facts put in the issue by the answer of the garnishee and the denial of the plaintiff.
>
> Sec. 6. If the issue be found for the garnishee he shall be discharged without farther[sic] proceedings; but if the issue be found for the plaintiff judgment shall be entered for the amount found due from the garnishee to the defendant in the original judgment, or so much thereof as will be sufficient to satisfy the plaintiff's judgment, with costs.

The garnishment statutes are now codified at Ark. Code Ann. § 16-110-401 (1987) *et seq*. Specifically, section five of the Act is codified

at Ark. Code Ann. § 16-110-405 (a) & (b) (1987). Section 6 of the Act is now codified at § 16-110-410 (1987).

Construing the garnishment statutes in a way that makes them consistent, harmonious, and sensible, as we must, we find that there was available to T&T a means to object to the answers to the interrogatories, that there was a process through which the court could determine whether Mooney and Northwest's answers were false, and that there was a remedy available to T&T if the court had so found.

Arkansas Code Annotated section 16-110-404 (1987) states that the garnishee shall file "full, direct, and true answers to allegations and interrogatories as may be exhibited against him by the plaintiff." Arkansas Code Annotated section 16-110-405(a) (section five of Act 115 of 1889) states that should the garnishee file his answers and the plaintiff deems those answers untrue or insufficient, then the plaintiff may deny the answer and cause this denial to be entered on the record. Under section 16-110-405(b), after a plaintiff disputes the truthfulness of a garnishee's answer, the court or justice shall proceed to try the facts put in issue by the answer of the garnishee and the denial of the plaintiff. Arkansas Code Annotated section 16-110-410 (section six of Act 115 of 1889) provides a remedy for the prevailing party after the court or justice has tried the issues created by the answer of the garnishee and the denial of the plaintiff. This section has had little revision since its enactment and reads:

> (a) If the issue is found for the garnishee, he shall be discharged without further proceedings.
>
> (b) However, if the issue is found for the plaintiff, judgment shall be entered for the amount due from the garnishee to the defendant in the original judgment, or so much thereof as will be sufficient to satisfy the plaintiff's judgment, with costs.

Therefore, under the garnishment statutes, T&T had a statutory remedy had it disputed Mooney's and Northwest's answers to the interrogatories and given the Crawford County Circuit Court an opportunity to decide the issue.

Case law has addressed a situation similar to the case at bar. In *Bell v. West d/b/a West's Serv. Sta.*, 241 Ark. 89, 406 S.W.2d 316 (1966), a plaintiff (judgment creditor) appealed from a decision of

the trial court refusing to award him judgment against the garnishee for the full amount of his judgment against a defendant, where the garnishee had filed an incorrect answer to a writ of garnishment. The supreme court, citing *Harris v. Harris*, 201 Ark. 684, 146 S.W.2d 539 (1941), reversed and remanded to the trial court for entry of judgment against the garnishee for the full amount of plaintiff's judgment against the defendant, holding that where the garnishee failed to file a true answer to the writ, the garnishee became liable for the full amount of the principal judgment. The decision in *Bell* is consistent with the relief provided for by Ark. Code Ann. § 16-110-910.

Therefore, because Arkansas law provides a statutory remedy for a party who proves, after a trial on the issues, that false answers to interrogatories propounded with a writ of garnishment have been filed, T&T had a remedy in the Crawford County Circuit Court where its judgment against Mooney was entered and where it initiated the garnishment proceedings against Northwest for the collection thereof. And we hold that no separate and independent fraud action exists in any county arising out of the alleged untruthful or insufficient answers to allegations and interrogatories exhibited against any garnishee.

Therefore, we affirm the Van Buren County Circuit Court's dismissal of T&T's complaint.

Affirmed.

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

Bobby Lynn UPTON *v.* STATE of Arkansas

CA CR 99-396 4 S.W.3d 510

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

Val P. Price, for appellant.

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

SAM BIRD, Judge. Appellant Bobby Lynn Upton was charged with battery in the second degree, resisting arrest, disorderly conduct, and public intoxication. A jury acquitted Upton of the second-degree battery charge and found him guilty of the misdemeanor charges of resisting arrest, disorderly conduct, and public intoxication. The jury recommended that he pay fines on the disorderly conduct, public intoxication, and resisting-arrest charges and also that he serve 105 days in the county jail on the charge of resisting arrest. The trial court accepted the jury's sentencing recommendations, but, upon request of the State, added to its judg-

ment and commitment order a provision that appellant would serve his jail time "flat," without credit for meritorious good time.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, the appellant's counsel has filed a motion to withdraw on the grounds that this appeal is without merit.

Counsel's motion was accompanied by a brief referring to everything in the record that might arguably support an appeal, together with a list of objections made by the appellant and ruled on by the court, a record of all motions and requests made by the appellant and denied by the court, and a statement of the reasons why counsel considers there to be nothing in the record that will support the appeal. The clerk of this court furnished the appellant with a copy of his counsel's brief and notified him of his right to file a pro se brief. The appellant has filed a brief to which the State has responded.

In his brief, counsel for appellant has set out eight adverse rulings, contending none of them have merit. In his pro se brief, appellant refers to two adverse rulings that he contends are erroneous. We agree with appellant that one of the adverse rulings was in error, and we modify the judgment and commitment order accordingly.

Appellant first argues that the court erred in giving the jury instruction Arkansas Model Jury Instruction 2nd—Criminal 605.1, which states that voluntary intoxication is not a defense. *See also Standridge v. State*, 329 Ark. 473, 951 S.W.2d 299 (1997). He argues that since he did not assert that voluntary intoxication was a defense, he was prejudiced by this instruction. When an objection to this instruction was made by counsel at trial, and overruled by the court, the following dialogue occurred:

> THE COURT: I'm going to go ahead and give it for this reason. That we have a question here about the defendant had been drinking and that the officer gave a public intoxication charge here. If this is not given, then the truth about whether or not he did this purposely and intentionally, that most certainly raises the question and introduces in a person's mind whether that defendant was at least very intoxicated. I think that's very reasonable. The fact that he knowingly did this if he was intoxicated. And for that

> reason, I'm going to give it so that they won't be confused on whether or not they can use the intoxication as a reason for. That will be the finding at this point.
>
> APPELLANT'S COUNSEL: All right. And Judge, with that, we have no objection to giving that instruction.

By withdrawing his objection to the jury instruction, the appellant waived his argument that he was prejudiced by the instruction. When an objection is withdrawn, it is as if the objection was never made. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994).

Secondly, appellant argues that the court erred by denying him the opportunity to receive credit on his jail sentence for meritorious good time. As already noted, the jury recommended that Upton receive 105 days in jail for the resisting-arrest conviction. During discussions that preceded the court's imposition of sentence, the State requested that the court order that the appellant serve the full 105 days "flat," without any credit for "good time." Appellant's counsel responded that appellant should be permitted to receive the two-for-one good-time credit. The court opined that to allow credit for meritorious time would be to reduce the jury's sentence, which he could not do. The court, therefore sentenced appellant to serve 105 days in the county jail, "flat (no 2 for 1 work credit)."

We agree with appellant's argument in his pro se brief that the trial court did not have the authority to deny him meritorious good time. Arkansas Code Annotated section 12-41-101 (Repl. 1995), provides, in part, that:

> (a) ... an inmate committed by any court in Arkansas to a county jail ... in the State of Arkansas may be entitled to a reduction, to be known as "meritorious good time," from his maximum term up to ten (10) days for each month served....
>
> (b) Meritorious good time shall be awarded under the rules and regulations promulgated by the county sheriff ... and approved by the county quorum court.... It shall be administered by the county sheriff ... subject to the provisions of this subchapter, for good discipline, good behavior, work practices, and job responsibility within the county ... jail.

It is clear from the language of the foregoing statute that the authority to grant or deny meritorious good time to a county

inmate belongs to the sheriff of the county to whose jail an inmate is committed, not to the judge ordering the commitment. *Cf. Elliot v. State*, 268 Ark. 454, 597 S.W.2d 76 (1980). Therefore, we modify the trial court's judgment and commitment order by deleting from it the provision requiring appellant to serve the 105 days "flat," without good-time credit.

From our review of the record and the briefs presented, we find that none of the other rulings adverse to appellant has merit. Therefore, because the court erred in ordering that the appellant was not eligible for meritorious good time, we modify that part of the judgment and commitment order. Counsel's motion to be relieved is granted, and the judgment of conviction is affirmed as modified.

Affirmed as modified.

GRIFFEN and CRABTREE, JJ., agree.

Martha S. DAVIS *v.*
OFFICE of CHILD SUPPORT ENFORCEMENT

CA 98-1343 5 S.W.3d 58

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered November 17, 1999
[Petition for rehearing denied December 22, 1999.]

Legal Services of Northeast Arkansas, by: *Dawn Bohanan*, for appellant.

Linda O. Bowlin, for appellee.

JUDITH ROGERS, Judge. Appellant, Martha S. Davis, was ordered by the Randolph County Chancery Court to pay child support in the amount of $70.00 a month. For reversal, appellant contends that the Chancery Court erred in finding that Supplemental Security Income [hereinafter "SSI"] is "income" from which child support can be assessed. We have found no cases specifically mentioning the issue of Supplemental Security Income, but in examining the law as it relates to "income" for purposes of setting child support in the State of Arkansas, we now conclude that SSI is "income," and we affirm.

On April 10, 1989, the Chancery Court of Randolph County entered its Decree of Divorce awarding custody of the two minor children of appellant, Martha S. Davis, to the children's father, Randy I. Davis. The parties reached a settlement that did not require the appellant to pay child support because she was unemployed. The trial court incorporated this settlement agreement in its decree and did not direct the appellant to pay child support.

Randy Davis assigned all rights to child support to the appellee, Office of Child Support Enforcement, who, in April 1998, filed an action against appellant in the Chancery Court of Ran-

dolph County to set child support. The appellant filed an answer alleging that she was disabled and that her only source of income was Supplemental Security Income in the amount of $484.00 a month. At trial appellant testified that, in exchange for $400.00 a month in rent, her sister allows the appellant to live with her and supplies items such as groceries and cigarettes. Appellant testified that she smoked "a pack a day, maybe." The remainder of appellant's income each month was used to purchase prescription medication to treat her disability.

On August 4, 1998, the Chancery Court of Randolph County found in favor of the appellee, and ordered the appellant to pay child support. Specifically the Court found:

> 4. That the Court was presented with the issue whether or not an individual whose sole source of income is Supplemental Security Income (SSI) could be ordered to pay child support. That the Court finds that the Defendant owes a continuing duty of support to the aforementioned children; Defendant currently receives Supplemental Security Income in the amount of $494.00 per month; and utilizing this income she smokes "about one pack of cigarettes a day maybe", and considering this and all other evidence before me, the Defendant is hereby directed to pay the sum of $70.00 per month as a reasonable amount of support for the Defendant to pay beginning Friday, August 7, 1998. Deviation from the chart is supported by evidence presented to the Court and so noted on the record pursuant to Ark. Code Ann. § 9-12-312.

The amount of child support a chancery court awards lies within the sound discretion of the court and will not be disturbed on appeal absent an abuse of discretion. *Schumacher v. Schumacher*, 66 Ark. App. 9, 986 S.W.2d 883 (1999). In setting the amount of family support, the chancellor must refer to the child-support chart. *Id.* Reference to the family-support chart is mandatory. *Woodson v. Johnson*, 63 Ark. App. 192, 975 S.W.2d 880 (1998); *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998); *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998). *See also* Ark. Code Ann. § 9-14-106 (Repl. 1998). The family-support chart creates a rebuttable presumption that the amount of child support set forth therein is the correct amount of child support to be awarded. That amount can be disregarded only if the chancery court makes express written findings or specific findings on the record that application of the support chart is unjust or inappropri-

ate. *Woodson v. Johnson, supra* and *Anderson v. Anderson, supra.* Relevant factors to be considered by the court in determining whether to deviate from the amount of child support set by the family-support chart are set forth in Administrative Order No. 10: Arkansas Child Support Guidelines, 329 Ark. appx. 668 (1997).[1] *Schumacher v. Schumacher,* 66 Ark. App. 9, 986 S.W.2d 883 (March 17, 1999). In the matter at hand, the appellant does not contest the deviation from the chart.

There is no evidence in the abstracted record to demonstrate the financial needs of the children or the custodial parent. This is very troublesome to the dissent. However, the appellant does not question the factual findings of the trial court. The only issue on appeal is whether or not SSI is "income" for purposes of paying child support. Thus, the sufficiency of the evidence to support the award of child support in this particular case is immaterial to this appeal. We will not violate the long-standing rules of this court mandating that we address only those issues properly presented for our review in order to reach what the dissent views as a less tragic ending to this case. We have been presented with a single question of law, that is whether SSI benefits can be considered "income" for purposes of setting child-support obligations. We will reach no other issue.

Furthermore, even if the sufficiency of the evidence had been questioned by appellant, it is her responsibility to bring up a record sufficient to demonstrate error. *Clowney v. Gill,* 326 Ark. 253, 929 S.W.2d 720 (1996); *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 754 S.W.2d 850 (1988). Appellant could have requested that the trial court make specific findings of fact pursuant to Ark. R. Civ. P. 52 concerning the financial needs of the children, but she did not; therefore, she has waived that issue. *See Smith v. Quality Ford, Inc.*, 324 Ark. 272, 276, 920 S.W.2d 497 (1996) ("[Rule 52] retains prior state law by which the failure of a party to request special findings of fact amounted to a waiver of that right. Reporter's Notes (as modified by the Court) to Rule 52, n. 1 [citing *Anderson v. West Bend Co.*, 240 Ark. 519, 400 S.W.2d 495 (1966)].") In the absence of evidence to the contrary, we will assume that the chancery court correctly applied the law. *See*

[1] Hereinafter we will refer to the Arkansas Child Support Guidelines as "guidelines," "child support guidelines," or "per curiam."

Brouwer v. Stephens, 7 Ark. App. 87, 644 S.W.2d 329 (1983). Therefore, we limit our discussion to the question of law properly presented to us and do not question the findings of fact below.

The child-support guidelines of the State of Arkansas define "income" as "any form of payment, periodic or otherwise, due to an individual, regardless of source. . . ." *Child Support Guidelines*, 329 Ark. appx. at 669; *see also* Ark. Code Ann. § 9-14-201(7) (1998 Repl.). Thus, under the plain language of the statute, the regular SSI payments received by appellant are "income." This conclusion is supported by this court's precedent as discussed in the following cases. In *Belue v. Belue*, 38 Ark. App. 81, 828 S.W.2d 855 (1992), this court held that veteran's disability benefits are properly considered income. Also, in *Kimbrell v. Kimbrell*, 47 Ark. App. 56, 884 S.W.2d 268 (1994), this court held that child support was properly assessed against an individual whose sole source of income was $435.00 per month in Social Security Disability benefits. "The language . . . 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." *Belue v. Belue*, 38 Ark. App. 81, 828 S.W.2d 855 (1992). The court's reasoning in *Kimbrell* is applicable here: "Despite appellant's disability, [s]he has a source of income and thus is not wholly without the means to pay support." *Kimbrell v. Kimbrell*, 47 Ark. App. 56, 884 S.W.2d 268 (1994). "[E]ach parent is responsible for bringing the child into this world and each, where financially able, has an obligation to render assistance." *Id.*, quoting *Petty v. Petty*, 252 Ark. 1032, 482 S.W.2d 119 (1972). Therefore, we affirm the finding of the chancery court that SSI benefits are income from which child support can be assessed under Arkansas law.

The question remains as to whether federal law preempts Arkansas courts from assessing child support against SSI benefits. The United States Supreme Court has stated explicitly the standard that is to be used in determining whether a federal law preempts state law in matters of domestic relations:

> We have consistently recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594, 10 S.Ct. 850, 852-853, 34 L.Ed. 500 (1890); *see Hisquierdo, supra*, 439 U.S., at 581, 99 S.Ct., at 808; *McCarty, supra*, 453 U.S., at 220, 101 S.Ct., at 2735. "On

> the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo, supra*, 439 U.S., at 581, 99 S.Ct., at 808, *quoting Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 175, 49 L.Ed. 390 (1904). Before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests." *Hisquierdo, supra*, 439 U.S., at 581, 99 S.Ct., at 808, *quoting United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 506, 15 L.Ed.2d 404 (1966).

Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029 (1987). The question thus becomes whether Congress has "positively required by direct enactment" that the Arkansas law, which includes SSI benefits within its definition of "income" for purposes of setting child support, be preempted and whether the Arkansas law does "major damage to clear and substantial federal interests." *Id.* Absent such a showing, Arkansas law will stand.

Other states that have addressed this issue are divided. Minnesota, New York, Tennessee, and Wisconsin have held that federal law preempts states from ordering that SSI recipients pay child support. *See Becker Co. Human Servs., re Becker Co. Foster Care v. Peppel*, 493 N.W.2d 573 (Minn. Ct. App. 1992); *Tennessee Dept. of Human Servs. ex rel Young v. Young*, 802 S.W.2d 594 (Tenn. 1990); *Langlois v. Langlois*, 441 N.W.2d 286 (Wisc. Ct. App. 1989); *Moore v. Sharp*, 532 N.Y.S.2d 811 (N.Y. App. Div. 1988).

Indiana and Iowa have state guidelines that prohibit the assessment of child support against income from public assistance. These states each define public assistance benefits to include SSI. *See In re Marriage of Benson*, 495 N.W.2d 777 (Iowa Ct. App. 1992); *Esteb v. Enright*, 563 N.E.2d 139 (Ind. Ct. App. 1990).

We join with Alabama, Kentucky, and Pennsylvania in holding that an individual whose sole source of income is SSI can be ordered to pay child support. *See Commonwealth of Ky., ex rel Morris v. Morris*, 984 S.W.2d 840 (Ky. 1998); *Whitmore v. Kenny*, 626 A.2d 1180 (Pa. Super. Ct. 1993); *Ex parte Griggs*, 435 So.2d 103 (Ala. Civ. App. 1983).

"The SSI program provides a subsistence allowance, under federal standards, to the Nation's needy aged, blind, and disabled."

Swcheiker v. Wilson, 450 U.S. 221, 101 S. Ct. 1074 (1981). "This program was intended to assist those who cannot work because of age, blindness, or disability, by setting a Federal guaranteed minimum income level for aged, blind, and disabled persons." *Id.* (quoting S. Rep. No. 92-1230, pp. 4, 12 (1972)). The protections against "execution, levy, attachment, garnishment, or other legal process" provided for social security disability benefits in 42 U.S.C. § 407(a) are extended to SSI benefits in 42 U.S.C. § 1383(d)(1).

"The patent intent of [section 407] is to prohibit creditors from asserting claims upon SSI funds that take precedence over the SSI recipient's right to such funds." *Morris, supra.* However, "alimony and child support are not a debt in the same sense as a debt owed to a creditor. . . . They are a duty of a higher obligation." *Griggs, supra.*

Applying the standard articulated by the United States Supreme Court in *Rose*, we find that the State is not preempted from ordering that a parent whose sole source of income is SSI be subject to an order to pay child support. Although SSI is protected by section 407 against garnishment, levy, and other legal process, Congress created a limited waiver of this sovereign immunity in 42 U.S.C. § 659(a), which makes government benefits that are based upon remuneration for employment subject to child-support enforcement measures regardless of the protections of section 407. There is some ambiguity as to whether section 659 applies to SSI benefits or not and even as to whether the section 407 prohibition against garnishment and other types of legal process is applicable to child support. *See Rose, supra.* However, given this ambiguity in the language and the traditional deference given to the states in matters of family law, it cannot be said that Congress has acted in such a positive and direct manner as to preempt state action. Therefore, we must consider whether or not allowing state courts to assess child support against SSI benefits will do "major damage to clear and substantial federal interests." *Rose, supra.*

As stated above, the purpose of the SSI program is to guarantee to individuals a minimum level of subsistence income. *Swcheiker, supra.* The Arkansas law does not do major damage to this interest because the guidelines grant chancellors a measure of discretion in assessing support. *See Child Support Guidelines*, 329 Ark. appx. at 669. The Chancellor has the discretion to consider all

of the evidence presented to the court in establishing child support and may deviate from the chart where it would be unjust not to do so.

> It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a specific written finding within the Order that the amount so calculated, after consideration of all relevant factors, including the best interests of the child, is unjust or inappropriate.

Id.

It is the province of the trial court to make these calculations, and we will not disturb its findings absent an abuse of discretion. There is no major damage done to the federal interest in providing a subsistence income to blind, aged and disabled individuals when the trial court is given discretion to balance competing interests, such as those of a parent and her minor children. We have confidence in the abilities of the chancellors of this state to balance the needs of noncustodial parents on limited incomes with those of their children. They have done so until now, and we have no cause to believe they will suddenly lose their ability to weigh the equities in matters of child support simply because the parent is on SSI as opposed to social security disability. There is no "major damage" done to the federal interest of providing a means of subsistence to blind, aged, and disabled individuals.

In the instant case, the chancellor considered the low level of the appellant's income along with her expenses and habits. According to the chancellor's interpretation of the evidence before him, the appellant was financially capable of paying $70.00 per month in child support, even though her only means of income is SSI. The chancellor recognized that this is a downward deviation from the presumptive amount of support called for in the guidelines; however, he noted that the circumstances warranted deviation. As such, the federal interest in providing a means of subsistence was given due consideration in this matter without sacrificing the state's interest in seeing that all parents support their minor children. As the dissent points out, we do not have before us evidence of all the financial matters involved in this case. We cannot assume based upon the limited evidence presented to us that the chancellor acted inequitably. Certainly, the appellant has a very

limited income; however, without more information, we cannot simply assume that the $70.00 per month awarded by the chancellor toward the support of appellant's children is not essential for their own subsistence.

We note that the dissent is concerned that the majority opinion violates the underlying federal public policy to provide a subsistence amount for its recipients. There is, however, an equally important public policy consideration that parents are responsible for the basic needs of their children. *Cf. Kimbrell* and *Petty*, *supra*. There is an obvious tension between these two concerns, and that is why discretion is given to the chancellor, who is in the superior position to observe witnesses and evidence, in child-support cases. *See Child Support Guidelines*, *supra*; *see also Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982); *Lagasse v. Lagasse*, 234 Ark. 734, 354 S.W.2d 274 (1962); *Griffen v. Newcom*, 219 Ark. 146, 240 S.W.2d 648 (1951). Absent a more direct or explicit pronouncement from Congress that the federal policy of protecting individuals from poverty preempts Arkansas' policy of protecting its children from the same horror, we find that Arkansas law is not preempted. Supplemental Security Income is "income" that can be considered in awarding child support.

Affirmed.

HART, JENNINGS, and STROUD, JJ., agree.

CRABTREE J.,concurs.

GRIFFEN, J., dissents.

TERRY CRABTREE, Judge, concurring. I concur in the result of this case but not without some pause to consider its full implications. In my opinion, the decision we address in this case should be decided on a case-by-case basis. The chancellor is in the best position to determine the needs of the parties and what income is available for the support of the minor children. While I agree with Judge Griffen that people with disabilities should enjoy at least a minimum standard of living, I also believe that each person who brings a child into this world should bear some responsibility for the child's upbringing. It is not enough to say that funds are not available to support a child; sacrifice is required by all who are

parents. In my opinion, it is but a small sacrifice to give up smoking to support, in some small way, our own children.

WENDELL L. GRIFFEN, Judge, dissenting. I agree that the broad definition of "income" found at Administrative Order No. 10 by our supreme court authorizes extending the child-support obligation to SSI benefits. I also agree that federal law does not expressly prohibit child-support payments from being assessed against SSI benefits. However, I dissent for three reasons. First, the chancellor's order directing appellant to pay child support from her SSI benefits, affirmed by today's decision, damages clear and substantial federal interests and directly contravenes the congressional intent that underlies the SSI program. Second, the majority fails to discern the different treatment that federal law accords benefits intended to serve as income replacement, from those benefits intended to secure a guaranteed subsistence income. Finally, the majority opinion affirms a chancellor's order that sets child support without proof about the children's needs, and unfairly attempts to shift the burden regarding proof of the children's needs.

Rather than turning solely on the issue of whether SSI benefits are "income" from which child support may be assessed, this appeal involves the broader issue of whether requiring an SSI recipient to pay child support from her benefits does major damage to clear and substantial federal interests and directly contravenes the intent of Congress in enacting the Supplemental Security Income Program. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). Unlike the majority, I conclude that assessing child support against SSI benefits both directly contravenes the congressional intent that underlies the SSI program and does major damage to the substantial federal interest in providing a national guaranteed minimum income level to poor persons who are blind, elderly, or disabled. Therefore, I would reverse the chancellor's order.

The majority states that the resolution of the issue in this case is determined by "whether Congress has 'positively required by direct enactment' that Arkansas law, which included SSI benefits within its definition of 'income' for purposes of setting child support, be pre-empted . . . ." (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979)). The majority concludes that because the federal statutes governing SSI are "ambiguous" with regard to whether SSI benefits are immune from garnishment and other legal process

applicable for collecting child support, and because the Supreme Court has traditionally given deference to the states in matters of family law, "it cannot be said that Congress has acted in such a positive and direct manner as to preempt state action."

However, this approach ignores that the Congress may, absent a positive direct enactment, implicitly intend to supercede state law in a given area. *See Wisconsin Public Intervenor v. Morther*, 502 U.S. 597 (1991). Congress may implicitly intend to supercede state law where the goals to be obtained by a federal program and the obligations imposed reveal a purpose to preclude state authority. *Id.* at 605 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)). Congress may also implicitly intend to preempt state law when that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wisconsin Public Intervenor v. Morther, supra,* at 605 (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

Thus, merely determining that Congress has not positively required by direct enactment that state law be preempted is not dispositive. The next step is to examine the congressional intent that underlies the SSI program, and determine whether the state law directly and adversely interferes with the objective of the federal program. The final step is to determine whether the state law does major damage to clear and substantial federal interests.

As the Supreme Court observed in *Schweiker v. Wilson*, 450 U.S. 221 (1981), SSI benefits were intended by Congress to help impoverished blind, aged, or disabled persons attain a guaranteed minimum income level. SSI benefits are immune from garnishment, levy, execution, or other legal process. *See* 42 U.S.C. §§ 407(a) and 1383(d)(1). Moreover, SSI benefits are not subject to federal taxation. 26 U.S.C. § 86(d)(1). Congress plainly intended that SSI beneficiaries be accorded special treatment. While no federal statute expressly dictates that SSI benefits are beyond the reach of an order to pay child support, it is self-evident that the diminution of those benefits by deducting child-support payments will directly and adversely impact the federal objective in providing a guaranteed minimum income for poor persons who are aged, blind, or disabled.

The majority states that Arkansas law does not do major damage to the federal interest in providing a guaranteed minimum income because Arkansas's child-support guidelines grant chancellors some discretion in assessing support. The majority is mistaken when it bottoms today's decision on the exercise of a chancellor's discretion. The fact that chancellors have discretion to deviate from the child-support guidelines does not resolve the threshold question of whether imposing those child-support guidelines undermine federal objectives in enacting the SSI benefit scheme. After all, if the federally guaranteed floor is uprooted by the exercise of that discretion then the federal interest in laying the floor has sustained major damage.

The decision by the Tennessee Supreme Court in *Tennessee Department of Human Services, ex rel. Young v. Young*, 802 S.W.2d 594 (Tenn. 1990), is a sound approach to the problem presented by this appeal, *i.e.*, whether SSI benefits should be subject to child-support orders, because it recognizes that benefits that are in the nature of replacement for earning loss (such as disability benefits and pension benefits) are materially different from welfare benefits aimed at providing recipients with subsistence income. Social Security Disability recipients, Veteran's Administration disability recipients, workers' compensation disability recipients, and recipients of unemployment compensation benefits receive benefits based on their income levels before disability or unemployment. Those benefits are properly deemed income for purposes of the child-support obligation. But as the Tennessee Supreme Court observed in *Young*:

> SSI payments are a form of public assistance and have nothing to do with earnings a person may have had. It is essentially a safety net program, to protect indigent persons who are otherwise qualified for the program. [T]he amount of money to which an SSI recipient is entitled is contingent upon *how little* a person makes or has made rather than how much. An eligible SSI recipient's benefits are the amount necessary to raise the recipient's income to the prescribed minimum level. By contrast, the amount of a Social Security Disability recipient's benefits is keyed to how much that person has paid into the Social Security system over time.

Id. at 597 (emphasis added).

The majority patently fails to recognize this vital distinction. Thus, the result affirmed today treats the subsistence stipend that the federal government provides aged, blind, or disabled poor people the same way that Social Security disability benefits, Veteran's Administration disability benefits, workers' compensation disability benefits, and unemployment compensation benefits are treated as far as child-support orders are concerned. But Supplemental Security Income benefits are not and have never been income replacement benefits. People receive SSI because the federal government intends to provide a national floor below which no aged, blind, or disabled poor person will fall, not because they were disabled in the course of their employment (Veteran's Administration and workers' compensation disability), or because they are disabled from gainful employment done in the past (Social Security disability), or because they are unemployed after having worked in the past (unemployment compensation benefits).

The majority is simply mistaken in asserting that "[a]lthough SSI is protected by [42 U.S.C. §] 407 against garnishment, levy, and other legal process, Congress created a limited waiver of this sovereign immunity in 42 U.S.C. § 659(a) which makes government benefits which are based upon remuneration for employment subject to child-support enforcement measures, regardless of the protections of section 407." If SSI benefits are not based upon remuneration for employment — a reality that the majority neither denies nor challenges — it is simply wrong to assert that a statute applicable to benefits based upon remuneration for employment authorizes the result affirmed today.[1]

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[1] 42 U.S.C. § 659(a) states:

> Consent to support enforcement. Notwithstanding any other provision of law (including section 207 of this Act [42 USCS § 407] and section 5301 of title 38. United States Code), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 466 [42 USCS § 666(a)(1), (b) and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part [42 USCS §§ 651 *et seq.*] or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.

The Tennessee Supreme Court also correctly reasoned that it would violate the explicit intention of Congress in enacting the Supplemental Security Income Program to require an SSI recipient to pay child support from subsistence benefits.

> Because of the nature of the program's mission, SSI recipients have a very low income level and little, if any, opportunity to raise that level because of their age or disability. Subtracting child support payments, in the variable amounts set by state trial judges, from this already low figure would reduce theindividual recipient's income below the guaranteed minimum level for aged, blind, and disabled persons.

Id., 802 S.W.2d at 597-98. If every chancellor in Arkansas can order child support paid from SSI benefits, the federally "guaranteed minimum" would be neither guaranteed nor a minimum subsistence benefit for aged, disabled, and blind poor people. Moreover, if each state can order child support paid from SSI benefits, the notion of a federally guaranteed minimum subsistence for the indigent, aged, blind, and disabled is made a joke by judges who merely pay lip-service to federal preemption. There is no hope for uniformity in the amount of SSI benefits. What a recipient may actually use to subsist varies depending on the judicial discretion of family court judges throughout the nation.

While I dissent in large part because I believe today's holding conflicts with federal law, I also dissent because of the impact today's decision will have on our state law. The record before us suffers from the absence of information about the financial situation of the two children who would benefit from the child-support payments ordered by the chancellor. We are provided no information about their financial needs, the financial means of the custodial parent, or whether the children face any special situation that impacts on the child-support issue. In other words, we do not know how $70 a month will affect the ability of the custodial parent to provide for the children. I question the propriety of setting a precedent for affirming the chancellor's award of child support absent information about the needs of the children to be supported.

The abstracted record includes the Petition to Set Child Support that the Office of Child Support Enforcement (OCSE) filed in the chancery court. The petition asserted that Randy I. Davis, father and physical custodian of the minor children (James R. Davis,

born October 27, 1983, and Jake A. Davis, born February 2, 1986), had assigned all rights to child support to and "has signed Contract and Assignment for Child Support Services or has assigned all rights to collect child support...." The Petition recited that the chancellor had entered a decree of divorce on April 10, 1989, awarding custody to Randy Davis "but did not direct defendant to pay child support." The Petition asserted no facts about the financial situation facing the children, their financial needs, or the ability of the custodial parent to meet those needs. The record is otherwise silent on those crucial factors related to determining child support. The Order of Support entered by the chancellor contains no findings of fact related to these issues. As far as appellate review is concerned, we do not know any of the facts that are essential to determining what child support is needed by these children, let alone whether that support has already been provided by the custodial parent or is being provided by a third party. Thus, we cannot fairly or honestly affirm the chancellor's decision as an appropriate exercise of his discretion. This is particularly important because of the impact of that decision on this impoverished, mentally disabled, and essentially homebound appellant.

Further, the majority opinion attempts to unfairly shift the burden regarding presentation of proof of the children's needs. While the majority accurately cites the holding that an appellant is responsible for bringing up a record sufficient to demonstrate error, *see Clowney v. Gill*, 326 Ark. 253, 929 S.W.2d 720 (1996), the appellee had the burden of proving the need for the child support that the chancellor ordered paid. After all, the appellee was standing in the shoes of the custodial parent in its claim for child support. Arkansas Code Annotated § 9-14-210(d) (Repl. 1998) states:

> The State of Arkansas is the real party in interest for purposes of establishing paternity and securing repayment of benefits paid and assigned past due support, future support, and costs in actions brought to establish, modify, or enforce an order of support in any of the following circumstances: . . . (2) Whenever a contract and assignment for child support services have been entered into for the establishment or enforcement of a child support obligation for which an automatic assignment under § 9-14-109 is not in effect.

It is beyond argument that the chancellor could not be affirmed in awarding child support on a petition by Randy Davis without some evidence about the financial needs of the children

and the support that Randy Davis or others provided. It is equally plain that had Randy Davis asserted a claim for child support against appellant, he would have been obligated to produce evidence concerning the support needed for the children. The burden of producing that evidence would not have shifted to appellant, either before the chancellor or on appeal, had Randy Davis failed to produce any evidence. Therefore, I do not understand why the missing proof from this record should be blamed on appellant, the noncustodial parent from whom support was being claimed, rather than OCSE, the party responsible for bringing the support petition. How does the OCSE stand in a different position from the custodial parent?

The majority opinion asserts that appellant "does not question the factual findings of the trial court. The only issue on appeal is whether or not SSI is 'income' for purposes of paying child support. Therefore, we limit our discussion to this question of law and do not question the findings of fact below." It is true that the appeal challenges the chancellor's order that appellant pay child support of $70 monthly from her SSI benefits. It is equally true that the chancellor made no factual findings related to the support needs of the children. Given that the record contains no proof about their support needs, I understand why no such factual findings were made. That does not explain how or why the majority believes appellant was responsible for producing the proof needed for such findings in order to challenge the chancellor's order. It also does not explain how the majority determined that it is equitable, on *de novo* review, to require this appellant to pay almost one-seventh of her monthly subsistence as child support when no one has proved a thing about the needs of the children to be supported.

The record plainly shows that appellant has a monthly income of $494 from SSI benefits. Appellant suffers from paranoid schizophrenia, is homebound, and pays $400 each month to her sister toward her rent, groceries, and other living expenses. It is undisputed that the rest of appellant's monthly SSI allowance is spent on medication for her schizophrenia, and that appellant smokes a pack of cigarettes a day. I do not understand how any of this evidence, or all of it for that matter, proves anything about the financial needs of the minor children. Appellant proved her entitlement to SSI benefits; she was not obligated to prove how much support the children needed.

Moreover, it is unwise and unfair to pose the problem presented in this appeal in terms of whether SSI beneficiaries have a moral obligation to support their children. I agree that poor parents are not exempt from the obligation to feed, clothe, and otherwise provide the support their children require. Every parent has a moral obligation to support her children. If this appellant had custody of her children she would no doubt qualify for additional government assistance for their needs. If the custodial parent is impoverished then he would qualify for that additional assistance. But appellant, the non-custodial mentally disabled and undisputably impoverished parent, is living on a federal subsistence stipend aimed at guaranteeing her a minimum living allowance. The question is whether money that the federal government has explicitly dedicated to guarantee a subsistence floor for her situation (aged, blind, or disabled poor people) can be diverted for child-support purposes without uprooting the floor. By disregarding the congressional intent to provide the destitute and mentally disabled federal subsistence benefits, and by ordering the appellant and others similarly situated to pay child support from those subsistence benefits, the court effectively destroys the federal effort to provide the appellant with a guaranteed minimum income.

Finally, it is a shame that the Office of Child Support Enforcement chose to treat this mentally disabled mother who subsists on less than $500 a month like a "deadbeat dad." The decision to do so, coupled with the chancellor's order and the result announced today, prove that Horace Walpole, the fourth Earl of Orford, was right more than two hundred years ago when he said, "This world is a comedy to those that think, a tragedy to those that feel."[2] The result affirmed today is anything but comical. I respectfully dissent from the tragedy that it will produce for this appellant.

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[2] Letter to Anne, Countess of Upper Ossory, August 16, 1776.

Chris SMITH *v.* STATE of Arkansas

CA CR 98-1353 3 S.W.3d 712

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

[redacted]

C. Scott Nance, for appellant.

Mark Pryor, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Judge. Chris Smith was charged with manufacturing a controlled substance and possessing drug paraphernalia, the charges being brought after the Third Judicial Drug Task Force executed a search warrant upon his home. He was convicted by a jury and sentenced to respective terms of one hundred forty-four months and twenty months in the Arkansas Department of Correction, the terms to run consecutively. On appeal he contends that the trial court erred 1) by denying his right to choose his own counsel or to proceed *pro se,* 2) by denying his motion to exclude his inculpatory statements, 3) by denying his motion for a directed verdict, and 4) by failing to give his proffered jury instruction. We first address the trial court's denial of the motion for a directed verdict. Finding no error on this or the remaining points, we affirm the conviction.

1. Whether the trial court erred in denying appellant's motion for a directed verdict.

A motion for a directed verdict is a challenge to the sufficiency of the evidence, which we consider before any other points on appeal. *Goins v. State*, 318 Ark. 689, 890 S.W.2d 602 (1995). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). In determining whether a finding of guilt is supported by substantial evidence, we review the evidence, including any that may have been erroneously admitted, in the light most favorable to the verdict. *Willingham v. State*, 60 Ark. App. 132, 959 S.W.2d 74

(1998). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other without resort to suspicion or conjecture. *Id.*

At the close of the State's case and again at the close of all the evidence, appellant moved for a directed verdict on the charge of manufacturing a controlled substance. The basis of his motion was that the State had not shown that methamphetamine had actually been manufactured, nor could it have been manufactured from the components found in the trailer where he allegedly did the manufacturing. Arkansas Code Annotated section 5-64-101(m) (Repl. 1997) defines "manufacture" in pertinent part as follows:

> "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

Appellant relies upon *Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989), for the proposition that the State is required to prove that the substance found must be "identifiable as the controlled substance the State charged appellant was manufacturing." He points out that the only identifiable methamphetamine seized from his residence was found in syringes located in an area of the home separate from the area where he allegedly manufactured the substance. He notes especially the testimony by State's witnesses who had seen appellant's home and conceded that not all of the components necessary to the manufacture of methamphetamine were present. Marvin Poe, coordinator of the judicial drug task force, testified that the inventory lacked the necessary component anhydrous ammonia; chemist Linda Burdict of the state crime laboratory agreed that appellant could not manufacture methamphetamine with what he had in the house; and Officer Mike Steel stated that not everything necessary to make the substance was present.

The State points to further testimony that among items found in the home were a bag of plastic bottles, a blue bag with filters and pill powder, two jugs of liquid with a drain opener, a potpourri heater, filters, a metal lid, a gallon jug with liquid residue, and a plastic bag with empty ephedrine boxes. Both Officer Poe and investigator John Beaver stated their opinions as experienced police officers that the items they observed constituted the makings of a

methamphetamine lab. Officer Poe additionally stated that ephedrine pills, when broken down, contain a substance needed in the manufacturing of methamphetamine; he testified that when the police officers arrived, appellant said that he was "filtering the pill powder" and "getting ready to cook," that he was in a secret operation with the police agency to lure someone else in and make a case, and that the ether smell in the bathroom was alcohol mixed with pill powder. Ms. Burdict testified that cooking and filtering pill powder are first steps in the manufacturing process. She also said that 24.902 grams of white powder in a plastic sandwich bag was found to be seven percent pseudoephedrine, which, like ephedrine, is a precursor for the manufacture of methamphetamine. Finally, in its response to the motion for directed verdict the State noted appellant's confession stating that an acquaintance was supposed to have brought to the house that night the ammonia needed "to finish off the cook."

The evidence viewed in the light most favorable to the verdict of guilt shows that appellant's home contained the makings of a methamphetamine laboratory and all but one component necessary for manufacturing methamphetamine,[1] that appellant had expected the arrival of the missing ingredient, and that he had begun the cooking process. We find that this evidence constitutes substantial evidence to sustain the verdict of guilt.

2. Whether the trial court erred in denying appellant the right to choose his own counsel or to proceed pro se *at trial.*

Appellant points out that he was forced to use his court-appointed counsel despite repeated statements that it was against his wishes. He argues that a functioning relationship between a defendant and his attorney is fundamental, and that it is clear from the dialogue in chambers that appellant and his court-appointed coun-

[1] This issue has not been decided by the Arkansas appellate courts, but in *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984), a van in a self-storage unit contained most of the chemicals and equipment used in the manufacture of methamphetamine, and a trace of the substance was found in containers. The conviction of manufacturing a controlled substance was reversed because the supreme court held that the evidence did not sufficiently link the defendants to the van, to the components of manufacturing the substance, or to the process of manufacturing, nor was it shown that the manufacturing process had taken place in the van.

sel "lacked communication." He concludes that the inability to aid in his own defense unfairly prejudiced his case.

At the courthouse on the morning of his trial, appellant informed his court-appointed counsel and the court that he no longer wished to retain counsel's services. The matter was discussed in chambers, with appellant's sister in attendance at his request. Appellant stated, "I just fired this man." When asked why counsel should not try the case, appellant replied that counsel would not bring forth all the evidence, had done things appellant did not want him to do, and wanted appellant "to take the stand and say I made meth and I haven't." Appellant concluded that "the man ain't right," and he told the court that he needed a reasonable bail so that he could hire a lawyer of his choice.

Appellant's counsel responded that he had discussed the evidence with appellant and devised a trial strategy based upon what counsel believed the jury would understand and what would result in the outcome most beneficial to appellant. Counsel told the court he had fully reviewed the evidence, including statements of appellant, statements of police officers, the crime lab report, and the search warrant, and that he had advised appellant that pleading directly to the court would be better if, in fact, appellant was guilty. Counsel also said that he told appellant they would go to the jury if that was what appellant wanted, but that appellant disagreed with counsel's trial strategy. The trial court ruled that it did not think counsel was incompetent or acting against appellant's interests, and that the trial would proceed with court-appointed counsel representing appellant.

The right to counsel of one's choice is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient and effective administration of justice. *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995) (citing *Leggins v. State*, 271 Ark. 616, 609 S.W.2d 76 (1980)). In *Morris v. Slappy*, 461 U.S. 1 (1982), the Court made it clear that the Sixth Amendment does not guarantee that an appointed attorney establish an exemplary rapport with the accused, nor does it guarantee an accused a "meaningful attorney-client relationship." *Burns v. State*, 300 Ark. 469, 780 S.W.2d 23 (1989). Once competent counsel has been obtained, the delay involved in changing counsel must be balanced against the public's interest in the prompt dispensation of

justice. *Harrison v. State*, 303 Ark. 247, 796 S.W.2d 329 (1990). If change of counsel would require the postponement of trial because of inadequate time for a new attorney to properly prepare a defendant's case, the court may consider such factors as the reasons for the change, whether other counsel has already been identified, whether the defendant has acted diligently in seeking the change, and whether the denial is likely to result in any prejudice to defendant. *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995).

A change of attorneys close to trial would require the granting of a motion for a continuance. *Leggins v. State*, 271 Ark. 616, 609 S.W.2d 76 (1980). The refusal to grant a continuance in order for the defendant to change attorneys rests within the discretion of the trial judge, and the decision will not be overturned absent a showing of abuse of that discretion. *Cooper v. State*, 317 Ark. 485, 879 S.W.2d 405 (1994).

In *Burns v. State*, 300 Ark. 469, 780 S.W.2d 23 (1989), and *Caswell v. State*, 63 Ark. App. 59, 973 S.W.2d 832 (1998), the appellate court affirmed the denial of a request for a new attorney. Counsel in *Burns*, after considering the charges and evidence against the defendant, frankly advised him to accept the State's plea bargain; the *Burns* court held that neither the general complaint that the defendant and his attorney did not get along nor counsel's recommendation to accept the plea constituted good cause to discharge appointed counsel. In *Caswell*, the defendant asserted his displeasure that counsel had told him "nothin'" and requested a new attorney on the day of his revocation hearing, the defendant referred to a "tremendous breakdown" in the relationship with his attorney, and new counsel was unidentified although the defendant's father told the trial court that he could borrow money to retain private counsel.

Here, after considering the State's charges and the evidence against appellant, counsel gave him frank advice to plead guilty if he was, indeed, guilty. Although counsel had been appointed over two months earlier and had represented appellant at a pretrial hearing one day before trial, appellant did not complain about counsel's representation until the morning of trial. We note that appellant had already been granted one continuance, and a change of counsel would undoubtedly have resulted in delaying trial to allow additional time for preparation. Further, we view appel-

lant's complaints about counsel not bringing forth the evidence appellant wanted introduced as a general disagreement with trial strategy. We cannot say that the trial court abused its discretion in refusing appellant's request for new counsel.

3. Whether the trial court erred in denying appellant's motion to exclude his inculpatory statement.

Appellant contends that the State violated Rule 17.1 of the Arkansas Rules of Criminal Procedure by waiting until the last weekday before trial to inform defense counsel of statements made by appellant to the State. He states in his brief that on the following Monday he orally moved to exclude the evidence, making arguments based upon the State's representations during discovery; that the trial court denied the motion to exclude; that the court failed to offer a continuance; and that the court relied upon the statements as a primary reason for denying appellant's motion for a directed verdict. He alleges that he was prejudiced in having to go forward after the trial court failed to exclude the statements or grant other appropriate sanctions allowed by Rule 19.7 of the Arkansas Rules of Criminal Procedure.

Arguments made to the trial court and the trial court's ruling are vital to a review by the appellate court. *Moncrief v. State*, 325 Ark. 173, 925 S.W.2d 776 (1996). Here, the abstract does not include appellant's discovery request, the State's response to discovery, the statements about which appellant complains, the motion to exclude, or the trial court's ruling on the motion. Thus, we will not address this point.

4. Whether the trial court erred in failing to give appellant's proffered jury instruction.

Appellant contends on appeal, as he did below, that the jury should have been instructed on ephedrine possession with intent to manufacture methamphetamine as a lesser-included offense of manufacturing methamphetamine. The trial court denied the instruction, ruling that "it is not a crime." We disagree with the trial court's ruling in light of Ark. Code Ann. § 5-64-1102 (Repl.1997), which states that possession of ephedrine with intent to manufac-

ture methamphetamine is a Class D felony. The instruction was correctly refused, however, for the reasons set forth below.

Arkansas Code Annotated section 5-64-1102 (Repl. 1997) states that it shall be unlawful for a person to possess ephedrine, pseudoephedrine or phenylpropanolamine, or their salts, optical isomers or salts of optical isomers with intent to manufacture methamphetamine. Appellant contends that the jury should have been instructed on this crime as a lesser-included offense of the manufacturing of methamphetamine, found at Ark. Code Ann. § 5-64-401 (Supp. 1999), which states that, subject to specific statutory authorization, it is unlawful for a person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance. The State contends that the offense for which appellant requested an instruction is not a lesser-included offense of the offense with which he was charged because it contains an element of proof not required in the "greater offense," namely, that a person possess ephedrine, pseudoephedrine or phenylpropanolamine, or their salts, optical isomers or salts of optical isomers. Our supreme court has stated that all of the elements of the lesser offense must be included in the greater offense, that the two crimes must be of the same generic class, and that the differences between the offenses must be based upon the degree of risk or risk of injury to person or property or else upon grades of intent or degrees of culpability. *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

The first sentence of appellant's proffered instruction, entitled "Ephedrine Possession with Intent to Manufacture Methamphetamine," is a correct statement of the offense set forth in the code at section 5-64-1102 (Repl. 1997). However, the instruction adds the following:

> To sustain the charge of Ephedrine Possession, the State must prove beyond a reasonable doubt:
>
> First: That Chris Smith intended to commit the offense of Ephedrine Possession;
>
> and;
>
> Second: That Chris Smith recklessly engaged in the conduct of Ephedrine Possession with the intent to manufacture methamphetamine.

The proffered instruction is an incorrect statement of the law for it adds a level of culpability, recklessness, not found in the definition of the offense, and it refers to the separate offense of ephedrine possession, a crime found in the code at section 5-64-1101 (Repl. 1997). Because the proffered instruction is an incorrect statement of the law, we need not address the issue of lesser-included offense. The trial court's refusal to give the instruction was not an abuse of discretion.

Affirmed.

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

Jessie C. RAY *v.* WAYNE SMITH TRUCKING

CA 99-401 4 S.W.3d 506

Court of Appeals of Arkansas
Division II
Opinion delivered November 17, 1999
[Petiton for rehearing denied December 22, 1999.]

Jerry G. James, for appellant.

Trammell Law Firm, by: *Gill A. Rogers*, for appellee.

TERRY CRABTREE, Judge. In this workers' compensation case, the Commission denied the appellant, Jessie C. Ray, benefits because he failed to prove by a preponderance of the evidence that he was performing an employment service when he sustained an injury to his right shoulder on August 16, 1997. The Commission affirmed and adopted the Administrative Law Judge's decision, and appellant appeals the Commission's determination claiming that it is not supported by substantial evidence. We reverse.

The appellee, Wayne Smith Trucking, employed appellant as an "over-the-road" truck driver. In this capacity, appellant drove a truck owned by appellee across the country, typically from Morrilton, Arkansas, to Chicago, Illinois. Appellant sustained an injury to his right shoulder on August 16, 1997, when he fell while installing a CB antenna on appellee's truck.

Originally, appellant had been assigned a truck with a "spring ride" suspension system, but he had requested a truck with an "air ride" suspension system, if one became available. Appellant made this request because an "air ride" suspension system provides a more comfortable ride. On August 15, 1997, Allen Hayes, a dispatcher for appellee, called appellant at home and advised him that a truck

with an "air ride" suspension was available if he still wanted it. Appellant responded that he did. On Saturday, August 16, 1997, on his regular day off, appellant went to appellee's shop to move a number of items from his old truck to the new truck so he would not have to do so early the next morning. Appellant moved several items, including his personal CB radio and antenna, oil, antifreeze, bedding for the sleeper cab, and spring-loaded bars, among other items. It was undisputed that appellee did not require appellant to have a CB or CB antenna in the truck. However, appellant testified that appellee did require spring-loaded bars be installed in the trucks.

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

A compensable injury is defined as an injury causing internal or external physical harm arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(5)(A)(Repl. 1997). Act 796 of 1993 amended the workers' compensation laws to exclude from the definition of "compensable injury" an injury sustained "at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102(5)(B)(iii). Our appellate courts have found that an employee is performing employment services when he is engaged in the primary activity which he is hired to perform or any incidental activity which is inherently necessary for the performance of the primary employment activity. *Tina Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998).

Appellant testified that he was paid according to his mileage. Appellant indicated that on the day that he transferred items from one truck to another that he was not paid for any of the work he did that day and that he was not scheduled to come in that day.

Appellant testified that he was not asked to change trucks; that when told about the availability of the "air ride" truck, he could have declined; and that appellee had done nothing to make him take the "air ride" truck.

On a number of occasions, the appellate courts have affirmed the Commission's factual findings that a claimant injured while performing a personal task, even while on the employer's premises, was not performing "employment services" for the purposes of compensability under Act 796 of 1993. *Hightower v. Newark Public School System*, 57 Ark. App. 159, 943 S.W.2d 608 (1997). In this instance, we recognize that appellant was on appellee's premises when appellant injured his shoulder.

We conclude that appellant was performing an incidental activity which was inherently necessary for the performance of his primary employment activity. On the day appellant sustained his injury, he was preparing his truck for a cross-country drive by equipping it with items necessary for the effective administrator of his job. Appellant's testimony revealed that appellee required spring-loaded bars to be installed in all trucks. As the new truck lacked such bars, appellant installed them before he drove the vehicle. In addition, appellant transferred items to the new truck that were extremely useful for a long-distance drive, such as, a CB radio and antenna, extra oil, and antifreeze. Furthermore, appellee did not pay for overnight lodging on appellant's regular trips to Chicago. Therefore, appellant acted prudently in packing bedding to be used in the truck's sleeper cab.

Allen Hayes testified that if appellant had not taken the "air ride" truck that another driver would have taken it. Thus, this accident could have happened to any driver willing to accept the "air ride" truck. Testimony also revealed that appellee was in the process of phasing out its "spring ride" trucks as it purchased only new trucks that contained an "air ride" suspension system. Eventually, appellant would have had to relinquish his "spring ride" truck for a newer "air ride" truck.

In its brief, appellee notes that in *Allan Kinnebrew v. Little John's Truck, Inc.*, 66 Ark. App. 99, 989 S.W.2d 541 (1999), we held that a truck driver is not performing employment services during the time that he is involved in activities of a personal nature. In

Kinnebrew, the truck driver was injured when he slipped and fell while taking a shower at a truck stop during the time that he was on the road for his employer. Clearly, a shower is not inherently necessary for the performance of the job the trucker was hired to do. On the other hand, in the case at bar, appellant injured himself as he prepared his truck for the long-distance trip with items necessary for the efficient performance of his job.

We do not believe that reasonable minds could have denied appellant benefits in this case. Therefore, we reverse and remand for an award of benefits.

Reversed and remanded.

BIRD and GRIFFEN, JJ., agree.

CONAGRA, INC. *v.* Vida STROTHER

CA 99-327 5 S.W.3d 69

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

Walmsley & Weaver, by: *Tim Weaver*, for appellant.

Comer Boyett, Jr., for appellee.

ANDREE LAYTON ROAF, Judge. This is a negligence case. Vida Strother sustained injuries when she slipped on a wet floor while leaving her employment site at Conagra after her shift had ended. Conagra appeals from a jury verdict in favor of Vida Strother for $125,000 in damages. Conagra raises two issues on appeal: (1) whether the trial court erred in failing to grant its motion for a directed verdict at the close of trial and motion for judgment notwithstanding the verdict (JNOV) after the verdict was returned; and (2) whether the trial court erred in failing to grant Conagra's motion for a new trial. We find no reversible error and affirm.

For more than twenty years, Vida Strother worked as an employee of the United States Department of Agriculture (USDA) assigned as a poultry inspector at the Conagra processing plant in Batesville, Arkansas. As a part of its agreement with the USDA, Conagra provided work accommodations for USDA inspectors on their premises. On March 24, 1997, Strother had just completed her shift when she went upstairs to the breakroom provided for USDA employees, changed into her civilian apparel, stepped "three or four steps" outside of the breakroom, and slipped and fell. Strother fractured her left elbow and injured her lower back and hips as a result of the fall.

For its first argument, Conagra contends that the trial court erred in failing to grant its motion for a directed verdict at the close of trial and JNOV after the jury returned its verdict. Arkansas appellate courts have stated that the motion for a directed verdict is a condition precedent to moving for JNOV based on the reasoning that a motion for JNOV is technically only a renewal of the motion for directed verdict made at the close of the evidence. *Wheeler Motor Co., Inc. v. Roth,* 315 Ark. 318, 867 S.W.2d 446 (1993); *Pennington v. Rhodes,* 55 Ark. App. 42, 929 S.W.2d 169 (1996). The standard of review from the denial of a motion for a directed verdict or a motion for judgment notwithstanding the verdict is whether the non-movant's proof was so insubstantial as to require a jury verdict, if entered in his behalf, to be set aside. *Unicare Homes, Inc. v. Gribble*, 63 Ark. App. 241, 977 S.W.2d 490 (1998); *Home Mut. Fire Ins. Co. v. Jones*, 63 Ark. App. 221, 977 S.W.2d 12 (1998); *St. Edward Mercy Medical Ctr. v. Ellison,* 58 Ark. App. 100, 946

S.W.2d 726 (1997). A trial court may grant a JNOV only if there is no substantial evidence to support the verdict of the jury and the moving party is entitled to judgment as a matter of law. *Unicare Homes, Inc. v. Gribble, supra.* Substantial evidence is defined as evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond suspicion or conjecture. *Union Pac. R.R. v. Sharp,* 330 Ark. 174, 952 S.W.2d 658 (1997). On appeal, we will only consider the evidence favorable to the appellee, together with all its reasonable inferences. *Home Mut. Fire Ins. Co. v. Jones, supra.* In such situations, the weight and value of testimony is a matter within the exclusive province of the jury. *Unicare Homes, Inc. v. Gribble, supra.*

Conagra's basis for its motions for directed verdict and for JNOV was that Strother failed to establish either of the elements required in a slip-and-fall case. Specifically, Conagra argues that Strother failed to prove that the presence of water on the floor was the result of its negligence or that the water had been on the floor for such a length of time that Conagra knew or reasonably should have known of its presence and failed to use ordinary care to remove it. We do not agree that Strother had the burden of establishing these elements under the facts of this case.

Strother was present at Conagra's facility in order to further its business, and therefore is owed the standard of care of a business invitee. *See Heigle v. Miller,* 332 Ark. 315, 965 S.W.2d 116 (1998). A property owner has a duty to exercise ordinary care to maintain his premises in a reasonably safe condition for the benefit of an invitee. *Kelly v. National Union Fire Ins. Co.,* 327 Ark. 329, 937 S.W.2d 660 (1997). We agree that, in order to prevail in a typical slip-and-fall case involving an invitee, the appellant must show either (1) that the presence of a substance upon the premises was the result of the defendant's negligence, or (2) that the substance had been on the premises for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Wilson v. J. Wade Quinn Co.*, 330 Ark. 306, 952 S.W.2d 167 (1997); *Kelly v. National Union Fire Ins. Co., supra*; *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993). *See also Derrick v. Mexico Chiquito, Inc.*, 307 Ark. 217, 819 S.W.2d 4 (1991); *Wal-Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991); *Skaggs Co., Inc. v. White*, 289

Ark. 434, 711 S.W.2d 819 (1986); *Safeway Stores, Inc. v. Willmon*, 289 Ark. 14, 708 S.W.2d 623 (1986). The mere fact a person slips and falls does not give rise to an inference of negligence. Possible causes of a fall, as opposed to probable causes, do not constitute substantial evidence of negligence. *Kelly v. National Union Fire Ins. Co., supra.*

However, in the instant case, testimony established that oils, grease and water were regularly tracked to and throughout the hallway outside the USDA employee breakroom as employees traveled to and from the breakroom and the processing area on the floor below. Because the hallway floor would become extremely slippery, Conagra had a long-standing policy of keeping non-skid safety mats throughout this area. As an added precaution, Conagra instructed its cleaning crew to clean this area only after all employees had left for the day. Specifically, testimony established that the janitors were instructed that the safety mats should not be removed and the floor should not be cleaned until after the last shift had left for the evening. Testimony further established that the safety mats were in place on the date of the accident when Strother entered the breakroom, but Strother and several other witnesses testified that the mats had been removed by the time she left the room minutes later, and that the hallway floor was slick.

In its brief, Conagra contends that the case of *Heigle v. Miller, supra*, is distinguishable because the plaintiff in *Heigle* was a licensee rather than an invitee. In *Heigle*, a licensee slipped and fell in the bathroom of the appellee's home, to which she had been invited as a house guest. The defendant was responsible for taking care of her eighty-year-old husband who suffered from incontinence and frequently urinated on the bathroom floor. The defendant knew of this problem and normally kept a piece of carpet on the floor in that area to prevent falls. During trial, the trial judge granted the defendant's motion for summary judgment, finding that Heigle was a licensee in the defendant's home and that, as a result, the duty of care owed to her was to refrain from injuring her through willful or wanton conduct or to warn of hidden danger where the licensee does not know or has no reason to know of the conditions or risks involved. On appeal, the supreme court reversed the grant of summary judgment and stated:

> Typical "slip and fall" cases occur in public places, which often occupy a great deal of space, and involve isolated incidents where anything could have been spilled or placed on the floor by anyone at anytime without the owner's knowledge. As such, our case law provides that in order to prevail in a "slip and fall" case, a plaintiff must show that: (1) the presence of the substance upon the premises was the result of the defendant's negligence, or (2) the substance had been on the floor for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it... Here, the presence of the foreign substance on the bathroom floor was not a one-time incident; the facts presented show that there was a recurring condition that frequently made the bathroom floor slick and unsafe. Moreover, Appellee admittedly knew that virtually every time her husband used the restroom, he would urinate on the floor. She further knew that when the piece of carpet was not in place in the bathroom, the floor was slick. Thus, the particular facts of this case do not require an analysis under a traditional "slip and fall" theory of recovery; rather, the issue presented requires a determination of the duty to warn of hidden dangers.

Heigle v. Miller, 332 Ark. at 324 (citations omitted). Accordingly, the supreme court reversed and remanded to allow the case to proceed to the jury as to whether the defendant breached the duty owed to the plaintiff as a licensee.

This case likewise does not require analysis under a traditional slip-and-fall theory, but instead involves a business owner's duty to keep its premises free of dangerous conditions that are likely to cause injury to its invitees. The law is well settled that the business owner has the duty to use ordinary care to maintain the premises in a reasonably safe condition. *Like v. Pierce*, 326 Ark. 802, 934 S.W.2d 223 (1996); *Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994); *Dye v. Wal-Mart Stores, Inc.*, 300 Ark. 197, 777 S.W.2d 861 (1989); *Johnson v. Arkla, Inc.*, 299 Ark. 399, 771 S.W.2d 792 (1989). Here, as in *Heigle*, Conagra knew that the floor outside of the breakroom became hazardous during normal usage by employees and, as a consequence, took the precaution of placing safety mats in that area. The mats were in place prior to Strother's entry into the breakroom, but were apparently removed by Conagra's agents while she was changing clothes; immediately after stepping outside of the breakroom, Strother slipped on the floor. Our standard of review compels us to affirm the findings of the jury

if substantial evidence supports allowing the case to proceed to the factfinder. Under the particular facts of this case, we agree that sufficient evidence existed to allow the case to proceed to the jury, and consequently, we cannot say that the trial court erred in denying the appellant's motion for JNOV.

For its second point on appeal, Conagra argues that the trial court erred in failing to grant its motion for a new trial. Conagra submitted a posttrial motion in which it again challenged the sufficiency of the evidence to support the verdict and challenged the court's decision to allow Strother to introduce evidence of prior incidents where water was on the floor. Prior to trial, Conagra submitted a motion in limine to exclude testimony concerning the prior incidents. The trial court ruled in favor of Conagra and instructed the plaintiff to confine the evidence to the particular date of the accident. However, at trial the plaintiff introduced testimony concerning the daily presence of oil and grease in the area, the presence of safety mats, and that the area was cleaned daily. Over Conagra's objection, the trial court admitted the testimony for the limited purpose of establishing that Conagra had notice of the condition.

A trial court's ruling on a motion in limine is not a final ruling on the admissibility of the evidence in question, but only interlocutory, tentative, or preliminary in nature. As such, it is subject to reconsideration and change by the court during the course of the trial, as the evidence in the trial is fully developed. *See* 75 AM. JUR. 2d *Trial* § 112. In *Nolen v. State*, 278 Ark. 17, 643 S.W.2d 257 (1982), the supreme court stated,

> We have held that a motion in limine, a threshold motion, should be precise and definite as to the subject matter sought to be prohibited. Further, whenever it is somewhat broad, it results in confusion and is necessarily subject to a later judgment and interpretation by the court. *Smith v. State*, 273 Ark. 47, 616 S.W.2d 14 (1981); and *Ark. State Hwy. Comm'n v. Pulaski Inv. Co.*, 272 Ark. 389, 614 S.W.2d 675 (1981).

In the instant case, the trial judge initially ruled in Conagra's favor regarding the admission of testimony concerning prior incidents of water being on the floor. However, at trial the judge admitted the testimony for the limited purpose of establishing that Conagra had prior notice of the hazardous nature of that area

of the floor. We will not reverse the trial court's ruling on the admission of evidence absent an abuse of discretion. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998); *Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576 (1997); *Warhurst v. White*, 310 Ark. 546, 838 S.W.2d 350 (1992). Upon review, we cannot say that the trial court abused its discretion when it admitted the testimony for the limited purpose of establishing that Conagra had actual notice of the hazardous nature of that area of floor.

Affirmed.

JENNINGS and PITTMAN, JJ., agree.

Brad SMITH *v.* Russell O. LOYD and Emogene T. Loyd

CA 99-264 5 S.W.3d 74

Court of Appeals of Arkansas
Division I
Opinion delivered November 17, 1999
[Petition for rehearing denied December 22, 1999.]

Boswell, Tucker & Brewster, by: *Dennis J. Davis*, for appellant.

Eudox Patterson, for appellees.

ANDREE LAYTON ROAF, Judge. Brad Smith appeals a decree entered by the Saline County Chancery Court finding that Russell O. Loyd and Emogene T. Loyd were entitled to a prescriptive easement over lands owned by Smith. On appeal, Smith argues that the chancellor erred in granting the prescriptive easement because the Loyds did not prove that they had used the property adversely for seven years. We affirm.

Since 1972, the Loyds have owned a 61.6-acre tract of land that lies due west of property now owned by Smith. Both properties are bordered on the north by land owned by William Brennan. Smith's property is unimproved and, except for a period of time beginning in the 1980s when a cable was stretched across the road by Brennan and later in 1991 when Smith placed a fence across it, unenclosed.

The only access to the Loyds' property is by a dirt road across Smith's land. The dirt road extends off of Nickel Bill James Road, a short county road that connects with Highway 5. When the Loyds became interested in selling their property, they determined that they needed to formally establish their right to access it. On December 11, 1997, the Loyds petitioned for a temporary

restraining order to enjoin Smith from barricading the roadway and a judgment declaring that they had a prescriptive easement. In his answer, Smith asserted that use of the road by the Loyds was permissive.

At the hearing on the petition, Russell Loyd conceded that Smith had never barricaded the road. Loyd further testified that he used the road about once a week for the twenty-six years that he owned the property and that his tenants also used the roadway. According to Loyd, when Smith bought his property in 1991, Smith installed a gate across the road and Loyd had to get a key from Brennan to access the property. Loyd claimed that the key did not work satisfactorily so he provided the lock that is currently in use on the gate. He further stated that the cable had been removed before Smith bought the land and that there was no other enclosure. Emogene Loyd also testified that she and her husband had used the dirt road to access their property for as long as they owned it. She also testified that she was a real estate broker and that their motivation for establishing the prescriptive easement was to make the property more marketable. She contended that without the easement, prospective buyers could not buy title insurance.

William Brennan, the adjoining landowner, testified that the dirt road was used for a number of years, perhaps decades, by hunters, fishermen, and "kids doing doughnuts and parties." According to Brennan, sometime in the early 1980s, after discussing with Russell Loyd the desirability of keeping people away from the river bottom area, Brennan and his son stretched a cable across the road to discourage the "partying." Brennan claimed, however, that the lock on the cable did not work and that it was "mostly for show."

Seventy-one-year-old Merle Holloway, who formerly worked for the county road department beginning in 1962, testified that until the cable was placed across the road, twice a year he would run the county road grader down the dirt road as far as the Loyds' property. He also testified that the road in question existed since 1950.

At the conclusion of the testimony, the parties stipulated that there were no livestock or cattle on Smith's property. After the hearing, the chancellor declared that the Loyds had established their

entitlement to a prescriptive easement over Smith's property. On appeal, Smith argues that the trial court erred in granting a private prescriptive easement to the Loyds because they had not established that they had used the property adversely to the rights of the owner for a period of seven years. Smith contends that the Loyds never showed that they engaged in any activity that would have placed him on notice of their claim. Citing *Burdess v. Arkansas Power & Light Co.*, 268 Ark. 901, 597 S.W.2d 828 (1980), he asserts that use of a roadway over unenclosed and unimproved land is deemed to be permissive and there must be some overt activity on the part of the user that an adverse use and claim of right is being asserted. Smith notes that the testimony established that prior to placing the cable across the road or the erection of the gate in 1991, the land was open, unenclosed and unimproved, and therefore he benefits from the presumption that use of the road by anyone, including the Loyds, was permissive. Consequently, he contends, the absence of proof that the Loyds performed some other activity besides driving up and down the road is fatal to their claim of a prescriptive easement. Further, citing *Hoover v. Smith*, 248 Ark. 443, 451 S.W.2d 877 (1970), Smith argues that when the wire was stretched across the road in the 1980s, the public's right to use the land was extinguished. These arguments are not persuasive.

Prescription is the acquisition by an adverse user of title to a property right which is neither tangible nor visible, as distinguished from the acquisition of title to the land itself by adverse possession. *Johnson v. Jones*, 64 Ark. App. 20, 977 S.W.2d 903 (1998). The supreme court has considered the period for acquiring a prescriptive right-of-way as analogous to the statutory seven-year period for the acquiring of title by adverse possession and has held that both require seven years. *Id.* Unlike adverse possession, however, prescriptive use need not be exclusive. *Id.* One asserting an easement by prescription must show by a preponderance of the evidence that his or her use has been adverse to the true owner and under a claim of right for the statutory period. *Id.* The determination of whether the use of a roadway is adverse or permissive is a question of fact, and a chancellor's finding with respect to the existence of a prescriptive easement will not be reversed by this court unless it is clearly erroneous. *Id.*

In *Kimmer v. Nelson*, 218 Ark. 332, 236 S.W.2d 427 (1951), where a roadway had been used by a succession of owners

for forty years, the supreme court held that the original restriction in the nature of a permissive passageway across the land of another may be deemed to have been abandoned if such use is not objected to by the landowner after a long passage of time. In *Fullenwider v. Kitchens,* 233 Ark. 442, 266 S.W.2d 281 (1954), the supreme court applied the principle announced in *Kimmer* to uphold a lower court's finding that use of a road through wild and unimproved land for over thirty years overcame the presumption that use of the land was permissive. The instant case is clearly analogous to *Fullenwider.* Here there is testimony that the roadway in question was used without complaint by the owner of record for nearly forty years before Smith acquired title to the property and erected the gate. Under the rationale propounded by the supreme court in *Fullenwider v. Kitchens, supra,* there is little basis for this court to conclude that the permissive-use presumption has not been overcome in the instant case.

Because we affirm on this basis, we need not address Smith's further argument that placing the wire across the road in the early 1980s resulted in the abandonment of any public prescriptive easement.

Affirmed.

HART, J., and HAYS, S.J., agree.

Joseph and Sharon ELDER *v.*
The SECURITY BANK of Harrison, *et al.*

CA 99-216 5 S.W.3d 78

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered December 1, 1999

[redacted]

Davis & Goldie, by: *Steven B. Davis*, for appellants.

Reeves Law Firm, by: *Ken Reeves*, for appellees Security Bank and First Commercial Mortgage Co.

Vowell & Atchley, by: *Stevan E. Vowell*, for appellee Liberty Life Insurance Co.

JOHN B. ROBBINS, Chief Judge. Appellants Joseph Clifford Elder and Sharon Lee Elder appeal from a summary judg-

ment rendered in favor of appellees Security Bank of Harrison, et al. We affirm.

On August 7, 1980, the Elders purchased a home and financed it with a thirty-year mortgage. At the time of the loan closing, Barry Molder, who was a loan officer for Security Bank of Harrison, sold the Elders a mortgage-payment disability insurance policy. The Elders remembered that they never received a copy of the policy, but that Mr. Molder assured them that, in the event of a disability, the mortgage insurance would cover the loan payments for the duration of the thirty years. In fact, however, the policy only provided for a maximum of five years of monthly payments in the event of disability.

Mr. Elder became totally disabled in March 1988, at which time the disability policy had passed to Integon. Integon began making the monthly mortgage payments and sending a monthly worksheet to the Elders reflecting this payment. Then, in December 1991, appellee Liberty Life acquired the policy from Integon. In May 1992, Liberty Life provided the Elders with a copy of a document entitled policy schedule, which summarized the coverage of the Elders' insurance policy. According to Mrs. Elder, this was the first time she had seen the policy schedule, and she contacted Liberty Life with questions about it. A representative of Liberty Life replied in October 1992 that the coverage was for a thirty-year term and a monthly benefit of $300. In April 1993 (five years after the disability), Liberty Life discontinued paying the monthly mortgage payments.

The Elders brought suit against the appellees on December 30, 1993, alleging breach of contract and negligence. Their complaint averred:

> At the time the disability insurance policy was issued, Barry Molder, acting within the apparent scope of his duties as agent for Security Bank, First Commercial and Liberty Life, contractually obligated himself to provide mortgage insurance for the full term of the plaintiff's mortgage. The selection by Barry Molder of a policy of insurance coverage which provided only sixty (60) months of coverage constitutes a breach of contract for which damages will lie. In the alternative, Security Bank acting by and through Barry Molder undertook a duty of reasonable care to the Elders to select an appropriate policy of credit disability insurance.

> Security Bank breached its duty by selecting a policy which was limited to sixty (60) months of benefits.

Upon consideration of the pleadings and depositions, the circuit court entered summary judgment in favor of the appellees. Specifically, the court found that the Elders' complaint was barred by the applicable statute of limitations. The court stated:

> The Court finds that it is clear from the pleadings that the application for disability insurance was completed by the Plaintiff, Joseph Clifford Elder, on August 7, 1980, and was turned over to Barry Molder as agent for or employee of the Security Bank of Harrison. A three-year Statute of Limitations, after the cause of action accrues, is applicable to both causes pled by the Plaintiffs. The Court finds that the Plaintiffs knew or should have known of the limited term (five years) payments under the policy when they received the "check stubs" with each check issued under the terms of the disability policy. Each monthly stub provided ample information concerning the term or length of payments. The Court finds that the first "check stub" was received by the Plaintiffs in May of 1988 and the applicable Statute of Limitations as to both causes of action pled by the Plaintiffs expired three years from that date. The Plaintiffs' original complaint herein was filed on December 30, 1993, which was after the time of expiration of the Statute of Limitations.

The Elders now appeal, arguing that the circuit court erred in granting summary judgment. They contend that the court erred in finding that they knew or should have known of the limited payment schedule in May 1988; in failing to consider the appellees' failure to disclose the terms of the policy; and in finding that the cause of action in contract accrued before April 1993, when the payments were terminated.

Arkansas Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the burden of sustaining a motion for summary judgment; once the moving party meets this burden, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997). On appeal, we view the

evidence in the light most favorable to the opposing party and resolve all questions and ambiguities against the moving party. *Id.* Summary judgment is proper when the statute of limitations bars the action. *Alexander v. Twin City Bank*, 322 Ark. 478, 910 S.W.2d 196 (1995). We will affirm a summary judgment when the plaintiff admits a dispositive fact. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997).

In Mrs. Elder's deposition, she acknowledged that, at some time when she was receiving monthly forms from Integon, she noticed an expiration date of 5/1/93. She thought that the date was wrong, and stated she thought the insurance company was "faking us out." As a result of the discrepancy, she asked for a copy of the policy along with the policy schedule, and received the policy on January 5, 1989. However, she stated that the policy schedule reflecting the five-year limit was not received until May 1992. Mrs. Elder testified that, when the policy was issued, she was led to believe it covered the full thirty-year term of the mortgage and that she believed this to be the case until the payments were terminated in April 1993.

In their argument for reversal, the appellants concede that the applicable limitations period is three years pursuant to Ark. Code Ann. § 16-56-105 (1987). However, they argue that their claims against the appellees were not barred by this limitations period.

The appellants first contend that the circuit court erred in ruling that they knew or should have known of the actual terms of the written policy more than three years prior to December 30, 1993. Appellants note that the Integon form that was introduced into evidence was dated 12/4/91. They further note that that exhibit had the notation "Expirty Date 5/1/93." Thus, appellants allege, it was not clear as to when these monthly forms began to reflect this notation, and at any rate the notation was ambiguous.

The undisputed facts clearly established that Mrs. Elder had actual notice of the five-year policy limit well before three years preceding December 30, 1993. She admitted that she saw the expiration date, thought it was incorrect, and that this caused her to ask for the policy, which she received on January 5, 1989. More importantly, the policy received on that date contained the following language:

> In no event shall the periodic indemnity payable hereunder in the event of disability exceed the lesser of (a) 60 months of such payments....

Thus, by Mrs. Elder's own admission, she was on notice of the alleged breach of contract on January 5, 1989, at the latest, and the limitations period expired before the complaint was filed.

The appellants next point out that, pursuant to Ark. Code Ann. § 23-87-110 (Repl. 1992), the appellees were responsible for providing a copy of the policy, and they failed to do so until January 1989. The appellants also note that a representative of Liberty Life assured them in October 1992 that the policy covered the full thirty-year term. Appellants argue that appellee's failure to disclose the policy provisions, and its concealment of the same, tolled the statute of limitations.

In *Williams v. Purdy*, 223 Ark. 275, 265 S.W.2d 534 (1954), the supreme court held:

> Mere ignorance of one's rights does not prevent the operation of the statute of limitations, but where the ignorance is produced by affirmative and fraudulent acts of concealment, the statute of limitations does not begin to run until the fraud is discovered. *Landman v. Fincher*, 196 Ark. 609, 119 S.W.2d 521; *Kurry v. Frost*, 204 Ark. 386, 162 S.W.2d 48; *State of Tennessee v. Barton*, 210 Ark. 816, 198 S.W.2d 512. Some affirmative act of concealment must be done; mere failure to reveal is not enough, unless there is a duty to speak.

In the instant case, there may be a fact question as to whether the appellees failed in their duty to disclose the provisions of the policy when it was issued. However, this is a moot point because it is undisputed that the policy was sent to the appellants in January 1989, and it contained the provision at issue. Furthermore, whether or not there was a misrepresentation in Liberty Life's letter to appellants in October 1992 is of no consequence because the limitations period expired in January 1992, at the latest. Thus, any concealment or misrepresentation did not sufficiently toll the limitations period in this case. Even accepting the Elders' contentions as being true, their complaint was still not timely filed.

The appellants' remaining argument is that their cause of action in contract did not accrue until April 1993, when payments

were terminated. However, this is incorrect. For breach of contract, the true test in determining when a cause of action arises or accrues is to establish the time when the plaintiff could have first maintained the action to successful conclusion. *Oaklawn Bank v. Alford*, 40 Ark. App. 200, 845 S.W.2d 22 (1993). The cause of action accrues the moment the right to commence an action comes into existence, and occurs when one party has, by words or conduct, indicated to the other that the agreement is being repudiated or breached. *Id.*

The oral contract, which appellants contend was breached, was the alleged promise of appellees to provide appellants with a mortgage-payment disability insurance policy that would pay monthly benefits for up to thirty years. Assuming this promise was made to appellants, as we must on our review of this summary judgment, the promise was breached when appellees caused an insurance policy to be issued to appellants that provided for monthly benefits with a maximum of only sixty months. Consequently, their cause of action accrued when the policy was issued in 1980, and appellants could have commenced their action at that time. It is only because appellants were not put on actual notice of the breach until they received a copy of their policy in January 1989 that the three-year limitations period was tolled until that late date. But for purposes of the statute of limitations, the appellants were not entitled to wait until May 1, 1993 (when payments were actually terminated), to bring suit against the appellees. Their action had accrued and become time-barred long before then.

Viewing the undisputed facts in the light most favorable to the appellants, we find that there were no genuine issues of material fact and that the trial court committed no error in finding that the appellees were entitled to summary judgment as a matter of law. Therefore, the judgment of the trial court is affirmed.

Affirmed.

PITTMAN, JENNINGS, and ROAF, JJ., and HAYS, S.J., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I agree with the appellants that summary judgment was improperly entered contrary to Rule 56 of the Arkansas Rules of Civil Proce-

dure. Material issues of fact exist concerning (a) whether the alleged implied contract existed and (b) whether appellants knew or reasonably should have known more than three years before they filed suit that the mortgage disability insurance policy sold to them by a bank officer would not pay benefits for more than sixty months on their thirty-year mortgage. Thus, I would reverse and remand for trial.

Joseph Elder and Sharon Lee Elder financed the purchase of a Boone County house with Security Bank of Harrison by executing a loan agreement on August 11, 1980, and by securing the loan with a thirty-year mortgage on the property. When the Elders secured the financing, Barry Molder, an employee of Security Bank, sold them a mortgage payment disability insurance policy through First Pyramid Life Insurance Company.

The Elders assert that Molder assured them that the mortgage payment disability policy would insure that the mortgage payments would be made in the event that Joseph Elder became disabled during the repayment period. First Pyramid issued its policy — No. SLO12961 — effective August 11, 1980, for thirty years. *The Elders did not receive a copy of their policy for more than eight years.* Sharon Elder believed that the policy application was their policy until they finally received the policy by letter from First Commercial Mortgage Company dated January 5, 1989, almost a year after Joseph Elder became disabled.

Joseph Elder became totally disabled March 31, 1988. The successors-in-interest to First Pyramid Life (Security Benefit Life Insurance Company, Integon Life Insurance Company, and Liberty Life Insurance Company, respectively) made mortgage payments of $300 each month until April 29, 1993, when payments were terminated based on the following language at Paragraph 1 of the policy:

> The insurance provided hereunder shall be for the purpose of paying monthly indemnification during the Total Disability of the Insured, in the amount specified in the Policy Schedule of this Policy. *In no event shall the periodic indemnity payable hereunder in the event of disability exceed the lesser of (a) sixty months of such payments, nor (b) the aggregate of the periodic scheduled unpaid installments of indebtedness owed the irrevocable beneficiary by the Insured so disabled; nor shall it exceed the original indebtedness divided by the number of periodic installments, nor be payable following the death of the Insured.* No

> insurance shall be provided hereunder unless the indebtedness to be insured shall be repayable in substantially equal monthly installments during the term of coverage. [Emphasis added.]

Sharon Elder became concerned about the term that mortgage payments would be made under the policy after she received a copy of the policy schedule on May 21, 1992, and after receiving disability claims worksheets, referred to as "check stubs" in the briefs and the trial judge's November 5, 1998, letter to counsel from Integon Life. The worksheets included a coded indicator that read "expirty date 05/01/93." Mrs. Elder consulted Donald Bishop, the attorney who represented her husband in his claim for Social Security disability benefits, based on her concern that the insurance might have been for five years rather than thirty years. Bishop wrote Security Benefit Life a letter dated September 8, 1992, requesting information on whether the term of insurance had been reduced. On October 19, 1992, Ellen Long, a customer service representative with Liberty Life Insurance, the successor to Integon, responded to Bishop's request. The opening paragraphs of her response state: "*I am writing in regard to your request concerning information on Joseph C. Elder. This policy was issued in September 1980 for a monthly benefit of $300 for a 30 year term. There has been no waivers* (sic) *signed by Mr. Elder reducing the term of mortgage disability insurance from 30 years to any lesser amount.*" On April 28, 1993, Andrea Wright of the Claims Division of Liberty Life issued a letter to Joseph Elder with an opening paragraph which read:

> Our check for $ 4/27/93 representing disability benefits from 3/30/93 to 4/29/93 was mailed to First Commercial Mortgage on 4/27/93. This completes payment of your disability as benefits have been paid for the maximum period of 60 months as provided in your policy [*sic*].

The Elders filed suit on December 30, 1993, against The Security Bank of Harrison, First Commercial Mortgage, and Liberty Life Insurance. Their complaint alleged that when Joseph Elder applied for the mortgage-payment disability insurance policy they were not advised by Barry Molder and could not have known in the exercise of reasonable care that the coverage provided by the policy was for a term less than the mortgage obligation, and that Molder knew or reasonably should have known when the policy was issued that they intended to purchase insurance coverage for the full term of their mortgage obligation. They claimed damages for

breach of contract and negligence. Their answers to interrogatories asserted that Molder assured them at the closing of their financing that the policy for which they applied would pay off their mortgage if Joseph Elder were ever disabled.

In their answers to interrogatories, Security Bank and First Commercial stated that they did not know whether Security Bank's employees advised the Elders that disability insurance coverage would be limited to sixty months. After Security Life and First Commercial filed cross-claims against Liberty Life for breach of contract and negligence based on the failure of First Pyramid to provide the Elders with a copy of the insurance policy or policy schedule until after Joseph Elder became disabled, Liberty Life filed an amended answer in which it again denied liability and affirmatively pled the three-year statute of limitations found at Ark. Code Ann. § 16-56-105 (Repl. 1987) as a bar to recovery by the Elders. In reply, the Elders asserted reliance on the October 19, 1992, letter from Ellen Long of Liberty Life that the policy provided for a $300 monthly benefit for a thirty-year term and that Liberty Life did not inform them that the benefits would be terminated until April 28, 1993. Thus, the Elders contended that the statute of limitations was tolled until April 28, 1993, the first date they claim they knew or reasonably should have known that the benefits would not be paid as they had been assured by Molder when they obtained financing in 1980.

The trial judge granted summary judgment on the view that the Elders "knew or should have known of the limited term (five years) payments under the policy when they received the 'check stubs' with each check issued under the terms of the disability policy . . . . The first 'check stub' was received by the Plaintiffs in May of 1988. The applicable Statute of Limitations expired three years from that date."

But viewing the evidence in the light most favorable to the Elders, as we are required to do in conducting appellate review of decisions granting summary judgment, leaves me convinced that the evidence they presented left material questions of fact unanswered. A genuine issue of material fact exists about whether Barry Molder assured the Elders that the financing for which they applied in 1980 would pay off their mortgage were Joseph Elder to become disabled. A genuine issue of material fact exists about whether the

Elders should have known when they received Ellen Long's letter that Liberty Life would not pay benefits in accordance with the representation they received from Molder, given that Long's letter conflicted with the disability worksheets, the Policy Schedule that they received in 1992, and the language of the policy that they received in January 1989.

Furthermore, I do not see how one can properly conclude that appellants' causes of action for breach of contract and negligence accrued until after the benefits had ceased in 1993. Our decisions consistently hold that the statute of limitations for contract actions runs from the point at which the cause of action accrues rather than the date of the agreement, and the test in determining when the cause of action accrues is to determine the time when the plaintiff could have first maintained action to successful conclusion. *Davenport v. Pack*, 35 Ark. App. 40, 812 S.W.2d 487 (1991). The date that the cause of action accrues determines the period of limitations in contract actions, not the date of the agreement. *Eckels v. Ark. Real Estate Comm'n*, 30 Ark. App. 69, 783 S.W.2d 864 (1990). I do not understand how the Elders could have brought an action for breach of contract until the alleged breach occurred.

Unlike the majority, I do not deem the January 5, 1989, date that appellees delivered the insurance policy to be the proper date for starting the statute of limitations for either cause of action asserted by the Elders. Granted, in January 1989, the Elders had been provided an insurance policy containing language different from what they understood Barry Molder had induced them to purchase. But they had no way of knowing what the policy stated for more than eight years after the financing took place. *Furthermore, appellees had not even delivered the policy schedule prescribed by their policy until May 21, 1992, more than three years after the January 5, 1989 date that the policy was delivered, and almost twelve years after they entered into the contract. According to the reasoning adopted by the majority, the Elders should have sued appellees for breach of contract before appellees even delivered the policy schedule despite the fact that they were plainly receiving the very benefits for which their lawsuit would have claimed and at a time when the document that would govern their contractual rights had not even been delivered by the appellees.* Rather than do that, they made what appears to have been an honest attempt to have appellees clarify their situation. They received information in the letter from Ellen Long that appeared to confirm their original under-

standing and allay Sharon Elders's concerns until the disability benefits terminated at the end of April 1993. Then they knew that their expectations had been disappointed.

Appellants had every reason to rely upon the October 17, 1992, letter from Ellen Long until they received the April 28, 1993, letter from Andrea Wright announcing that benefits had been completely paid. I certainly do not agree that whether appellants acted reasonably in relying upon Long's letter is an issue of law. Therefore, I would hold that the statute of limitations on appellants' breach of contract claim was tolled until April 28, 1993.

I see no reason why the Elders should have brought an action to reform the insurance contract when Ellen Long had provided them with a letter that allayed their concerns. They were receiving the benefits for which they had bargained when Long's letter arrived. Long's letter stated that the policy term had not been reduced from the thirty-year period of their mortgage liability. Thus, it seems that the Elders have now been penalized for not suing appellees after receiving what might ordinarily be considered written assurance that their policy was consistent with what they had secured when they decided to obtain the mortgage disability protection. This is the first time I have ever seen insurance companies and a lending institution complain about being sued too slowly. That the appellees do so while having plainly contributed to the confusion that produced the delay is more than slightly ironic.

Likewise, our cases show that a claim for negligence accrues when harm ensues, not merely when the negligent act occurs. In *Midwest Mut. Ins. Co. v. Ark. Nat. Co.*, 260 Ark. 352, 538 S.W.2d 574 (1976), our supreme court held that a cause of action for an insurance agent's negligent failure to obtain insurance coverage for a vehicle did not accrue on the date of the failure, but accrued no earlier than the date when suit was filed against the insured and it was required to assume the cost of its own defense because of the agent's negligence. Similarly, an insured's claim against an insurer and adjuster for bad faith and negligence in failing to settle within policy limits was held to have accrued when the insured was held liable to accident victims in the underlying tort action, not an earlier date when the insurer failed to respond to settlement letters. *Carpenter v. Automobile Club Interinsurance Exchange*, 58 F.3d 1296 (8th Cir. 1995).

Counsel for appellees admitted during oral argument, and with commendable candor, that he did not know how appellants could have asserted an action for negligence before April 28, 1993, the first date that they could have known that they were damaged by the decision to terminate benefits. If Molder was negligent in failing to provide the insurance protection that appellants desired in 1980, appellants certainly had no claim until they were damaged by that negligence in May 1993 by being obligated to pay the mortgage payments to First Commercial despite Joseph Elder's disability. Any other view amounts to saying that appellants could have sued the appellees for negligence before they sustained damage.

I would hold that appellants' cause of action for negligence did not accrue until they were forced to pay the May 1993 mortgage payment and the final element of that claim — their damage on account of having to pay the mortgage payments—occurred. It is unrealistic to expect parties to file lawsuits until they have been damaged, and it is unfair to hold the failure to file a lawsuit against the innocent appellants in this case, where genuine issues of material fact are so clearly present, and where the record plainly shows that appellees are responsible for the confusion that produced the delay.[1]

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[1] It appears that the trial court and the majority differ in their interpretation of when the statute of limitations expired with regard to the contract and negligence actions. As I read the trial court's order at pages 3-4 of the majority opinion, the trial court found that the statute of limitations for both causes of action began in May 1988 and expired on May 1991. However, I read the majority opinion to hold that the statute of limitations for the contract action was tolled until January 1989, when the Elders received their copy of their policy (page 7). This, of course, would mean that the statute of limitations expired in January 1992, before the appellants filed their suit. It is obvious that a cause of action cannot be tolled until 1989 if it began in 1988. If the trial court is correct, then the appellants had until May 1994 to file their contract action and their suit filed on December 20, 1993, was timely.

With regard to the negligence claim, the trial court held, again at pages 3-4 of the majority opinion that the statute of limitations for both causes of action expired in May 1991. However, at page 6 of the majority opinion, the majority states that whether or not there was a misrepresentation in Liberty Life's letter to the appellants in October 1992 is of no consequence because the limitations period expired in January 1992, "at the latest." This appears to be in direct conflict with the trial court's finding that the statute of limitations expired in May 1991. Of course, if January 1992 is the correct expiration date, the appellants' negligence claim is precluded, but the point is that if the majority cannot agree with the trial court on the expiration of the applicable statutes of limitation, a material question in this regard exists that dictates reversal.

Jimmie Don MONTAGUE *v.* STATE of Arkansas

CA CR 99-356 5 S.W.3d 101

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered December 1, 1999

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

Mark Pryor, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Asst. Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. A jury found the appellant guilty of negligent homicide and driving while intoxicated (DWI). He appeals, contending that DWI is a lesser-included offense of negligent homicide and that the trial court erred in sentencing him separately on that count. We agree.

On July 17, 1997, at approximately 5:35 a.m., appellant was driving home when his vehicle crossed the center line of the road and entered the path of a vehicle driven by Nick Elliot causing a

collision that resulted in Elliot's death. Appellant admitted drinking beer prior to the accident, and a blood test, taken approximately one hour after the accident, established that his blood-alcohol content was .12%. Appellant was charged with manslaughter and DWI. The trial court instructed the jury on negligent homicide, which is a lesser-included offense of manslaughter, and DWI as follows:

> If you have reasonable doubt of the Defendant's guilt on a charge of manslaughter you will then consider the charge of [n]egligent [h]omicide. To sustain this charge the [S]tate must prove beyond a reasonable doubt that:
>
> Jimmie Don Montague negligently caused the death of Nick Elliott as a result of operating a vehicle while intoxicated or while having a blood alcohol level of 0.10% or more by weight.
>
> . . .
>
> Jimmy Don Montague is charged with the offense of [d]riving while [i]ntoxicated. To sustain the charge the [S]tate must prove beyond reasonable doubt that Jimmy Don Montague.... operated or was in actual physical control of a motor vehicle while there was one tenth of one percent (.10%) or more by weight of alcohol in his blood as determined by a chemical test of his blood or breath.

The jury, after returning guilty verdicts for negligent homicide and DWI, recommended that appellant receive a suspended sentence of six years' imprisonment and a fine of $5000 for negligent homicide and a year in the county jail and a $1000 fine for DWI. The judge imposed the recommended sentences for both convictions.

For reversal, appellant contends that DWI is a lesser-included offense of negligent homicide and that sentencing him on both convictions is illegal. Citing *Tallant v. State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993), and Ark. Code Ann. § 5-1-110 (1987), appellant argues that his sentence for DWI must be vacated.

In *Tallant,* this court set aside a conviction for DWI, holding that DWI is an essential component of negligent homicide. Arkansas Code Annotated section 5-1-110 (Repl. 1997) provides in part as follows:

> (a) When the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense if:
>
> (1) One offense is included in the other, as defined in subsection (b) of this section....
>
> (b) .... An offense is so included if:
>
> (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged....

Based on the rationale that when a criminal offense cannot be committed without the commission of an underlying offense, a conviction cannot be had for both, appellant's conviction and sentence for DWI must be set aside.

Appellee contends that appellant's argument is a double-jeopardy argument that appellant failed to raise below, and constitutional arguments cannot be raised for the first time on appeal. It is undisputed that appellant did not raise the argument before the trial court. We, however, may review allegations of void or illegal sentences raised for the first time on appeal because void or illegal sentences may be corrected at any time. *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992). A sentence is considered void when the trial court lacks the authority to impose it. *Id.* An appellant cannot be convicted of both the greater offense of negligent homicide and its lesser-included offense of DWI, and therefore, appellant's sentence for DWI is void.

Where the error below has nothing to do with the issue of guilt or innocence, the appellate court may correct the sentence instead of remanding. *Bangs, supra.* We, therefore, set aside appellant's conviction and sentence for DWI, and we affirm his conviction and sentence for negligent homicide.

Reversed in part; affirmed in part.

ROBBINS, C.J., CRABTREE, GRIFFEN, MEADS, JJ., and HAYS, S.J., agree.

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

CA 98-881 5 S.W.3d 484

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 1, 1999

Timothy S. Pickering; and *Skinner & Thomas*, by: *H. Edward Skinner*, for appellant Southwestern Bell Telephone Company.

Wright, Lindsey & Jennings LLP, by: *N.M. Norton* and *J. Mark Davis*, for appellee AT&T Communications of the Southwest, Inc.

Paul Ward, for appellee Arkansas Public Service Commission.

JOSEPHINE LINKER HART, Judge. In this appeal, we review the Arkansas Public Service Commission's interpretation of a part of Act 77 of 1997, the Telecommunications Regulatory Reform Act of 1997, codified at Ark. Code Ann. §§ 23-17-401—412 (Supp. 1997). Twenty-six incumbent local exchange carriers (ILECs), sixteen of which are the appellants herein, filed a motion to have the Commission vacate Order No. 7 of Docket No. 93-142-U. The Commission refused and assessed civil sanctions against the appellants for knowingly violating Act 77 and other Commission orders. We find no error and affirm.

Order No. 7 approved a joint petition filed by the general staff of the Arkansas Public Service Commission (Staff) and a number of local exchange carriers, requesting that the Commission approve a plan to reduce intraLATA toll rates.[1] In Order No. 7, the Commission approved a reduction in intraLATA toll rates of approximately $10 million and designated that $4.8 million of that amount be used to reduce the carrier common line (CCL) access charges paid by the interexchange carriers (IXCs) and other non-LECs to the LECs. The $4.8 million reduction in CCL charges approved in Order No. 7 was implemented by the LECs through a credit on the bills issued to the IXCs by the Administrator of the Arkansas Intrastate Carrier Common Line Pool (AICCLP).

The Telecommunications Regulatory Reform Act, Act 77, allowed incumbent local exchange carriers (ILECs) to elect alternative regulation and exempted them from a number of statutory requirements, including the authority of the Commission to fix intraLATA toll rates, Ark. Code Ann. § 23-3-114. Relying on Act

[1] IntraLATA toll rates are a portion of the long distance rates that a customer is charged to make a long distance (toll) call. Part of these rates known as Common Carrier Line (CCL) charges are made up of access charges that the LECs assess the interexchange carriers (IXCs) for the IXCs' use of the LECs' facilities in the origination and termination of long-distance calls. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

77 and Commission Order No. 9 entered in separate Commission Docket No. 96-428-U[2], the appellants that were in attendance at the October 6, 1997, Steering Committee Meeting of the Arkansas IntraLATA Toll Pool, instructed AICCLP Administrator Wayne Gatlin to remove the credits from the interexchange carriers' (IXCs') bills beginning October 1997. Twenty days later, the appellants filed a petition with the Commission to vacate Order No. 7.

In their petition to vacate, appellants claimed that the enactment of Act 77 removed the Commission's authority to mandate uniform statewide toll rates and, therefore, there is no longer any authority or need for the AICCLP to subsidize the IXCs' toll rates. Although Staff initially agreed that the Commission lacked the authority to enforce the $4.8 million credit after the passage of Act 77, it changed its position and argued along with several IXCs that section 4(D) of Act 77, section 23-17-404(e)(4)(D), precluded any changes in the AICCLP prior to three years after the effective date of Act 77. This section provides: "Except as provided in this paragraph, the intrastate Carrier Common Line (CCL) Pool charges shall continue as effective on December 31, 1996." Although all the parties at the hearing agreed that this section froze the "CCL Pool charges" for the next three years, they disagreed over whether the Order No. 7 credits were included in the phrase "CCL Pool charges." In Order No. 4, the Commission held that the $4.8 million credits are included in the phrase "CCL Pool charges" and that Act 77 freezes the level of the CCL pool charges for a period of three years.

For their first point on appeal, the appellants contend that the Commission acted unlawfully and failed to regularly pursue its authority by requiring the appellants to continue to apply the credits established by Order No. 7. They contend that the phrase "intrastate Carrier Common Line (CCL) Pool charges," which appears in section 23-17-404(e)(4)(D), does not include the credits implemented in Order No. 7 and dispute the Commission's holding that the phrase is plain and unambiguous.

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[2] In Order No. 9, the Commission held that section 11(f) of Act 77 exempts the ILECs from a number of statutory requirements; including section 23-3-114, and the ILEC deregulatory election provisions in conjunction with the section 11(f) exemptions of Act 77 superseded and vacated the Commission order that required mandatory participation of the ILECs in the AITP.

This court's review of appeals from the Arkansas Public Service Commission is limited to determining whether the Commission's findings of fact are supported by substantial evidence, whether the Commission has regularly pursued its authority, and whether the order under review violated any right of the appellant under the laws or the Constitutions of the State or Arkansas or the United States. Ark. Code Ann. § 23-2-423(c)(3), (4), and (5) (1987); *Bryant v. Arkansas Pub. Serv. Comm'n*, 55 Ark. App. 125, 931 S.W.2d 795 (1996). In *AT&T Communications of the Southwest, Inc. v. Arkansas Public Service Commission,* 67 Ark. App. 177, 994 S.W.2d 494 (1999), where this court reviewed an interpretation the Commission had given to another part of Act 77, this court noted:

> 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. When a statute is ambiguous, we must give effect to the legislative intent. 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. 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.

Id. at 189-90, 994 S.W.2d at 502 (citations omitted).

The appellants and the other parties to the docket asserted at the hearing, and agreed on appeal, that the phrase "CCL Pool charges" as used in Act 77 should be interpreted in light of the Intrastate Flat Rate CCL Service Tariff (Tariff). The Tariff contains the rates and regulations that apply to the administration of the Intrastate Flat Rate (IFR) Carrier Common Line (CCL) Service and includes three pages of definitions, although it does not define the term "charges." The third paragraph of section three of the Tariff, labeled "General Description," contains the language on which the Commission relied in holding that the term "CCL Pool charges" includes the Order No. 7 credits:

> The amount of the IFR CCL charges to the carriers shall be designed to recover the aggregate intrastate CCL revenue requirement. The CCL revenue requirement may include: 1) the sum of CCL revenue requirements in the intrastate CCL revenue require-

> ments in the intrastate jurisdiction for each LEC in accordance with the allocation procedures...; 2) the aggregate AUSF requirements of the eligible LECs as provided for in the AUSF tariff; 3) the direct expenses incurred by the AICCLP Administrator for billing and collecting the IFR CCL charge; 4) other Commission ordered charges and credits and 5) revenue requirement claims. All such amounts shall be subject to annual approval by order of the Commission. The AICCLP Administrator shall use the approved amounts until they are superseded by subsequent Commission order.

Appellants argue that the first sentence of this paragraph defines CCL charges as revenue requirements and that the components listed in the second sentence should not be included as charges because this sentence uses the word *may* rather than the mandatory *shall*. In Order No. 4, the Commission explained why it could not accept appellants' interpretation that "CCL Pool charges" was synonymous with "revenue requirement."

> In an attempt to explain away the tariff language cited by Staff and AT&T, SWBT [Southwestern Bell Telephone Company] appears to contend that only the first sentence of the third paragraph of the IFRCCL Service tariff is relevant to determining the CCL charge frozen in Act 77. That sentence provides that "CCL charges to the carriers shall be designed to recover the aggregate intrastate CCL revenue requirement." IFR CCL Tariff, 4th Revised Sh. 4. SWBT then explains that the next sentence should be read as, "The CCL revenue requirement may include: 1) the sum of the CCL revenue requirements in the intrastate jurisdiction for each LEC in accordance with the allocation procedures ... directed by Order No. 14 in Docket No. 90-133-U" and items 2 through 5 which the tariff says may be in the revenue requirement, should be ignored as never having been in the calculation of revenue requirement....
>
> SWBT's explanation neglects to explain why the AICCLP Administrator utilized items 2 through 5 in calculating the CCL charge prior to December 31, 1996....
>
> The items which the AICCLP Administrator includes in the calculation of carrier bills are the same components of the CCL revenue requirement which Section 3 of the tariff states the CCL charge is designed to recover. SWBT fails to explain why the CCL charges include "credits approved by the Commission" as a component of the CCL revenue requirement and calculation of the

> CCL charge in the tariff but should be ignored when Act 77 refers to "CCL Pool charges."
>
> . . . .
>
> The plain language of Act 77 and the IFR CCL tariff does not support the ILECs Motion. Ark. Code Ann. section 23-17-404(e)(4)(D) requires that CCL pool "charges" shall remain as effective on December 31, 1996, for a period of three years. The CCL pool charges effective on December 31, 1996, and billed to the IXCs included "4) other Commission ordered charges and credits." IFR CCL Tariff 4th Revised Sh. 4 at Sec. 3. In addition, the IFR CCL tariff requires that the AICCLP Administrator use the approved amounts including the credits "until they are superseded by subsequent Commission order." *Id.* The credits included in the CCL charge which was in effect on December 31, 1996, were the credits ordered in Docket No. 93-142-U. It was not necessary to specifically reference those credits as a component of the CCL pool charge in Ark. Code Ann. section 23-17-404(e)(4)(D) to give effect to the tariffed charge including the credits which was billed to IXCs on December 31, 1996, and frozen for a three year period.

Order No. 4 at 8-9. The Commission also noted that the ILECs' contention that Act 77's freeze of the AICCLP charges applies only to the CCL gross revenue requirements would be greatly helped if the General Assembly said "revenue requirements" instead of using the phrase "CCL pool charges." Appellants have not challenged the Commission's holding that the credits were included in the IFR CCL tariff in effect on December 31, 1996, and February 4, 1997, the effective date of Act 77.

Appellants cite several references in the Tariff where the words "revenue requirement" do not include all or some of the five components listed in paragraph 3 of section 3, 4th Revised Sheet 4. To discuss each such instance would unduly lengthen this opinion and serve no purpose. Suffice it to say that we have considered the Tariff in its entirety and cannot agree that the Commission's interpretation of "CCL Pool charges" to include the Order No. 7 credits is clearly wrong.

In Order No. 4 the Commission assessed a civil sanction of $1,000 against each ILEC present at the AITP Steering Committee Meeting for knowingly violating Act 77 and Commission orders in

Docket Nos. 86-159-U and 93-142-U. Appellants contend that this action was unlawful because the orders the Commission found that they had violated have been superseded by Act 77 and there is no substantial evidence to show that they willfully violated Act 324. We disagree.

The Commission assessed sanctions against the appellants that were present at the Steering Committee meeting after finding that the appellants agreed and decided to implement a plan to terminate the credits allowed by Order No. 7 by instructing the AICCLP Administrator to cease applying the credits to the non-ILEC CCL bills. The AICCLP Administrator in accordance with appellants' instructions increased the CCL Pool charges in October. The ILECs waited until after the increase had been billed and on October 24 filed a motion seeking the Commission's approval of the action that they had already taken; that motion did not acknowledge their prior implementation of their decision to discontinue the credits without the benefit of a Commission order. The Commission held:

> In directing the AICCLP Administrator to increase CCL charges through the discontinuation of the credits, the ILECs did violate Act 77, Order No. 7 in Docket No. 93-142-U, the AICCLP tariff and the Commission orders in Docket No. 86-159-U approving the currently effective tariff. From the minutes of the AITP Steering Committee, it is apparent that the ILECs made the decision knowing that the action they were taking required prior Commission approval. In addition, the ILECs directed the AICCLP Administrator to take action contrary to the IFR CCL tariff which requires that the AICCLP Administrator not change the amounts used to calculate the CCL charge without a Commission order approving the change. The minutes of the AITP Steering Committee which are Staff Ex. 2 reflect the ILECs "knowingly, willfully and purposefully" committed the violations.
>
> .... Each ILEC having a representative present at the AITP Steering Committee meeting held on October 9, 1997 (Staff Ex. 2), is hereby assessed a civil sanction of $1,000.00 pursuant to Ark. Code Ann. section 23-1-103 for violating Act 77 and knowingly violating Commission orders in Docket No. 86-159-U and 93-142-U.

Appellants first argue that Ark. Code Ann. § 23-1-103 (1987) does not provide the Commission with authority to access sanctions

against them for violating section 4(D) of Act 77. This statute provides in pertinent part:

> (a) Every public utility and every person or corporation shall obey and comply with every requirement of this act and of every order, decision, direction, rule, or regulation made or prescribed by the commission in the matters specified or any other matter in any way relating to or affecting the business of any public utility. The commission shall do everything necessary or proper in order to secure compliance with, and observance of, every order, decision, direction, rule, or regulation by all officers, agents, and employees of every public utility.
>
> (b)(1) Upon a finding by the commission that any jurisdictional water, gas, telephone, or electric public utility has knowingly, willfully, and purposefully violated any of the provisions of this act, by agent or otherwise, the commission shall assess a civil sanction of one thousand dollars ($1,000) on the utility.

Appellants contend that subsection (b)(1)'s reference to "this act" refers to Act 324 of 1935 and any subsequent legislative act which amends or has amended Act 324 and that, because nothing in Act 77 suggests that it was intended to amend or be a part of Act 324 for purposes of section 23-1-103, the Commission has no authority to assess sanctions against them for violation of Act 77.

It is clear from Order No. 4 that, in assessing sanctions against appellants, the Commission did so for appellants' violation of Order No. 7 of Docket No. 93-142-U and the Tariff orders of Docket No. 86-159-U as well as Act 77. Assuming without deciding that the Commission was without authority to assess sanctions for Act 77 violations, section 23-1-103(a) clearly gives the Commission authority to assess sanctions for violations of Order No. 7 and the Tariff orders. This section provides that every public utility shall obey and comply with every order made or prescribed by the Commission relating to or affecting the business of the public utility. The "orders" referred to in section 23-1-103(a) are not restricted to any particular act, but rather this section requires every public utility to obey and comply with every Commission order in any way relating to or affecting the business of a public utility. Although appellants argue that they are no longer required to comply with Commission Order No. 7 and the Tariff orders because Ark. Code Ann. § 23-3-114 (1987) was eliminated by Act 77, we do not find this argument persuasive. Order No. 7 and the Tariff

orders resulted from a joint stipulation of the parties, which the Commission was urged to adopt. No reference to section 23-3-114 is made in them. Therefore, we cannot agree that Act 77's elimination of section 23-3-114 nullified those orders.

Furthermore, Ark. Code Ann. § 23-2-421(c)(1) (1987), a provision of Act 324, provides that an order shall take effect and become operative immediately upon the service thereof, unless otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or revoked by the Commission, or vacated upon review. As the Commission noted in Order No. 4, the appellants that were assessed sanctions for failure to comply with Order No. 7, ceased compliance before they sought revocation of Order No. 7 by the Commission. Appellants have not demonstrated that the Commission was without authority to assess sanctions against them.

Appellants also argue that there is not substantial evidence to support a Commission finding that the appellants with representatives present at the AITP Steering Committee meeting "knowingly, willfully, and purposefully" violated Order No. 7 and the Tariff orders. They contend that, because section 23-1-103(b)(1) is penal in nature, it should be strictly construed, and, if this is done, it is clear that their conduct did not constitute a knowing, willful, and purposeful violation of Act 324. In support of their argument, they rely on *St. Louis, Iron Mountain & Southern Railway Co. v. Batesville & Winerva Telephone Co.,* 80 Ark. 499 (1906), where the supreme court held that the words "wilfully and intentionally" in a criminal statute mean more than a mere doing voluntarily or knowingly the act in question:

> The use of the term "willful," and in this case almost its synonym "intentional," in a criminal or penal statute "implies knowledge and a preference to do wrong." They mean in such statutes, "not merely voluntarily, but with a bad purpose." "An evil intent without justifiable excuse." "Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit to do it."

Id. at 504 (citations omitted). Appellants point out that the *St. Louis* decision was handed down before the passage of Act 324 of 1935, and therefore, it must be presumed that the legislature was aware of the supreme court's definition of "willful" when it used the word

"willfully" in the act and intended that definition. *See Scarbrough v. Cherokee Enterprises,* 306 Ark. 641, 816 S.W.2d 876 (1991). Appellants conclude that their conduct in discontinuing the credits does not evince evil intent, bad purpose, or a preference to do wrong.

We cannot agree that it was necessary for the Commission to find "evil intent" in order to find that the appellants willfully violated section 23-1-103(b). In *Steward v. Thomas,* 222 Ark. 849, 853, 262 S.W.2d 901 (1953), the supreme court held that "willful misconduct" depends upon the facts of a particular case and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. In *Trans Union Corporation v. Crisp,* 49 Ark. App. 76, 82, 896 S.W.2d 446, 449 (1995), this court held that "[t]o be found in willful noncompliance, a defendant must have 'knowingly and intentionally committed an act in conscious disregard for the rights of others.'" (quoting *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993)).

In finding that the appellants willfully violated Act 324, the Commission referenced the Steering Committee minutes and emphasized the fact that the ILECs' motion to vacate Order No. 7 was not filed until after they had discontinued the credits. Further, the appellants did not mention in their motion that they had already discontinued the credits. Larry Walther, Executive Director—Regulatory and Industry Relations for SWBT, testified that Wayne Gatlin, the AICCLP Administrator, reports directly to him and that he directed Mr. Gatlin to remove the credits. He admitted that the IXCs were not consulted prior to the credits being eliminated and that the IXCs' first notice of the appellants' actions was by an insert in their CCL invoices. He stated that his authority for discontinuing the credits was his interpretation of Act 77. When asked why he and the other LECs bothered to file their motion to have Order No. 7 vacated, he responded: "Well, I guess we thought it appropriate.... I — I guess to notify the Commission of our intent, to make sure that it was their interpretation also and that's why we're here today." The pertinent portion of the Steering Committee minutes provide:

> With that, the discussion moved to the 1.6M annual credits that are being flowed to from the AITP (LECs) to the IXCs through the

> AICCLP. After some discussion about the remaining pool membership, and questions about continuing obligations to pay the credits, Wayne was instructed not to flow the money to the AICCLP and have Larry Chisenhall draft a motion to seek clarification from the APSC on whether the credits are still due, or not. Wayne is to notify the IXCs that the credits are not being issued, and that the LECs are seeking a ruling from the commission on the continuation of the credits. The committee agreed to an AICCLP tariff change making the obligation of the AITP for the credits zero.

After reviewing the evidence before the Commission, we cannot say that the Commission's finding that the appellants willfully violated Act 324 and its decision to assess sanctions against the appellants that had members present at the Steering Committee is not supported by substantial evidence. In order to prove that a Commission decision is not supported by substantial evidence, the appellant must show that the proof before the Commission was so nearly undisputed that fair-minded persons could not reach the conclusion the Commission did. *See AT&T Communications of the S.W. v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 843 S.W.2d 855 (1992). Appellants have not met this burden.

Affirmed.

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

Paul Daniel WALTERS *v.* Carol Lynn WALTERS

CA 99-625 5 S.W.3d 76

Court of Appeals of Arkansas
Division IV
Opinion delivered December 1, 1999

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

Gean, Gean & Gean, by: *David Charles Gean*, for appellee.

JOHN E. JENNINGS, Judge.This is an appeal from an order requiring appellant to pay $634.67 in past-due medical bills that were incurred on behalf of his children. Appellant's only issue on appeal is the argument that the trial court did not have jurisdiction to determine whether this obligation was dischargeable in bankruptcy. We affirm.

Appellant, Paul Daniel Walters, and appellee, Carol Lynn Walters, were divorced in Oklahoma. Pursuant to an order rendered in

that state, appellant was required to pay sixty-six percent of their children's medical, dental, and optometry expenses not covered by insurance. In conjunction with her application to register the foreign decree, appellee filed a motion for contempt, alleging that appellant had failed to reimburse her for his share of these costs.

As his defense, appellant contended that these expenses were incurred prior to his discharge in bankruptcy on June 19, 1998, and that the trial court lacked jurisdiction to determine whether this debt was dischargeable in bankruptcy. The trial court ruled that it had jurisdiction and that the costs associated with the children's medical expenses were in the nature of support and were not subject to discharge.

In this appeal, appellant does not question the trial court's decision that this was a nondischargeable debt. His sole argument is that the trial court lacked jurisdiction to make that determination. We disagree.

Under 11 U.S.C. § 523(a)(5), debts to a former spouse for alimony, maintenance, or support are not dischargeable in bankruptcy. Unlike many other debts, those for alimony and support are not automatically discharged in the absence of an objection by the creditor. *Fortner v. Fortner*, 631 So.2d 327 (Fla. App. 1994). And, jurisdiction over the nondischargeability of debts under § 523(a)(5) is not exclusive in the bankruptcy courts. *In re Moralez*, 128 B.R. 526 (Bankr. E.D. Mich. 1991). Instead, state and federal bankruptcy courts have concurrent jurisdiction to determine whether a debt is excepted from discharge under § 523(a)(5). *In re Tremaine*, 188 B.R. 380 (Bankr. S.D. Ohio 1995). *See also In re Smith*, 125 B.R. 630 (Bankr. D. Utah 1991); *Manuel v. Manuel*, 238 S.E.2d 328 (Ga. 1977); *Loyko v. Loyko*, 490 A.2d 802 (N.J. Super. Ct. App. Div. 1985). Although appellant cites *In re Ramey*, 59 B.R. 527 (Bankr. E.D. Ark. 1986), and *Riley v. Riley*, 61 Ark. App. 74, 964 S.W.2d 400 (1998), those decisions do not hold to the contrary.

There is no indication in the record that this matter was litigated in the bankruptcy proceeding. Based on the authorities above, the trial court had jurisdiction to decide this issue.

Affirmed.

ROBBINS, C.J., and STROUD, J., agree.

Roger BUFORD *v.* STANDARD GRAVEL COMPANY

CA 99-491 5 S.W.3d 478

Court of Appeals of Arkansas
Division II
Opinion delivered December 1, 1999

Denver L. Thornton, for appellant.

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

David L. Pake, for appellee Second Injury Fund.

SAM BIRD, Judge. Roger Buford appeals a decision of the Workers' Compensation Commission denying his claim for additional benefits for permanent total disability. He argues that the decision of the Commission is not supported by substantial evidence. We agree and reverse and remand for an award of permanent total disability benefits.

Buford, forty years old and a high-school graduate, has an employment history of heavy labor. He was trained as a telephone-cable splicer while in the Air Force. After an honorable discharge, Buford was employed as a truck driver, a "derrick hand" in the oil fields, an electrician, a cable-TV installer, and, most recently, a journeyman welder. In September 1981, Buford was working high on an oil derrick when a chain binder broke, struck Buford in the throat, and his larynx was crushed. As a result, he speaks with rough-sounding hoarseness and cannot speak loudly, but he was never given a permanent-impairment rating for that injury.

In October 1988, Buford was working for appellee Standard Gravel Company as a welder when he sustained a herniated disk and was found to have six lumbar vertebrae, instead of the normal five. On November 10, 1988, Dr. Zachary Mason, a Little Rock neurosurgeon, performed a laminectomy and diskectomy at the L4-5 level on the left. On January 12, 1989, Buford returned to Dr. Mason and requested that he be released to return to work. In a letter to Dr. Gary Bevill, Buford's family physician in El Dorado, Dr. Mason said Buford had a ten-percent permanent-impairment rating. Dr. Mason also said he had cautioned Buford against stressing his back and specifically to avoid lifting objects weighing greater than forty pounds and to avoid repeated bending and stooping. Buford returned to work for appellee.

In 1991, Buford again injured his back at work and returned to Dr. Mason. An MRI showed a very large herniated disk, and a myelogram revealed nerve root compression at the L5-6 level on the left. On August 14, 1991, Dr. Mason performed another lumbar laminectomy to remove the ruptured disk. Following the second injury Dr. Mason again restricted Buford from repetitive bending, stooping, and lifting objects weighing more than forty to fifty pounds, and assigned him a permanent-impairment rating of fifteen percent to the body as a whole. Buford was released to return to work on November 4, 1991.

In February 1993, Buford again returned to Dr. Mason complaining of low back and bilateral leg pain. Dr. Mason stated in a letter to Dr. Bevill dated February 11, 1993, that working as a welder Buford had been unable to strictly follow the restrictions placed upon him and, while lifting heavy pipe, began to have severe back pain to the extent that he was unable to work. Dr. Mason

referred Buford to Dr. Austin Grimes, a Little Rock orthopedist. On May 27, 1993, Dr. Grimes performed another lumbar diskectomy at the L4-5 level and a fusion. Buford has not been able to work since. After extensive physical therapy and rehabilitation efforts, Buford endured a series of epidural steroid injections on July 13, 1995, but continued to have severe pain in his lower back and legs.

On February 27, 1997, Healthworks Outpatient Physical Therapy at JRMC, reported to Dr. Grimes that it had performed a functional capacity evaluation on Buford. The summary stated that Buford had a seventy-five percent validity criteria indicating consistent effort and there was no observed symptom exaggeration or inappropriate illness behavior. It recommended:

> Mr. Buford is *not capable* of working for *an eight hour day*. His functional abilities deteriorated during this evaluation. Due to the length of time since the injury, *and the extent of the injury*, it would appear that Mr. Buford *would not benefit* from any type of rehabilitation program. [Emphasis added.]

At the hearing on Buford's claim for additional benefits, he testified that he lives in a house provided rent free by his in-laws, and he draws social security disability of only $1,300 a month for himself, his wife and a child. He said he cannot sit, stand, sleep, drive, or walk for more than just a few minutes or carry anything over forty pounds. He can do minor maintenance on things like a vacuum cleaner, he sometimes does the dishes, and occasionally makes the beds, but he can do only minor yard work and gardening, although he admitted that he has mowed the yard a few times. He said he had also fished in a bass tournament and gone camping once a year.

Buford also testified that he has friends who live next door and down the street who are disabled like he is, and he walks to visit them. They talk, drink beer, watch television, and listen to music. Buford said he is not on regular pain medication because the insurance company has refused to cover it, and he cannot afford to pay for the prescriptions himself. He said the only thing he has to deaden the pain is beer.

Buford has been evaluated by two rehabilitation companies. One wanted him to become a welder instructor, but they sent him,

a journeyman welder, to school to learn *basic welding*. There is no training in El Dorado that a journeyman welder can take to learn to become an instructor. Furthermore, Buford cannot speak to a class for thirty to forty minutes at a time because of his throat injury, and he can only talk loud enough for a class to hear him "if they were quiet."

The second rehabilitation company forwarded approximately twenty-three job "opportunities" to Buford, and he filled out applications with those employers "honest." Buford explained that if the application had a question about disability on it, he answered truthfully because he is disabled, but if the application did not specifically ask for the information, he did not volunteer it.

The administrative law judge awarded appellant a thirty percent anatomical impairment and a twenty percent wage-loss disability, to be paid by the Second Injury Fund. The Commission affirmed and adopted his opinion. The Second Injury Fund has not appealed its liability. On appellate review, we must view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission. *Boyd v. General Indus.*, 22 Ark. App. 103, 733 S.W.2d 750 (1987); *McCollum v. Rogers*, 238 Ark. 499, 382 S.W.2d 892 (1964). Our standard of review on appeal is whether the decision of the Commission is supported by substantial evidence. *Boyd v. General Indus.*, *supra*; *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998); *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983). Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994); *Johnson v. American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992). These rules insulate the Commission from judicial review and properly so, as it is a specialist in this area and

this court is not. *Wade v. Mr. C. Cavenaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988). However, a total insulation would obviously render the appellate court's function in reviewing these cases meaningless. *Boyd v. Dana*, and *Boyd v. General Indus.*, *supra*.

Buford argues on appeal that the Commission erred in holding that he did not come under the odd-lot doctrine, and we agree. For many years, Arkansas case law provided that an employee who was injured to the extent that he could perform services that were so limited in quality, dependability, or quantity that a reasonably stable market for them did not exist was classified as totally disabled, because he fell within the "odd-lot" category of disabled workers. *See Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978); *Ellison v. Therma-Tru*, 66 Ark. App. 286, 989 S.W.2d 987 (1999); *Nelson v. Timberline Int'l, Inc.*, 57 Ark. App. 34, 942 S.W.2d 260 (1997); *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992), *supp. op.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993). Section 24 of Act 796 of 1993 [now codified as Ark. Code Ann. § 11-9-522(e) (Repl. 1996)] abolished the odd-lot doctrine for permanent disability claims based on injuries that occurred after July 1, 1993; however, the doctrine was applicable to Buford's disability claim stemming from compensable injuries sustained in 1981, 1988, 1991, and 1993.

Under the odd-lot doctrine, where the claim is for permanent disability based on incapacity to earn, the Commission is required to consider *all* competent evidence relating to the disability, including the claimant's age, education, medical evidence, work experience, and other matters reasonably expected to affect his earning power. *Rooney*, *Ellison*, *Nelson*, and *Moser*, *supra*, and *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985). An injured worker who relies upon the odd-lot doctrine has the burden of making a prima facie showing of being in that category based upon the factors of permanent impairment, age, mental capacity, education, and training. If the worker does so, the employer then has the burden of showing that some kind of suitable work is regularly and continuously available to him. *Nelson*, *supra*.

Buford claims he belongs in the odd-lot category because he has a fiften percent permanent anatomical impairment from the first two back surgeries (Dr. Grimes did not give him an anatomical impairment rating), he is unable to speak above a whisper, he has

had three back injuries and surgeries that left him with constant pain, and unable to work more than four hours a day, while at the same time he is restricted from any continuous bending, stooping, walking, standing, and restricted from lifting over forty pounds. Although he finished high school and says he can read, write, and do simple math, his functional equivalency test scores show he is very poor at math and writing.

The Commission emphasized Buford's reluctance to go back to work; his lack of motivation; his use of beer; his enjoyment of walking to his friends' houses; his ability to deer hunt, fish, and camp; his ability to shop with his wife, garden, and mow the yard. The Second Injury Fund also stresses appellant's lack of motivation to work, his enjoyment of spending his days with his other disabled buddies, drinking beer, watching TV, and listening to music.

Although motivation is a factor that may be considered by the Commission in determining permanent disability, *see* Ark. Code Ann. § 11-9-522 (b); *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Sapp v. Phelphs Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998), in this case, the Commission based its decision to deny benefits almost entirely on its conclusion that Buford lacked motivation to work. The record simply does not contain facts that support the Commission's conclusion that Buford was "sadly lacking" in motivation.

The evidence is clear that Buford sustained four serious work-related injuries: a crushed larynx, and three consecutive injuries to his lower back that required surgical correction. After each injury except the last one, Buford has gone back to work. Following the loss of his job as a "derrick hand" due to his larynx injury, he sought out a friend who taught him to weld. Following his first back surgery, he asked the doctor to give him a release to return to work; and he returned to his welding job following his second back surgery. These examples of Buford's conduct do not demonstrate a lack of motivation to work.

The functional capacity evaluation revealed that Buford can work only four hours a day, and then with many physical restrictions. The report stated that Buford "put forth good effort which passed validity criteria," that "there were no indications of symptom magnification," that "a conditioning program could, at best,

help client achieve a light duty rating, but not a full-time work status," and that he "would not benefit from any type of rehabilitation program." These reports, along with the medical reports introduced at the hearing, indicate that Buford's reluctance to work was due to pain and discomfort resulting from his physical condition, not from any lack of motivation on his part.

The Commission seemed to take offense at Buford's testimony that he filled out the employment-application forms truthfully, and that he considers himself disabled. Had he been untruthful or falsely misrepresented his physical condition in obtaining employment, and, thereafter, sustained another work-related injury, the employer could have claimed that it was protected from liability by the *Shipper's Transport* defense. *See Shipper's Transport of Georgia v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979).

When Buford's age, education, work experience, and medical restrictions are considered together, Buford made a clear and convincing prima facie case that he was totally and permanently disabled by his throat injury and his three back injuries. The burden then shifted to the employer to show that work is readily and consistently available within appellant's restrictions in his hometown of El Dorado, Arkansas. The employer failed to meet that burden. Gaye Signoff, a vocational counselor, testified that she had located thirteen jobs in the El Dorado community that she felt were within Buford's abilities, and Buford testified that he filled out applications at all of them. However, because he replied truthfully when asked about his physical condition, or for some other reason, he received no offer of an interview, much less a job, from any of those employers. Buford said when he went to seek a job, most people wondered why he was there, and that at one place where Signoff had told him a stool would be available, he was told that he would not be allowed to sit down at all.

The Commission should have awarded Buford permanent and total disability benefits. We reverse and remand for it to enter the order.

Reversed and remanded.

GRIFFEN and CRABTREE, JJ., agree.

Rita HODGES *v.* Laverne CANNON and Alliene Cannon, the Estate of Alvin L. Moore, and Susan Fox as Executrix of the Estate of Alvin L. Moore, Deceased

CA 99-230 5 S.W.3d 89

Court of Appeals of Arkansas
Division I
Opinion delivered December 1, 1999

[redacted]

Evans & Evans, by: *James E. Evans, Jr.*, for appellant.

Matthews, Campbell, Rhoads, McClure & Thompson, P.A., by: *Edwin N. McClure*; and *Stephen Lee Wood, P.A.*, by: *Stephen Lee Wood*, for appellees.

SAM BIRD, Judge. Appellant, Rita Hodges, appeals an order of the Benton County Probate Court dismissing her contest of the will of her late uncle, Alvin L. Moore. Hodges also appeals an order of the Benton County Chancery Court dismissing her complaint in which she alleged that she had an oral contract with Moore whereby he would make her a beneficiary of his will in return for her moving into his house and taking care of him. Hodges also appeals a joint order of the probate and chancery courts imposing sanctions on her and her counsel pursuant to Ark. R. Civ. P. 11. For clarity we will first set forth the underlying facts, followed by separate discussions of the decisions of the probate court, the chancery court, and the joint order of both courts.

Facts

Rita Hodges, Alvin Moore's niece, had been named as the sole beneficiary of Moore's will, which he executed on October 23, 1996 (the 1996 will). However, on August 6, 1997, Moore revoked the 1996 will and executed a new one (the 1997 will) in which he designated appellees Lavern and Alliene Cannon, his longtime friends and neighbors, as the sole beneficiaries of his estate, and disinherited Hodges. Moore died of cancer on August 16, 1997, at the age of seventy-six.

On August 18, 1997, Susan Fox, an attorney and the designated executrix of Moore's 1997 will, filed a petition for probate of will and appointment of personal representative, and on the same day an order was entered admitting the will to probate and appointing Fox as executrix. On August 27, 1997, in probate court, Hodges filed a demand for notice of proceedings, a petition to remove Fox as the personal representative of the estate, a petition for appointment of herself as personal representative of the estate, and a contest of the 1997 will. Hodges alleged in her will-contest petition that the Cannons had procured the 1997 will through undue influence on Moore; that Moore lacked testamentary capacity to execute a valid will on August 6, 1997; that the will was not

properly executed; and that Susan A. Fox, the executrix, was the preparer of, and benefitted from, the will.

In addition, on August 27, 1997, appellant filed in Benton County Probate Court and in Benton County Chancery Court identical complaints in which she alleged that there existed an oral contract by which Moore agreed to make her a beneficiary of his will in return for her moving into his house and taking care of him. In March 1998, appellee Fox filed a motion in probate court requesting that sanctions be imposed on appellant and her counsel pursuant to Ark. R. Civ. P. 11. The motion alleged a lack of proof supporting the allegations in Hodges's complaint and noted the court's disposition of the issues raised by pleadings. In a brief that accompanied the motion, Fox argued that Hodges's claims were not well grounded in fact, warranted by existing law, or a good-faith argument for the extension, modification, or reversal of existing law, but were interposed for the improper purpose of harassment, unnecessary delay, or needless increase in the cost of litigation.

The will contest in probate court and the contract case in chancery court were consolidated for trial, at which the presiding judge sat as both probate judge and chancellor. After Hodges presented her case-in-chief, the court granted appellees' motions to dismiss appellant's contract-based complaint in chancery court and appellant's petition contesting the will in probate court, which the court followed with written orders dated July 30, 1998, and August 3, 1998, respectively. On November 10, 1998, a joint order of the probate and chancery courts was entered imposing sanctions on appellant and her counsel pursuant to Ark. R. Civ. P. 11, holding appellant and her counsel jointly and severally liable for a portion of appellees' attorney's fees totaling $13,472.

Probate Case

Probate court orders are reviewed de novo on appeal and are not reversed unless the probate court clearly erred. *Wells v. Estate of Wells*, 325 Ark. 16, 922 S.W.2d 715 (1996); *White v. Welsh*, 323 Ark. 479, 915 S.W.2d 274 (1996). A probate court order is clearly erroneous if it is clearly against the preponderance of the evidence. *In re Estate of Davidson*, 310 Ark. 639, 839 S.W.2d 214 (1992). A probate court's finding of fact is clearly erroneous when, although

there is evidence to support the fact found, the appellate court, on reviewing the entire evidence, is left with a definite and firm conviction that the probate court erred. *Balletti v. Muldoon*, 67 Ark. App. 25, 991 S.W.2d 633 (1999). We defer to the superior position of the probate judge to determine the credibility of witnesses and the weight to be accorded their testimony. *Wells v. Estate of Wells, supra.*

In a will-contest case, after the proponent of the will proves that it is rational on its face and has been executed and witnessed in accordance with testamentary formality, the party challenging the validity of the will is required to prove by a preponderance of the evidence that the will is invalid. *In re Estate of Davidson, supra.* In the case of a beneficiary of a will who procures the making of the will, a rebuttable presumption of undue influence arises, which places on the beneficiary the burden of going forward with evidence that would permit a rational fact-finder to conclude, beyond a reasonable doubt, that the will was not the product of insufficient mental capacity or undue influence. *Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992); *Edwards v. Vaught*, 284 Ark. 262, 681 S.W.2d 322 (1984); *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984). A beneficiary procures a will, thereby causing the rebuttable presumption of undue influence to arise, by actually drafting it for the testator. *See, e.g., Looney v. Estate of Wade, supra; Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979). A beneficiary also procures a will, thereby causing the rebuttable presumption to arise, by planning the testator's will and causing him to execute it. *See Orr v. Love*, 225 Ark. 505, 283 S.W.2d 667 (1955). However, a beneficiary who is merely present when a will is drafted does not, by his presence, procure the will. *See, e.g., Abel v. Dickinson*, 250 Ark. 648, 467 S.W.2d 154 (1971); *Sullivant v. Sullivant*, 236 Ark. 95, 364 S.W.2d 665 (1963). Whether the beneficiary procured the making of a will is a threshold question that must be answered in the affirmative before the beneficiary must prove beyond a reasonable doubt that the testator enjoyed both required mental capacity and freedom of will. *See Rose v. Dunn, supra.* However, the burden of proof, in the sense of the necessity to prove lack of mental capacity or undue influence by a preponderance of the evidence, remains on the party challenging the will. *Id.*

The degree of undue influence that invalidates a will is well established. The Arkansas Supreme Court has described this degree of undue influence:

> It is not sufficient that the ... testator was influenced by the beneficiary in the ordinary affairs of life, or that he was in close touch and upon confidential terms with him; but there must be a malign influence resulting from fear, coercion, or any other cause which deprives the ... testator of his free agency in disposing of his property.

Gross v. Young, 242 Ark. 604, 611, 414 S.W.2d 624, 628 (1967) (quoting *Boggianna v. Anderson*, 78 Ark. 420, 94 S.W. 51 (1906)). *Accord In re Estate of Davidson, supra*; *Reddoch v. Blair*, 285 Ark. 446, 688 S.W.2d 286 (1985). In order to void a will, undue influence must be directed toward procuring a will in favor of particular parties. *In re Estate of Davidson, supra; Rose v. Dunn, supra.* However, a beneficiary of a will does not exercise undue influence over the testator merely because the beneficiary influenced him in the ordinary affairs of life or because the beneficiary was in a confidential relationship with the testator when he executed his will. *Reddoch v. Blair, supra; Rosenbaum v. Cahn*, 234 Ark. 290, 351 S.W.2d 857 (1961). In addition, a testator's decision to favor a person with whom he had developed a close and affectionate relationship is not, of itself, proof that the favored beneficiary procured the will by undue influence. *See Reddoch v. Blair, supra*; *Abel v. Dickinson, supra.*

In the November 1998 joint order, the probate court specifically found that the Cannons had not procured Mr. Moore's third will by the exercise of undue influence. In this order the probate court noted, "No one testified to any type of conversation, suggestions, intimidation or any other matter of pressure or coercion. There is no evidence of fear on the part of [Mr. Moore] or anyone which would have deprived him of his free will."

The lack of any undue influence on Mr. Moore exercised by the Cannons was established by the testimony of appellee Fox. Ms. Fox drafted not only the will at issue, but she had also drafted his previous two wills. Ms. Fox testified that on August 6, 1997, when Mr. Moore executed the will at issue in her office, she asked him if anyone was coercing him to make a new will and that Mr. Moore told her that he was not being coerced and that his decision to make a new will was a matter of his own free will. Ms. Fox audiotaped

Mr. Moore's execution of the will at issue, and a transcript of this tape was introduced into evidence as Defendant's Exhibit No. 1. Examination of this transcript shows that Ms. Fox asked Mr. Moore if the Cannons were forcing him to change his will and whether they had promised him anything and that Mr. Moore replied that the Cannons were not forcing him to change his will and that they had not promised him anything. Moreover, examination of this transcript shows that during the execution of his will Mr. Moore stated that he was doing so as a matter of his own free will. Mr. and Mrs. Cannon testified that they were not aware that Mr. Moore had made them the beneficiaries of the 1997 will until after he had done so. Appellant notes that on August 6, 1997, the Cannons drove Mr. Moore to Ms. Fox's law office; however, that they did so does not, of itself, prove that they exercised undue influence over Mr. Moore. *See Reddoch v. Blair, supra*; *Rose v. Dunn, supra*. Mr. Cannon testified that he drove Mr. Moore to Ms. Fox's law office because Mr. Moore asked him to do so. Moreover, both Mr. Cannon and Ms. Fox testified that the Cannons were not in the room when Mr. Moore executed the will at issue. In addition, Ms. Fox testified that in late July 1997 Mr. Moore appeared by himself at her law office and made an appointment to see her on August 6, 1997.

With regard to a testator's mental capacity to execute a will, if he 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 to whom and upon what consideration, at the time the will is executed, then he possesses sufficient mental capacity to execute a will. *Rose v. Dunn, supra; Green v. Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983). Evidence of the testator's mental condition, both before and after execution of the will at issue, is relevant to show his mental condition at the time he executed the will. *See Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). A testator's old age, physical incapacity, and partial eclipse of mind will not invalidate a will if he has the requisite testamentary capacity when the will is executed. *Green v. Holland, supra*. A testator does not lack testamentary capacity merely because old age has impaired his mental faculties. *See Noland v. Noland, supra*.

In its August 1998 order, the probate court found that the appellees' proof of statements that Mr. Moore made when he executed his 1997 will, proved that, at that time, Mr. Moore had

sufficient mental capacity to make a valid will. In the November 1998 joint order, the probate court stated, "There is nothing before the court which would suggest the elements of mental capacity were not present when [Mr. Moore] executed his will on August 6, 1997." Proof of Mr. Moore's possession, on August 6, 1997, of the requisite mental capacity to make a valid will was provided by the testimony of appellee Fox. Ms. Fox testified that she would not have allowed Mr. Moore to execute the will if she felt that he were not competent to do so. Moreover, she testified that, on August 6, 1997, Mr. Moore seemed fully competent to her and that he was aware that he was disinheriting Hodges and was making the Cannons the sole beneficiaries of his will. Examination of the transcript of the audiotape of Mr. Moore's execution of his will on August 6, 1997, reveals that Mr. Moore stated that he wanted to make the Cannons the beneficiaries of his will and that he wanted to remove appellant as a beneficiary because she had moved out of his house and did not want to continue to provide care for him. Appellant notes that there was testimony that Mr. Moore's mental faculties were in decline by August 6, 1997. However, a testator's physical incapacity and partial eclipse of mind will not invalidate a will if the testator had the requisite testamentary capacity when he executed his will. *Green v. Holland, supra.* Appellee Fox's testimony established that Mr. Moore had the requisite testamentary capacity when he executed the 1997 will.

Chancery Case

Appellant's contention that the chancery court erred in finding that she did not have an oral contract with Mr. Moore pursuant to which he would make her a beneficiary of his will is governed by the provisions of Ark. Code Ann. § 28-24-101(b)(1)(1987). Section 28-24-101(b)(1) states that a contract to make a will can be established (insofar as is pertinent to this case) only by a statement of the material provisions of the contract in a provision of the will or by an express reference to the contract in a will and extrinsic evidence proving the terms of the contract. The essential elements of a contract are: 1) competent parties; 2) subject matter; 3) legal consideration; 4) mutual agreement; and 5) mutual obligations. *Odom Antennas, Inc. v. Stevens*, 61 Ark. App. 182, 966 S.W.2d 279 (1998). A contract to make a will is valid when the evidence offered to establish the contract is clear, cogent, satisfac-

tory, and convincing. *Pickens v. Black*, 318 Ark. 474, 885 S.W.2d 872 (1994); *Apple v. Cooper*, 263 Ark. 467, 565 S.W.2d 436 (1978). This evidence must be so strong as to be substantially beyond a reasonable doubt. *Pickens v. Black, supra.* When a trial court's decision on the existence of a contract to make a will turns on the assessment of witness credibility, we defer to the trial judge's superior position to make this assessment. *Apple v. Cooper, supra; Purser v. Kerr*, 21 Ark. App. 233, 730 S.W.2d 917 (1987).

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).

The chancery court found that appellant introduced no evidence that would prove, pursuant to section 28-24-101(b)(1), that appellant had an oral contract with Mr. Moore whereby he would make her a beneficiary of his will in return for appellant's moving into his house and providing care for him. In the November 1998 joint order, the chancery court stated, "[The court] cannot find an enforceable oral contract between [Mr. Moore] and [appellant] was intended or that one ever existed." Appellant failed to satisfy the requirements of section 28-24-101(b)(1) because neither Mr. Moore's 1996 will, in which appellant was named beneficiary, nor the will at issue, contains a statement of the material provisions of a contract between Mr. Moore and appellant, and neither will contains an express reference to a contract between them. Several witnesses testified that Mr. Moore had named appellant as the beneficiary of the 1996 will because he was unhappy that appellant's mother, his late sister, had left appellant only $1,000 in her will. Appellant herself testified that she tried to explain to Mr. Moore the arrangements she had made with her mother regarding what her mother would leave her in her will, but that he did not believe appellant's mother had treated her fairly. Moreover, appel-

lant testified that Mr. Moore told her that he was going to make her a beneficiary of his will because she was the only relative that had kept in touch with him over the years and was the only one that was doing anything for him. It is true that appellant testified that after Mr. Moore made her the beneficiary of his will in October 1996, she agreed to keep house for him, cook his meals and take care of him, but appellant's testimony in this regard simply does not satisfy the requirements of section 28-24-101(b)(1). Thus, the chancellor's decision that there was no valid contract to make Hodges a beneficiary of Moore's will is not clearly erroneous.

Sanctions

Finally, appellant asserts that the probate court and the chancery court erred in granting the appellees' motion for sanctions, pursuant to Ark. R. Civ. P. 11, against her and her counsel. In the November 1998 joint order the courts awarded Fox and Mr. Moore's estate an attorney's fee of $6,736 and awarded appellees Lavern and Alliene Cannon an attorney's fee of the same amount. The courts ordered that appellant and her counsel were jointly and severally liable for the attorney's fee awards. We conclude that the courts erred in granting appellees' motion for sanctions pursuant to Rule 11.

Rule 11 states in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated.... The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of

> the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The primary purpose of Rule 11 sanctions is to deter future litigation abuse and the award of attorney's fees is but one of several methods of achieving this goal. *See Crockett & Brown, P.A. v. Wilson*, 321 Ark. 150, 901 S.W.2d 826 (1995). When a trial court determines that a violation of Rule 11 has occurred, the Rule makes sanctions mandatory. *Id.* The moving party has the burden to prove a violation of Rule 11. *Bratton v. Gunn*, 300 Ark. 140, 777 S.W.2d 219 (1989). The imposition of sanctions pursuant to Rule 11 is a serious matter to be handled with circumspection, and the trial court's decision is due substantial deference. *Williams v. Martin*, 335 Ark. 163, 980 S.W.2d 248 (1998). We review a trial court's determination of whether a violation of Rule 11 occurred under an abuse-of-discretion standard. *Id.* In deciding an appropriate sanction, trial courts have broad discretion not only in determining whether sanctionable conduct has occurred, but also what an appropriate sanction should be. *Id.* When a trial court imposes a monetary award as a Rule 11 sanction, the trial court should explain the reason for the sanction so that a reviewing court may have a basis to determine whether the chosen sanction is appropriate. *Id.* The trial court should consider: 1) the reasonableness of the moving party's attorney's fees; 2) the minimum sanction necessary to deter the nonmoving party from future misconduct; 3) the ability of the nonmoving party to pay; and 4) factors relating to the severity of the nonmoving party's Rule 11 violation. *Id.*

Pursuant to Rule 11, an attorney signing a pleading, motion, or other paper on behalf of a party constitutes a certificate that: 1) the attorney made a reasonable inquiry into the facts surrounding the document or pleading; 2) the attorney made a reasonable inquiry into the law supporting that document to insure that it is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and 3) the attorney did not interpose the document for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. *Id; Ward v. Dapper Dan Cleaners and Laundry, Inc.*, 309 Ark. 192, 828 S.W.2d 833 (1992).

Rule 11 is not intended to permit sanctions just because the trial court later decides that the attorney against whom sanc-

tions are sought was wrong. *Crockett & Brown, P.A. v. Wilson, supra.* In exercising its discretion under Rule 11, the trial court is expected to avoid using the wisdom of hindsight and should test the lawyer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. *Id.* The essential issue is whether the attorney who signed the pleading or other document fulfilled his or her duty of reasonable inquiry into the relevant law, and the indicia of reasonable inquiry into the law include the plausibility of the legal theory espoused in the pleading and the complexity of the issues raised. *Id.* The moving party establishes a violation of Rule 11 when it is patently clear that the nonmoving party's claim had no chance of success. *See Chlanda v. Killebrew*, 329 Ark. 39, 945 S.W.2d 940 (1997).

Although we have concluded that the probate judge's decision that Moore was competent to execute his will is not clearly against a preponderance of the evidence, we do not believe that there is a complete lack of evidence in the record to support appellant's contention that Moore lacked testamentary capacity or that appellees procured the will, and we are unable to say that Hodges' contest of Moore's 1997 will had "no chance of success."

For example, appellant's daughter, Rhonda Kolle, a certified nurses' aid specializing in geriatrics, testified that, during the three days preceding Moore's execution of his will, she stayed with Moore in his home and found it hard to carry on a conversation with him because he would "drift off" and not comprehend what was being said, that Moore thought she (Kolle) was her mother (appellant, Rita Hodges), that he could not remember things he had been told only a couple of hours earlier, and that he confused her present husband with her former one, even though he knew she had been through a "not very nice" divorce from her previous husband. Furthermore, there was evidence that Moore consumed large quantities of alcoholic beverages during the brief period Kolle stayed with him, while simultaneously administering morphine for pain caused by his physical condition.

Also, even though we have held that the judge's decision that the appellees did not procure or unduly influence Moore in the making of his will is not clearly erroneous, we cannot say that the record is void of any evidence that supports that position, or that Hodges had no chance to succeed. After all, there was testimony

that appellees drove Moore to the lawyer's office where the will was made, and that one of the appellees stayed at the lawyer's office while the will was being prepared and executed. This evidence, when coupled with Kolle's testimony about Moore's frail physical condition and confused mental state during the days that immediately preceded the will's execution, gives rise, at least, to cause for reasonable suspicion that the appellees may have exerted some influence over Moore in the preparation and execution of his will, especially in light of the fact that the appellees, although bearing no blood relationship to Moore and, therefore, not natural objects of his bounty, were named the sole beneficiaries of his substantial estate.

To avoid sanctions under Rule 11, a lawyer is required to make reasonable inquiry to determine that the allegations of a pleading are well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. The practice of law is not an exact science and a lawyer is not required, under Rule 11, to anticipate with precision how the evidence will be perceived or whose credibility will be given the most weight by the trier of fact. Mere negligence in the discovery of evidence, inadequate preparation for trial, strategic errors in the presentation and miscalculations of the effect of evidence, or failure to accurately predict the result of a trial, do not give rise to the imposition of sanctions under Rule 11 in the absence of a showing that pleadings in the case were interposed for an improper purpose, "such as to harass, or to cause unnecessary delay or needless increase in the cost of litigation." Ark. R. Civ. P. 11.

We do agree that Hodges's counsel should have known that, in view of the requirements of Ark. Code Ann. § 28-24-101(b)(1), Hodges could not prevail on her complaint in chancery court seeking to establish the existence of a contract to make a will. However, since the probate and chancery court cases were consolidated for purpose of trial, and since it is likely that the trial would have taken place even had the claim of an oral contract not been included, it does not appear to us that the length of the trial or the amount of appellees' attorney's fees would have been significantly affected had the oral contract claim not been made by Hodges. Consequently, we reverse and dismiss the Rule 11 sanctions against appellant and her counsel.

Appellees have also filed a motion for costs and attorney fees arising out of this appeal, alleging that they were required to provide supplemental abstracting of pleadings and orders to which appellant "referenced" in her abstract, but failed to include "the basis" of such pleading or order. Arkansas Supreme Court Rule 4-2 (a)(6) provides that an appellant's abstract need only include "such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision." Likewise, Arkansas Rule of Appellate Procedure—Civil 6(c), provides that "[a]ll matters not essential to the decision of the questions presented by the appeal shall be omitted." We have carefully examined appellant's abstract and do not find that the pleadings and orders are so abridged as to preclude our understanding of the issues presented for appeal. Although appellant's abstract significantly abbreviates the pleadings and orders in the case, it appears to us that she has merely excised matters not pertinent to the issues on appeal, as required by the rules. Appellees' motion does not refer us to any particular pleading or order that they deem to be insufficiently abstracted, and our review did not reveal any. Furthermore, appellees' supplemental abstract appears to include portions of the record that are not essential to our understanding of the issues. Therefore, appellees' motion for attorney fees relating to this appeal is denied.

Affirmed in part and reversed and dismissed in part.

STROUD and NEAL, JJ., agree.

Matthew RAGER, Jr., Marjorie Rager, As Next Friend of Joshua Rager, Deborah Rager, as Next Friend of Cory Rager, and Yolanda Pigeon *v.* Chandra Rager TURLEY

CA 99-104 6 S.W.3d 113

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered December 1, 1999
[Petition for rehearing denied January 12, 2000.*]

* JENNINGS and CRABTREE, JJ., would grant.

James Dunham, for appellant Joshua Rager.

John Van Cleef, for appellants Matthew Rager, Jr., Marjorie Rager, Cory Rager, and Yolanda Pigeon

Mobley Law Firm, by: *Jeff Mobley*, and *Skelton & Steuber, P.A.*, by: *Kristin Steuber*, for appellee.

OLLY NEAL, Judge. This appeal is from the Pope County Probate Court's order authorizing a settlement of a wrongful-death action that appellee Chandra Rager Turley filed following the August 1994 death of her father, Thomas Rager, in a vehicular accident that occurred in the scope of his employment with Tyson Foods, Inc. Thomas was also survived by his minor sons, Tommy Joe (age seventeen years) and Cory (age four years); his mother, Marjorie Rager; his brothers, Matthew Rager and Eugene Rager; and a sister, Yolanda Rager Pigeon. After appellee was appointed administratrix of the estate, she brought a wrongful-death action against the other parties involved in the accident.

After mediation with the defendants in the wrongful-death action, appellee filed a petition with the probate court on January 14, 1998, for authorization to settle the wrongful-death action. On March 11, 1998, appellant Joshua Rager, who was born on February 1, 1988, filed a petition to intervene in the probate action, asserting that he is Thomas's illegitimate child and is entitled to participate in the distribution of the proceeds from any settlement of the wrongful-death action. After Joshua's mother died in 1996, Marjorie adopted Joshua. Appellee objected to Joshua's intervention on the grounds that his claim was barred by Arkansas Code Annotated section 28-9-209 (1987) and that he had not established that he was Thomas's child. Appellee asserted that Thomas had denied his paternity of Joshua and that Joshua's mother had lived with one of Thomas's brothers before Joshua was born.

The probate judge held a hearing on whether Joshua should be treated as a beneficiary and whether the wrongful-death settlement was fair but declined to hear evidence of the distribution of the settlement proceeds at that time. On August 5, 1998, the probate judge issued an order denying Joshua's motion to intervene, stating:

> [T]he intervention claim of Joshua Rager which seeks to participate in the proceeds of the wrongful death claim is barred by the operation of *Ark. Code Ann. Sec. 28-9-209(d) (1987), and its other provisions*, and *Boatman v. Dawkins, 294 Ark. 421, 743 S.W.2d 800*

> *(1988)*. Therefore, since Joshua Rager filed no claim against the estate nor a paternity action against the decedent within 180 days of Thomas Howard Rager's death, he would not be entitled to share in the proceeds of this action....

(Emphasis in original.) The probate judge found that, because Joshua could not share in the wrongful-death proceeds, the $450,043 settlement was reasonable and merited approval. Without holding another hearing, he also approved the distribution of the settlement proceeds to which appellee had agreed.

Joshua, Marjorie, Cory, Matthew, and Yolanda have raised three points on appeal. They argue that the probate judge erred in (1) approving the wrongful-death settlement, (2) approving the payment of a fee to the administratrix from the proceeds of the wrongful-death settlement, and (3) ordering a distribution of the proceeds without first conducting an evidentiary hearing. Appellee concedes, and we agree, that the probate court erred in approving the payment of a fee to appellee from the proceeds, because a wrongful-death recovery does not become part of the assets of the deceased person's estate. *Douglas v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998); Ark. Code Ann. § 16-62-102(e) (Supp. 1999). Accordingly, we reverse the probate court's award of this fee to appellee.

Appellants contend that the probate judge should not have approved the settlement because it did not provide for Joshua and point out that the wrongful-death statute includes the decedent's "children" among the beneficiaries of such an action. Arkansas Code Annotated section 16-62-102(d) (Supp. 1999) states: "The beneficiaries of the action created in this section are the surviving spouse, children, father and mother, brothers and sisters of the deceased person, persons standing in loco parentis to the deceased person, and persons to whom the deceased stood in loco parentis." Appellants argue that, because Joshua seeks to participate in a wrongful-death settlement and not to inherit from Thomas, the probate judge should not have relied on Arkansas Code Annotated section 28-9-209(d) (1987), which sets forth certain requirements before an illegitimate child can inherit from his father's estate. Appellants contend that this statute has no application to the right of an illegitimate child to participate in the distribution of a wrongful-death settlement. Appellants also point out that the case relied

upon by the probate judge, *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988), was an appeal from a determination of heirship. There, an illegitimate child of the decedent was not permitted to share in her father's estate because she had failed to comply with section 28-9-209(d); the proceeds of a wrongful-death settlement were not involved. We agree with appellants that this inheritance statute is irrelevant in the context of the distribution of the proceeds of a wrongful-death settlement.

However, the probate judge's decision approving the settlement is not erroneous as a matter of law because Joshua was not included as a beneficiary. The probate court has the power to decide who is a beneficiary according to the wrongful-death statute. *See Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991). Appellants' contention that appellee bore the burden of establishing Joshua's paternity is simply incorrect; that burden remained with Joshua. In order to qualify as a beneficiary of the wrongful-death settlement, Joshua was required to prove that he is Thomas's child; this, he did not do. Therefore, Joshua's failure to satisfy this burden of proving his status as a beneficiary according to the wrongful-death statute requires us to affirm the probate judge's denial of his motion to intervene. A trial court's ruling will be affirmed on appeal if it is correct for any reason. *Alexander v. Chapman*, 299 Ark. 126, 771 S.W.2d 744 (1989).

Appellants further argue that the probate judge erred in approving the settlement because they do not wish to settle the wrongful-death action on the terms proposed by appellee. Appellants also point to appellee's admission at trial that she accepted the proposed settlement without knowing whether the products-liability aspect of the case had been thoroughly investigated. On the other hand, appellee testified that, with counsel, she engaged in discovery and mediation with the other parties to the wrongful-death action, obtained information about the economic loss caused by her father's death and about other tort jury verdicts in Pope County. She stated that she considered her father's conscious pain and suffering and that, in reaching her decision, she weighed the emotional difficulty a trial would cost the family, the fact that no one accepted blame for the accident, and the possibility of losing at trial. In our view, the probate judge did not clearly err in authorizing appellee to settle for the total amount set forth in the agree-

ment. *See In re Estate of Campbell*, 294 Ark. 619, 745 S.W.2d 596 (1988).

Appellants also argue that the probate judge committed error in failing to hold a hearing on the distribution of the settlement proceeds after he decided the settlement's fairness. We agree. Subsections (g) and (h) of the wrongful-death statute, Ark. Code Ann. § 16-62-102, provide that the court approving a compromise settlement shall fix the share of each beneficiary, upon the evidence, and that the probate court shall consider the best interests of all the beneficiaries. *Bell v. Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994). Subsection (f) states that, if the case is tried, the sum fixed for damages shall be that which is "fair and just compensation for pecuniary injuries, including a spouse's loss of the services and companionship of a deceased spouse and mental anguish resulting from the death, to the surviving spouse and beneficiaries of the deceased person." The factors set forth in (f) also guide the probate court's determination of the apportionment of the settlement proceeds in those cases where the damages issue is not tried. In *Bell v. Estate of Bell, supra*, the probate judge decided the shares of the settlement proceeds allocable to three beneficiaries after an apportionment hearing wherein testimony was taken from three witnesses, including an economic consultant, and a pretrial report from the guardian *ad litem* for each minor beneficiary was filed with the court. On appeal, the supreme court rejected the challenge to the probate court's distribution of the settlement proceeds, noting that the probate judge had considered the compensable elements enumerated in the wrongful-death statute and the evidence presented at the hearing. The court stated:

> Clearly, an historical distinction has been built into the wrongful death legislation between the proceeding to determine the apportionment of the award and the proceeding to determine the liability and computation of damages recoverable from the tortfeasor, which distinction is preserved in the scheme of our current statute where the issue of fixing the amount of damages is dealt with in subsection 16-62-102(f) and the issue of fixing the shares of the statutory beneficiaries in that award is dealt with in subsection 16-62-102(g).

318 Ark. at 492, 885 S.W.2d at 881. *See also Douglas v. Holbert, supra; In re Estate of Campbell, supra.* Thus, we conclude that the wrongful-death statute requires a probate judge, after approval of a

settlement, to consider evidence regarding the distribution of the settlement proceeds among the beneficiaries. We therefore reverse on this point and remand for the probate judge to conduct a hearing for that purpose.

Affirmed in part; reversed and remanded in part.

BIRD, J., agrees.

ROBBINS, C.J., and ROAF, J., concur.

JENNINGS and CRABTREE, JJ., dissent.

JOHN B. ROBBINS, Chief Judge, concurring. While I concur with the majority's disposition of this appeal, I disagree with its rationale in disposing of appellants' first issue, i.e., whether the probate court erred in approving the wrongful-death settlement because it did not provide for Joshua. Joshua contended that he was a biological child of the decedent and was entitled to participate in the wrongful-death proceeding inasmuch as "children" are included as beneficiaries under the wrongful-death statute.

The majority cited *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991), as authority for the proposition that the probate court has the power to decide who the beneficiaries are in a wrongful-death action, but then held that the burden was on Joshua to prove that he was the son of the decedent, and thus a beneficiary. The majority concluded that, because Joshua had failed to do so, the probate court did not err in approving the settlement without Joshua's involvement, even though the trial court did so on the mistaken basis that Ark. Code Ann. § 28-9-209(d) (1987), pertaining to heirship rights of illegitimate children, was applicable.

Although I agree that section 28-9-209(d) is inapplicable to the determination of beneficiary status in a wrongful-death proceeding, I disagree that the probate court had jurisdiction to adjudicate Joshua's paternity. While *Standridge v. Standridge, supra*, pertained to a determination of beneficiary status in a wrongful-death proceeding, it did not involve paternity. The beneficiary categories in contention there were "surviving spouse" and "persons to whom the deceased stood in loco parentis." Consequently, I submit that *Standridge* is not authority for probate court jurisdiction to determine paternity. Arkansas Code Annotated section 9-10-101(a)(1)

(Repl. 1998) provides that "chancery court shall have concurrent jurisdiction with the juvenile division of chancery court in *cases and matters relating to paternity*" (emphasis added); and Ark. Code Ann. § 16-13-304(b) (Supp. 1999) provides as follows:

> Notwithstanding the provision of the Arkansas Juvenile Code of 1989, § 9-27-301 et seq., or any other enactment which might be interpreted otherwise, the chancery court or any division of chancery court shall have *jurisdiction for all cases and matters relating to paternity*. (Emphasis added.)

Our supreme court has had occasion to compare the subject-matter jurisdiction of the probate court and the chancery court in the area of paternity determinations, *In re: Estate of F.C.*, 321 Ark. 191, 900 S.W.2d 200 (1995), and made this observation:

> The probate court has jurisdiction over the administration, settlement, and distribution of estates of decedents and the determination of heirship. *See* Ark. Code Ann. § 28-1-104(1987). Chancery court, however, has concurrent jurisdiction with the juvenile division of chancery court in cases and matters relating to paternity. Ark. Code Ann. § 9-10-101 (Repl 1993); Ark. Code Ann. § 16-13-304(b) (Repl. 1994); Ark. Const. amend. 67. In the instant case, the sole purpose of the action is to establish paternity. Consequently, the probate court was without jurisdiction to hear the matter.

Id. at 193, 900 S.W.2d at 201.

Consequently, in the case now before us, inasmuch as Joshua's paternity had not been adjudicated prior to his seeking to intervene in the wrongful-death proceeding, and because the probate court lacked jurisdiction to make a paternity determination, there was no error committed in dismissing Joshua's motion to intervene.

ROAF, J., joins in this opinion.

JOHN E. JENNINGS, Judge, dissenting. The primary issue on appeal is whether an illegitimate child is entitled to participate as a beneficiary in a wrongful-death proceeding. The trial court held, as a matter of law, that the claim was barred. The majority holds, correctly in my opinion, that the trial court erred in so ruling. The majority then, however, affirms the trial court's decision on the basis that the evidence is insufficient to establish that

Joshua Rager was in fact the illegitimate child of the decedent. I think the majority is wrong for several reasons.

In the first place Joshua Rager was not yet a party to this lawsuit. When the trial court denied his motion to intervene and ruled, as a matter of law, that an illegitimate child could not participate in a wrongful-death settlement, this obviated any need for proof on the issue. A proffer is unnecessary when the substance of the evidence is apparent. Rule 103, Arkansas Rules of Evidence. The law does not require a useless act. *Doup v. Almand*, 212 Ark. 687, 207 S.W.2d 601 (1948). It is not even clear that Joshua, as a nonparty whose motion to intervene had been denied, would be entitled to offer evidence.

But even if we were to require affirmative evidence that Joshua was the child of the decedent, such evidence was before the trial court. Margie Rager, the decedent's mother, testified that she adopted Joshua. She testified that the decedent told her that Joshua was his son and that Joshua had lived with her for some two years. She testified that she told Chandra Turley, a daughter of the decedent and the administratrix of his estate, that Joshua was Tommy Rager's child. Chandra Turley testified that she had been told this by her grandmother.

Although the trial court never reached the issue whether Joshua was in fact Tommy Rager's son, surely the evidence would support a finding that he was.

For the reasons stated, I respectfully dissent. I am authorized to state that Judge CRABTREE joins in this dissent.

Mary Helen THOMAS *v.* Billy Dale THOMAS

CA 99-76 4 S.W.3d 517

Court of Appeals of Arkansas
Division III
Opinion delivered December 1, 1999

[redacted]

Jane Watson Sexton, for appellant.

Everett Law Firm, by *David D. Stills* and *John C. Everett*, for appellee.

MARGARET MEADS, Judge. This is an appeal from certain provisions of a decree of divorce relating to the division of property. Appellant, Mary Helen Thomas, appeals from the provisions of the decree that held that certain stock certificates and three certificates of deposit held in the parties' joint names were appellee's separate property; that awarded appellee $50,000 in his investment account as his separate property; and that awarded appellee one-half of the enhanced value of appellant's retirement account and monthly pension benefit. Appellee cross-appeals from the provisions of the decree treating his cattle and farm as marital property, and not recognizing his interest in appellant's separately owned house. We reverse on direct appeal and affirm in part and reverse in part on cross-appeal.

When the parties married in 1985, appellant had been employed at Levi-Strauss since 1959 and had a pension profit-sharing and a 401(k) account valued at $75,000. Appellant also owned a home subject to a mortgage. Appellee lived on a ninety-six-acre farm. He was in the farming business, had a partnership in a litter business, and ran cattle on the farm he owned as well as on seven other leased farms. The parties signed a prenuptial agreement under which appellant advanced $60,000 to appellee for his farming business. Under the terms of the agreement, appellant was to receive $60,000 from appellee's separate assets in the event of divorce or appellee's death in order to restore appellant to the position she was in prior to the advance. The mortgage on appellant's house was paid off in 1991 with a lump sum of approximately $9,000 from the parties' "tractor" account. Appellant retired in 1992, after thirty-three years with Levi-Strauss, and receives a net monthly pension of $1,338.36. Her retirement accounts are currently valued at $371,000. Appellee has an investment account in his name. Several certificates of deposit as well as shares of Wal-Mart, Tyson, and CIFRA stock are held in both parties' names. The parties also have several bank accounts in both names at McIlroy Bank and Farmers & Merchants Bank. The parties individually had these accounts prior to their marriage, but put each other's names on the separate accounts subsequent to their marriage.

Appellant testified that when they married, appellee had more farming equipment and more cattle than he currently has, and he was active in the farming business. During the marriage appellee received approximately $123,000 from the sale of a farm that his father gave him and his sisters, and he also received money from his father's estate. He incurred certain insurance losses to the poultry houses and barn on the farm he owned prior to marriage for which he received approximately $165,000. In May 1992, appellee sold some cattle for $135,000. Appellant testified that some of the cattle could have been part of appellee's herd prior to their marriage. Also in 1992, appellee sold some farm equipment that "had been there" as long as they were married.

During the marriage, appellant usually deposited her pay from Levi-Strauss into a joint bank account at McIlroy Bank from which she paid the parties' electric bill, telephone bill and Comtel; bought groceries, clothing, and items from Wal-Mart; and made church donations. Appellant also paid certain of appellee's farm expenses including bills for the veterinarian, diesel, tractor tires, and tractor labor. Some of appellant's payroll and bonus checks were also deposited into the joint account at Farmers & Merchants Bank (referred to as the farm or tractor account), the account from which appellee generally spent money and into which appellee deposited all his farm income as well as the parties' joint tax refunds. Sometimes appellant's paycheck could not cover all the parties' expenses, in which case appellant would take money out of the tractor account. Appellant testified that they lived off her paycheck and had she not paid for the household, appellee would not have had the money in his tractor account to do all the things he did. She also testified that she helped appellee earn a living by cutting, raking, and baling hay, disking the ground, and helping work the cattle.

In regard to appellee's cattle, appellant testified that appellee sold most of his farm equipment and cattle in 1992 when they were planning to retire and travel. She testified that appellee's current herd was acquired since 1992. The parties changed their minds about retiring and returned to Arkansas where appellee got back into the farming and cattle business.

Appellant testified in detail regarding three certificates of deposit held jointly by the parties. The largest, valued at $80,000, was purchased with $50,000 of the insurance proceeds for losses to

appellee's farm. It was not until several weeks prior to the hearing on the divorce that appellee said that the certificate came from insurance money, and he did not believe appellant should have any part of it. The other two certificates were purchased with the proceeds of either cattle sales, insurance, or auctions. Appellant testified that they had the certificates for years; when they were purchased both names were put on them; and appellee said "nothing about them not being both of our interest."

With regard to the parties' stock, appellant testified that appellee probably suggested the stock be put in their joint names because he usually decided where large sums of money went and that he had both their names placed on the stock. The money "probably" came out of the farm account, but she had some good bonuses then, and they had some good tax returns, all of which were deposited in the farm account.

Appellee testified that appellant's testimony regarding his insurance losses, inheritance, and the sources of money available to him was "pretty accurate." Appellee agreed that he had a lot "less" cattle and equipment, and older equipment now than when he married. He testified regarding a financial statement that he completed in April 1985 in order to get a loan, but he said even though it states that it is, to the best of his knowledge, a true, correct and complete statement of his financial condition and he signed it, he didn't list all of his property. He admitted that appellant worked in the farming operation, but said "how much hay can you bale from three o'clock in the evening or four o'clock until quitting time." He also testified that after she retired in 1992, she was at the farm full-time, but didn't help him full-time.

Appellee testified further that they generally cleared between $20,000 and $40,000 per year on his farming operation, and he could not have bought all the certificates of deposit and stock if he had to rely on his farm income alone. He said that he paid off some of his debts and bought some stock with his insurance proceeds; he used approximately $100,000 from the sale of his father's farm to pay off debts and bought "stock and stuff" with the remainder; and that the money to pay off appellant's mortgage came from the sale of cattle.

In an amended decree entered November 16, 1998, the chancellor granted appellee a divorce and divided both marital and nonmarital property. The chancellor found among other things that $9,000 in marital funds were used to pay off the mortgage on appellant's house, but in order to adjust the equities between the parties he awarded the house to appellant. The chancellor found that appellant's interest in her retirement account was $75,000 at the time of the parties' marriage; that its current value is $371,000; that the $296,000 increase is marital property; and that one-half of that amount should be equally divided between the parties. In regard to appellant's monthly retirement income, the trial court found that any beneficial interest accruing subsequent to the marriage is marital property. Appellant was awarded $60,000 pursuant to the parties' prenuptial agreement. The chancellor found that the Wal-Mart, Tyson, and CIFRA stock as well as the three certificates of deposit held in the parties' joint names were acquired with the proceeds of appellee's separate nonmarital property; that there was no intent for him to make a gift to appellant; and thus these assets were appellee's separate nonmarital property free and clear of any claim by appellant. The chancellor also found that the funds in the parties' checking and savings accounts were marital property and should be divided equally between the parties. Finally, the chancellor found that appellee's cattle and farm equipment were marital property to be equally divided and sold, with the balance, if any, to be divided equally between the parties.

Appellant argues on appeal that the chancellor erred in finding that the stock certificates and certificates of deposit held in joint names were not marital property; erred in awarding appellee the $50,000 in his investment account as his separate property; and erred in awarding appellee one-half the enhanced value of her retirement and pension accounts. On cross-appeal, appellee argues the chancellor erred in treating his cattle and farm equipment as marital property; and erred in not awarding him any interest in appellant's house.

Appellee has also filed a motion to dismiss this appeal because appellant has accepted $63,978.08 representing the award by the chancellor pursuant to the parties' prenuptial agreement and $7,549.50 representing appellant's share of the parties' joint bank account as benefits under the decree of divorce. Appellee says once

a party accepts a benefit under a decree, the party is no longer permitted to appeal the terms of that decree.

A party may prosecute an appeal from a judgment partly in his favor and partly against him even after accepting the benefit awarded him by the judgment, provided the record discloses that what he recovers is his in any event. *Bolen v. Cumby*, 53 Ark. 514, 14 S.W. 926 (1890). One who accepts the benefit of so much of a decree as is favorable to him is not estopped thereby to appeal from the remainder of the decree, if the part accepted and that appealed from are independent. *Bass v. John*, 217 Ark. 487, 230 S.W.2d 946 (1950). Appellants' appeal was not inconsistent with their acceptance of the judgment amounts where the judgment awards that were accepted were theirs in any event and their claims on appeal expressly went to additional awards. *Shepherd v. State Auto Property & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993).

Here, appellant's appeal is not inconsistent with either her acceptance of the chancellor's award pursuant to the parties' prenuptial agreement or with her acceptance of her share of the parties' joint bank accounts. These items were hers regardless of the outcome of this appeal. We therefore deny appellee's motion to dismiss this appeal.

Appellant's first two arguments on appeal are that the trial court erred in finding that the stock certificates and three certificates of deposit held in joint names were appellee's separate nonmarital property. She says that it is not controverted that these items were purchased subsequent to the parties' marriage and that all were held in the parties' joint names.

Chancery cases are reviewed *de novo*, and the chancellor's findings will not be disturbed unless they are clearly erroneous or clearly against the preponderance of the evidence. *O'Neal v. O'Neal*, 55 Ark. App. 57, 929 S.W.2d 725 (1996). With respect to the division of property in a divorce case, we review the chancellor's findings of fact and affirm them unless they are clearly erroneous, or against the preponderance of the evidence. *Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993).

Once property is placed in the names of both husband and wife without specifying the manner in which they take, such property is presumed to be held by them as tenants by the entirety.

Creson v. Creson, 53 Ark. App. 41, 917 S.W.2d 553 (1996). In order to rebut this presumption, the party claiming the property as separate property must present clear and convincing evidence that there was no intent to make a gift of the property to the spouse. *Mathis v. Mathis*, 52 Ark. App. 155, 916 S.W.2d 131 (1996). Clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact-finder to come to a clear conviction, without hesitation, of the truth of the facts related. *McLain v. McLain*, 36 Ark. App. 197, 820 S.W.2d 295 (1991). On review, the issue is whether the chancellor's finding that the appellee overcame the presumption that these items were held by the entirety by clear and convincing evidence is against a preponderance of the evidence. *Id.*

■ In the present case there was some testimony as to the source of funds used to purchase these items. There was testimony that the stock had been purchased with proceeds of "stuff" that appellee got rid of; some of the proceeds from appellee's insurance; and some of the proceeds of the sale of appellee's father's farm. In regard to the certificates of deposit, there was testimony that one was purchased with some of the proceeds of appellee's insurance and the others with proceeds of either cattle sales, insurance, or auctions. The fact that money or other property may be traced into different forms is an important matter, but tracing is merely a tool and not an end in itself; therefore, it does not end the inquiry. *McClain, supra.* In the instant case, it is not disputed that these items were purchased during the marriage and held in the parties' joint names, and thus the question is whether appellee presented sufficient evidence to overcome the presumption that the parties owned the property as tenants by the entirety. *Id.* We find that he did not.

■ We first note that the chancellor stated that the testimony had been *pretty convincing* that the shares of stock were purchased after the sale of items that appellee owned prior to the parties' marriage. This does not meet the *clear and convincing* evidence standard. Moreover, in regard to both the stock and the certificates of deposit, the chancellor stated that in order to find that appellant had an interest in them, he had to find appellee made a gift to her, and because appellant testified that appellee never said anything about it,

the chancellor would have trouble or be strained to find a gift. But, as we have already said, once property is placed in the names of both husband and wife without specifying the manner in which they take, the property is *presumed* to be held as tenants by the entirety. *Creson, supra.* Finally, appellee presented no testimony whatsoever that he had no intent to make a gift to appellant. Therefore, the presumption was not rebutted, and the chancellor erred in finding that the shares of stock and three certificates of deposit were appellee's separate nonmarital property. We reverse and remand on this issue for the chancellor to modify his order and to divide these items as marital property pursuant to Ark. Code Ann. § 9-12-315 (Repl. 1998).

Appellant next argues that the chancellor erred in awarding appellee $50,000 in an investment account in appellee's name with Arvest Bank Co. which represented the proceeds from a 1992 sale of cattle. She contends that where there was no proof that the cattle were the same as appellee owned in 1985 and where she actively assisted appellee in the cattle farming operation, the court erred in not awarding her a one-half interest in the remaining proceeds from the sale.

Maury Hill testified that appellee had approximately 350 head of cattle when the parties married; that appellee sold just about all his cattle in 1992, some seven years after the parties' marriage; and that he saw appellant on the farm working as hard as any man. Appellant testified that in May 1992 appellee sold a "bunch" of cattle to Randy Laney for $135,000; that some of the individual cattle might have lived from 1985 to 1992 and been part of the original herd; that the herd itself was intact; that the sale was from that herd; and that the $50,000 represented the last payment from Laney. Appellant also testified that she worked on the farm and helped appellee with his cattle, and that her income from Levi-Strauss was used for certain farm expenses including veterinarian bills for the cattle. Moreover, appellee testified that appellant worked hard and would come out to the farm and help him bale hay after she got off work. From the evidence above, it is obvious that the parties' joint efforts went into the maintenance of the herd of cattle. Therefore, we find that the chancellor's award of the $50,000 in appellee's investment account was clearly erroneous, and we reverse and remand on this issue for the chancellor to make a

division that recognizes appellant's contribution to the maintenance of the herd.

Finally, appellant argues that the trial court erred in awarding appellee one-half of the enhanced value of her retirement accounts and monthly pension benefit. The parties were married in December 1985 and were divorced by decree entered November 16, 1998. At the time of the parties' marriage, appellant was working at Levi-Strauss earning approximately $45,000 per year and had profit-sharing and 401(k) accounts worth about $75,000. Appellant retired in 1992 after thirty-three years' service. Since that time she has received $1,338.36 per month from her pension plan and draws nothing from the 401(k) unless she requests it. The chancellor found that appellant's interest in the retirement accounts as of the date of the parties' marriage was $75,000; that on the date of the hearing the accounts' value was $371,000; and that the $296,000 increase in value of the accounts is marital property to be divided equally between the parties, with each party accruing to the beneficial ownership of one-half of the amount. In regard to appellant's monthly pension, the chancellor found that appellant has a vested interest in a separate individual retirement account through Levi-Strauss & Co. upon which she now draws approximately $1,300 per month and that any beneficial interest accruing in the account subsequent to the marriage is marital property.

Appellant argues that during the course of the parties' marriage the funds in the retirement account ballooned from $75,000 to $371,000 through no effort or action of the parties and for "whatever unexplained economic reason." Appellant says it is inequitable, given her thirty-three years' labor during which the parties were married only seven years, to award appellee a $148,000 windfall. Appellant argues that the trial court should have awarded appellee a fractional interest in her benefits reflecting the number of years the parties were married and the number of years appellant actually worked at Levi-Strauss, according to the formula approved in *Marshall v. Marshall*, 285 Ark. 426, 688 S.W.2d 279 (1985), and *Askins v. Askins*, 288 Ark. 333, 704 S.W.2d 632 (1986).

We first address the matter of appellant's monthly pension of $1,338.36. Appellant testified that this pension check is the result of a pension plan she earned during her period of employment at Levi-Strauss, only a part of which time she was

married to appellee. Pension benefits based on contribution or services outside the period of the marriage constitute nonmarital property, and an award of retirement benefits should reflect the correct proportionate share of each party. *Marshall, supra.* Military pensions have been divided proportionately to the number of years of marriage coinciding with the pensioner's military service. *See Young v. Young*, 288 Ark. 33, 701 S.W.2d 369 (1986) (approving an award to the spouse of the military retiree of one-half of 17/20 of the retirement pay where the parties had been married for seventeen of twenty years of military service); *Askins, supra* (approving an award to the spouse of one-half of twelve divided by the number of years appellant will have served upon retirement where the parties had been married for twelve years of the appellant's military service). Although appellant's pension is not a military pension, it is analogous, and we see no reason why it should be treated differently; therefore we reverse the chancellor's finding in regard to appellant's monthly pension benefit and remand for the chancellor to award appellee a proportionate share of appellant's monthly benefit. Appellee is entitled to one-half of a fractional interest in each pension check. The fraction will have a numerator of seven, the number of years the parties were married during appellant's employment at Levi-Strauss; the denominator will be thirty-three, the total number of years of appellant's employment.

In regard to appellant's 401(k) plan, Ark. Code Ann. § 9-12-315(b)(1) (Repl. 1998) provides that marital property means all property acquired subsequent to the marriage. Pension benefits based on contributions not made during the marriage constitute nonmarital property. *Marshall, supra.* Therefore, the chancellor correctly found that appellant's $75,000 interest in these retirement accounts as of the date of the parties' marriage was appellant's separate property and not subject to distribution to appellee. However, the chancellor also found that the $296,000 increase in the value of appellant's retirement accounts subsequent to the parties' marriage was marital property. The increase in value of property acquired prior to marriage is excepted from the definition of marital property. Ark. Code Ann. § 9-12-315(b)(5); *Smith v. Smith*, 32 Ark. App. 175, 798 S.W.2d 442 (1990). Here, at least part of the $296,000 increase in appellant's retirement account resulted from the increase in the value of appellant's nonmarital property. Therefore, the chancellor erred in holding the entire increase in value of

appellant's retirement accounts to be marital property. *Yockey v. Yockey*, 25 Ark. App. 321, 758 S.W.2d 421(1988). The increase in value of the $75,000 in appellant's retirement accounts at the time of the parties' marriage is nonmarital property, and we reverse and remand on this issue for the chancellor to determine the amount of the increase attributable to appellant's $75,000 nonmarital interest in the accounts which increase constitutes appellant's nonmarital property.

On cross-appeal, appellee first argues that the trial court erred in treating his cattle and farm equipment as marital property. With regard to the farm equipment, appellee says the farm equipment was either owned prior to the marriage or was acquired in exchange for farm equipment owned prior to the marriage, and therefore should have been awarded to him as his premarital property. We agree that the farm equipment is nonmarital property.

At trial, the parties submitted a list of assets as Stipulated Exhibit No. 2. Although appellant testified that she did not agree that some of the items on that exhibit represented farm equipment that appellee owned prior to their marriage and that he did not have all of the items, she also testified that he had dozers, back hoes, seed drills, rakes, fluffers, hay balers, tractors, wagons, silage cutters, and "all that stuff" a long time before she knew him. The chancellor erred in finding that the farm equipment is marital property, and we reverse on this point.

In regard to the cattle, however, Maury Hill testified that appellee had approximately 350 head of cattle when the parties married, and that in 1992 he sold "just about all his cattle." Appellee heard Hill's testimony regarding the cattle and agreed that the testimony was "pretty well the way I see the matter." Moreover, appellant testified that appellee sold his cattle in 1992 when the parties were planning to retire and travel. Later they changed their minds, returned to Arkansas, and appellee started buying cattle again and got back into the farming business. Therefore, we do not agree that the chancellor erred in finding the cattle to be marital property.

Appellee's second argument on cross-appeal is that the trial court erred in not recognizing appellee's interest in appellant's house by virtue of his $9,000 payment on the mortgage. In its order

the trial court found that $9,000 of marital funds were utilized to make a payment on the outstanding mortgage. However, in order to adjust the equities between the parties, the chancellor awarded the house to appellant free of any claim on appellee's part. It appears that the basis for the chancellor's decision was to adjust the equities between the parties. In light of our previous findings on direct appeal we reverse on this point and remand to the chancellor to reconsider the equities in light of our reversal.

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

PITTMAN and NEAL, JJ., agree.

Sylvester HATLEY *v.* STATE of Arkansas

CA CR 99-416 5 S.W.3d 86

Court of Appeals of Arkansas
Division I
Opinion delivered December 1, 1999

William C. McArthur, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Sylvester Hatley was convicted in a jury trial of negligent homicide and refusal to submit to a chemical test, for which he was sentenced as an habitual offender to ninety-six months in the Arkansas Department of Correction. . On appeal he argues that 1) the evidence is insufficient to support his conviction for negligent homicide, and 2) the trial court erred in giving a jury instruction based on the refusal statute, Ark. Code Ann. § 5-65-202 (Repl. 1997), for the refusal to submit count. We affirm.

On May 18, 1997, Danny Loveless and his wife experienced mechanical trouble with their pickup truck as they drove northbound on Highway 65 toward Little Rock. They pulled well off the roadway and stopped. At approximately 12:20 a.m., the vehicle that Hatley was driving slammed into the pickup, killing Danny Loveless. Hatley was subsequently charged with negligent homicide, DWI, and refusal to submit to a chemical test.

At Hatley's trial, the following evidence was presented. Dr. Greene "Kip" Colvin, an ear, nose, and throat specialist who treated Hatley's facial injuries in the emergency room, testified that while working closely with Hatley's mouth area he noted a strong

odor of alcohol. He also stated that Hatley seemed "a little more lethargic or sleepy" than he would have expected from someone undergoing a painful examination and that observation bolstered his belief that Hatley was under the influence of intoxicants. Dr. Colvin also testified that the odor of alcohol could come, at least in part, from alcohol being dispersed from the body through the lungs.

Eddie Johnson testified that he saw Hatley driving on the night in question. According to Johnson, Hatley came up behind him "real fast" and eventually passed him. After Hatley passed, Johnson stated he saw the car "zigzagging from one side of the road to the other" from shoulder to shoulder across both lanes. Johnson observed this erratic driving for at least a minute, then saw Hatley hit the Lovelesses' parked vehicle. Johnson stated that he was driving at seventy miles an hour at the time, so that Hatley was exceeding the speed limit at the time of the accident. According to Johnson, the Lovelesses' truck was off the road, far enough so as not to be in the way of anyone driving in the ordinary lane of traffic. On cross-examination, Johnson testified that he told police that Hatley either had to have gone to sleep or been intoxicated.

Eddie Johnson's wife Barbara, who was riding with him on the night of the accident, testified next. She recalled that Hatley came up behind them, which caused her husband to move over to the right-hand lane. After a short time, Hatley passed them and began weaving from lane to lane. According to Barbara Johnson, the weaving stopped when Hatley hit a vehicle that was parked on the right-hand side of the road.

Sergeant Steve Pickens of the Arkansas State Police testified that when he arrived on the scene he observed heavy front-end damage to Hatley's vehicle, and corresponding damage to a horse trailer that the Lovelesses were towing. Pickens stated that the Lovelesses' vehicle was more than three feet off the roadway. He also observed Danny Loveless lying on the roadway in front of the pickup truck. According to Sergeant Pickens, he smelled the odor of an alcoholic beverage in Hatley's vehicle.

Roger L. Perry, another trooper who responded to the accident, testified that he observed the Lovelesses' vehicle parked more on the grass than on the shoulder of the road. He also testified that when he arrived, Hatley was behind the wheel of his

Cadillac and had refused medical treatment from the EMTs that were already on the scene. Trooper Perry then recalled that when Sergeant Pickens told Hatley that if he was refusing treatment he would have to go with them, as Hatley got out of his car, he noted that Hatley was "unstable" and that there was a "very strong" odor of intoxicants about his person. He also stated that he had to hold Hatley by the arm. At that point, Hatley decided that he wanted treatment.

Corporal Derrick Briggs, the first trooper to reach the scene of the accident, testified that the Lovelesses' vehicle was parked approximately five feet off the lane of traffic. He also testified that he smelled an odor of intoxicants coming from Hatley. Based on his suspicion that alcohol was involved, at UAMS, Corporal Briggs read Hatley his "Act 106 rights," his implied consent to a blood, breath, or urine test. According to Corporal Briggs, Hatley consented to the test by initialing the "yes" block and signing the form. When a nurse came in to draw the blood, however, Hatley refused to let her do so. On cross examination, Corporal Briggs stated that in addition to the strong odor he detected at the scene and in the hospital, he also noted at both the hospital and at the accident scene that Hatley had red, bloodshot eyes. Over Hatley's objection, the consent form was entered into evidence.

At the close of the State's case, Hatley moved for a directed verdict on the negligent homicide charge, arguing that the only proof of intoxication was an odor. The motion was denied. After Hatley presented a case consisting of testimony from his brother, Ivory Moore, and his mother, Mary Hatley, who both denied seeing any evidence of intoxication on the day in question, but noted that Hatley appeared to be mentally impaired because of his injuries, he renewed his objection, which was again denied.

Hatley first argues that there was insufficient evidence of intoxication to sustain his conviction for negligent homicide. He contends that there was only evidence of an odor of intoxicants, which, without any other evidence, is insufficient to prove intoxication. This argument is without merit.

Negligent homicide is codified in pertinent part as follows:.

> (a)(1) A person commits negligent homicide if he negligently causes the death of another person, not constituting murder or manslaughter, as a result of operating a vehicle, an aircraft, or a watercraft:
>
> (A) While intoxicated . . .
>
> (2) A person who violates subdivision (a)(1) of this section is guilty of a Class D felony.
>
> . . .
>
> (c) For the purpose of this section, "intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

Ark. Code Ann. § 5-10-105 (Repl. 1997). The test for determining sufficiency of the evidence is whether there is substantial evidence to support the verdict. *Johnson v. State*, 337 Ark. 196, 987 S.W.2d 694 (1999). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* The appellate court considers only the evidence that supports the conviction without weighing it against other evidence favorable to the accused. *Id.*

Contrary to Hatley's assertion, there was more than the mere odor of intoxicants to prove the intoxication element of negligent homicide. In addition to the strong odor of intoxicants reported by Dr. Colvin, Sergeant Pickens, Trooper Perry, and Corporal Briggs, the troopers all noted that Hatley struck the Lovelesses' horse trailer despite the fact that it was parked well off the roadway. Additionally, Corporal Briggs testified that Hatley had bloodshot eyes. The observations of police officers with regard to the smell of alcohol and actions consistent with intoxication can constitute competent evidence of intoxication. *Id.* Moreover, Hatley also refused to take a blood test, and the refusal to be tested is admissible evidence on the issue of intoxication and may indicate the defendant's fear of the results of the test and the consciousness of guilt. *Medlock v. State*, 332 Ark. 106, 964 S.W.2d 196 (1998). Eddie and Barbara Jordan also testified that Hatley was weaving across two

lanes of traffic and generally driving in a manner that caused Eddie to believe that Hatley was "either asleep or intoxicated." *See Weeks v. State*, 64 Ark. App. 1, 977 S.W.2d 241 (1998). Accordingly, we find that there is substantial evidence of intoxication and therefore we affirm the negligent homicide conviction.

Hatley next argues that the trial court erred in giving a jury instruction on refusal to submit because the instruction did not specify a knowing or intentional culpable mental state. Further, he contends that he did not knowingly or intentionally refuse the test because of the serious mental and physical condition he was in and that he was prejudiced because the jury could use his refusal to take the test to raise a presumption of conscious guilt of intoxication. Hatley asserts that without this presumption of intoxication, there was nothing but the odor of intoxicants to establish the intoxication element and the verdict would have been different. We cannot consider this argument because it is not preserved for review.

At the trial, the State submitted a jury instruction on refusal to submit based on the statute, Ark. Code Ann. § 5-65-205 (Repl. 1997), which states in pertinent part:

> (a) If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency, as provided in § 5-65-202, none shall be given, and the person's motor vehicle operator's license shall be seized by the law enforcement officer, and the officer shall immediately deliver to the person from whom the license was seized a temporary driving permit.
>
> (b) The Office of Driver Services shall then proceed to suspend or revoke the driving privilege of the arrested person, or any nonresident's driving privilege, on the basis of the number of previous offenses in accordance with the provisions of § 5-65-104.

The following instruction was given over Hatley's objection:

> Sylvester Hatley is charged with the offense of refusal to submit to a chemical test.
>
> To sustain this charge, the state must prove beyond a reasonable doubt that:
>
> (1) A law enforcement officer requested that Sylvester Hatley submit to a chemical test of his breath, blood or urine; and

(2) Sylvester Hatley refused to submit to the chemical test as designated by the law enforcement agency by which the officer is employed.

Although Hatley objected to this instruction because it omitted a culpable mental state as an element of the offense, he failed to proffer an instruction containing what he saw as the correct elements of the offense. This failure to proffer or abstract the proposed instruction precludes this court from considering the issue on appeal. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997).[1]

Affirmed.

HART, J., and HAYS, S.J., agree.

[1] We note that under Ark. Code Ann. § 5-2-204 (c) (1) (Repl. 1997), a culpable mental state is not required if: "the offense is a violation, unless a culpable mental state is expressly included in the definition of the offense." An offense is a violation, as opposed to a felony or misdemeanor, "if the statute defining the offense provides that no sentence other than a fine, or fine or forfeiture, or civil penalty is authorized upon conviction." Ark Code Ann. § 5-1-108 (b) (Repl. 1997). Because the only penalty for refusal to submit is suspension of a driver's license, it is clearly only a violation and accordingly, a culpable mental state is not required.

Cephas BREWER *v.* STATE of Arkansas

CA CR 98-935 6 S.W.3d 124

Court of Appeals of Arkansas
Division IV
Opinion delivered December 8, 1999

[redacted]

Karen Pope Greenaway, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Cephas Brewer appeals his convictions of two counts of rape, for which he received two concurrent twenty-year prison terms. He does not argue that the evidence was insufficient to convict him for either of these rapes committed against two of his stepgranddaughters. His points on appeal are that the trial court erred in the following ways: (1) admitting the testimony of each girl as to the other's count of rape, in violation of Ark. R. Evid. 404(b), (2) refusing to sever the counts of rape into separate trials, and (3) failing to read a stipulated jury instruction to the jury. We affirm.

A summary of the victims' testimonies is necessary. Appellant was married to the victims' grandmother. One of the victims, V.R., was twenty-two, married, and pregnant with her second child at

the time of trial. She testified that she had experienced numerous episodes of sexual abuse that began when she was approximately ten or eleven years of age and continued until she was sixteen years old. Overlapping during that time, the other victim, A.J., was present and actually lived with her grandmother and her stepgrandfather for a few months. A.J., age twelve at the time of trial, was ten years younger than her older cousin.

V.R. testified that she often went to appellant's home after school, and appellant began to approach her in a sexual manner. This began when she was in the fifth grade, she recalled, which would have been in the mid-1980s. At first, V.R. was touched on her breasts and vagina. Appellant then asked her to give him oral sex, this occurring in the barn after he had asked her to help tend to the chickens. She complied, following appellant's instructions on how to do it. Thereafter, every time she went over to her grandmother's and appellant's house, he had her perform oral sex on him. Appellant had intercourse with V.R. for the first time when she was thirteen, at his home when they were lying down together to take a nap. Appellant told V.R. that he loved her and that he was preparing her for dating and being married. Appellant had intercourse with V.R. more than twenty times between the time that V.R. was thirteen and sixteen. She also testified that appellant showed her a picture of appellant's stepdaughter (V.R.'s aunt) performing oral sex on him in the same manner as appellant had instructed V.R. to do it. Once V.R. was old enough to get a job and a car, she rarely spent any time over at her grandmother's and appellant's house. V.R. stated that she had kept this secret all these years and did not wish to be testifying about it. V.R.'s concern was that she did not want this to happen to her young cousin, A.J.

A. J. testified as well. The sexual abuse perpetrated on A.J. was testified to have occurred between her ages of five and ten, approximately falling in the years 1989 until January 1996. Because A.J.'s parents had separated during these years, A.J., her mother, and her brother lived with appellant for a few months. During the other pertinent time, she went to appellant's house after school, during summer, or anytime that her mother needed a sitter. She often went on camping trips and other outings with her stepgrandfather.

A.J. testified to much of the same behavior that V.R. did. A.J. was fondled and asked to perform oral sex on appellant, beginning

when she was in kindergarten. A.J. gave a detailed account about what appellant required her to do during these episodes. A.J. also testified that appellant brought a jar of Vaseline that he called "slickum" on camping trips; that appellant would make sure that A.J.'s brother was asleep in another tent; that appellant would put "slickum" on her vagina; and that he would try to enter her vagina but could not. This was not an isolated event. Appellant taught A.J. how to "french" kiss him. Appellant also showed A.J. pornographic materials to show her how to position herself during sex with him. He told A.J. that he loved her and that she was "lucky" to have this happening to her.

The victims' episodes of sexual abuse coincided on one camping trip. V.R. testified while the three of them were laying down to sleep together in the back of appellant's truck, appellant put himself between the girls, had sex with V.R., and then had A.J. perform oral sex on him. Afterward, they all slept together in the bed of his truck.

404(b) Evidence

Appellant argues that it was error to allow each girl to testify about their experiences because it was improper for the jury to use this testimony as to the other's count of rape. Rule 404(b) states:

> 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 notice, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

An exception has been carved out, commonly known as the "pedophile exception," which provides:

> When the alleged crime is child abuse or incest, we have approved allowing evidence of similar acts with the same or other children in the same household when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship.

Taylor v. State, 334 Ark. 339, 349, 974 S.W.2d 454, 460 (1998); Mosley*v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996); *see also*

Munson v. State, 331 Ark. 41, 959 S.W.2d 391 (1998); *Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994). It is also admissible to show the familiarity of the parties and antecedent conduct toward one another and to corroborate the testimony of the victim. *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987); *Hyatt v. State*, 63 Ark. App. 114, 975 S.W.2d 433 (1998). Such evidence helps to show the depraved instinct of the accused. *Williams v. State*, 103 Ark. 70, 146 S.W. 471 (1912). The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Munson, supra.* We find no abuse of discretion in this case.

Appellant concedes that the forced oral sex and sexual intercourse are acts similar in nature. Appellant argues that V.R. did not live in the same household and therefore does not meet a requirement of the pedophile exception. We disagree. This case presents the classic situation for application of the pedophile exception. These girls were in the same relationship to the appellant; both were stepgranddaughters. While A.J. did in fact live in appellant's household for a period of time, the majority of contact between appellant and these girls was due to their positions as stepgranddaughters and the frequency of their visits to his home. The sexual abuse always occurred when the girls were in his care or under his authority. This is sufficient to trigger the pedophile exception. *See Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998) (friend of daughter/victim allowed to testify that she too was abused when spending the night at appellant's house); *Greenlee, supra* (evidence permitted in case of a rape of a five-year-old girl in babysitter's care under this exception when prior sexual abuses occurred with all young boys while appellant babysat them). While appellant asserts that there was no intimate relationship with these girls, we could not disagree more. The nature of their familial relationship and the extensive time spent with each of them belies this assertion.

Appellant displayed pornographic materials to both girls. To the extent that appellant argues that the testimony regarding pornographic material should not have been permitted, he is in error. Just because some of the acts did not rise to the level of rape did not render evidence of those acts inadmissible. *See Hyatt* and *Greenlee, supra.*

Appellant argues that we should adopt a standard stated in an Arizona case requiring reliable medical expert testimony to demonstrate a continuing emotional propensity to commit the act charged in pedophile cases. We decline to do so and could not do so. We must follow the precedent set by our supreme court, and we are powerless to overrule its decisions. *Kearse v. State*, 64 Ark. App. 144, 986 S.W.2d 423 (1999).

Accordingly, we hold that in this case the trial court did not err in concluding that the probative value of the evidence outweighed the danger of unfair prejudice because the evidence involves similar crimes against children who were in appellant's care or household at the time that the incidents occurred. *See e.g. Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998).

Motion to Sever Trials

Appellant argues that the trial court erred in denying his motion to sever the counts of rape for separate trials. We disagree. Arkansas Rule of Criminal Procedure 22.1 provides that if an appellant's pretrial motion for severance is denied, he must renew the motion before or at the close of all the evidence. If there is no renewal, then the argument is waived on appeal. The reasoning is that the trial court is in a far better position to know after the evidence has been presented whether the charges should have been severed due to their being joined solely because they were of the same or similar nature and not part of a single scheme or plan. *Wynn v. State*, 316 Ark. 414, 871 S.W.2d 593 (1994). Here, appellant's pretrial motion to sever was denied; he never renewed the motion. The fact that appellant mentioned a motion to sever in the motion for new trial does not suffice to renew the motion, especially when the motion for new trial, filed before judgment was entered, was ineffective. *See Brown v. State*, 333 Ark. 698, 970 S.W.2d 287 (1998).

Jury Instruction

Appellant argues that the trial court erred in failing to read Arkansas Model Jury Instruction—Criminal 203-A, which reads:

> Members of the jury, you are instructed that evidence of other alleged crimes, wrongs or acts of [defendant] may not be considered by you to prove the character of [defendant] in order to show that he acted in conformity therewith. This evidence is not to be considered to establish a particular trait of character that he may have, nor is it to be considered to show that he acted similarly or accordingly on the day of the incident. This evidence is merely offered as evidence of [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [absence of mistake or accident] [specify other]. Whether any other alleged crimes, wrongs, or acts have been committed is for you to determine.

However, there is no evidence that appellant objected to the omission of the instruction when the instructions were read to the jury or at the conclusion of their reading. A party who does not object at the first opportunity, thereby giving the trial court an opportunity to correct the alleged error, waives the argument on appeal. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). Appellant attempted to raise this issue in his motion for new trial, but as has been discussed, that motion was ineffective because it was filed prior to the judgment. *Brown, supra.* Appellant's attempt to raise the issue of ineffective assistance of counsel with regard to this jury instruction is likewise barred because it is raised for the first time on appeal. *Marts, supra.*

For the foregoing reasons, we affirm.

JENNINGS and STROUD, JJ., agree.

Albert Beasley MARSHALL and Frederick Darnell Marshall *v.* STATE of Arkansas

CA CR 99-418 5 S.W.3d 496

Court of Appeals of Arkansas
Division I
Opinion delivered December 8, 1999

William C. McArthur, for appellant.

Mark Pryor, Att'y Gen., by: *James R. Gowen, Jr.*, Asst. Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. The appellants, Albert Beasley Marshall and Fredrick Darnell Marshall, appeal their convictions for aggravated robbery and theft of property for which each received total sentences of ten years in the Arkansas Department of Correction. Both challenge the sufficiency of the evidence to support their convictions. Albert Marshall also argues that the trial court erred in denying his motion to suppress his custodial statement, made prior to being advised of his *Miranda* rights, regarding his disposal of a weapon. We affirm.

We consider challenges to the sufficiency of the evidence prior to considering other alleged trial errors. *See, e.g., Britt v. State*, 334 Ark. 142, 150, 974 S.W.2d 436, 439 (1998). A person commits the offense of aggravated robbery if, with the purpose of committing a theft, he employs or threatens to immediately employ physical force upon another while armed with a deadly weapon. Ark. Code Ann. § 5-12-103(a)(1) (Repl. 1997). A person commits the offense of theft of property when he knowingly takes unauthorized control over the property of another with the purpose of depriving the owner thereof. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 1997). We affirm if there is substantial evidence to support a verdict. *Britt, supra.*

On January 26, 1999, while Bruce Shealey was in the parking lot of the Holiday Inn Select in Little Rock, a man wearing a red jacket grabbed him from behind and stated, "I got a gun in your back. I want your wallet." When Shealey tried to move, the assailant said, "You don't understand. I have a gun. I'll put a hole in your

head." After Shealey saw that he was holding a nine-millimeter or .45 caliber handgun, Shealey gave him his wallet, which contained credit cards. Shealey was released, and he ran between two parked cars. From there, he heard someone say, "Shoot him." About twenty to thirty feet away, Shealey saw a person facing him who was wearing a denim or blue jacket and standing next to a small red truck. Shealey watched his assailant walk toward the red truck. After the truck started toward the parking-lot exit, Shealey ran into the hotel, where he met Officers Steve Woodall and Steve Graves of the Little Rock Police Department. Shealey reported the robbery to the officers and described the two males and their vehicle.

Woodall and Graves immediately left the hotel in their patrol car in pursuit of a small red truck leaving the parking lot with two occupants. Despite the officers' attempt to stop the assailants by activating the police car's blue lights, the truck sped away. Officers Hinman and Colclasure joined the pursuit in another vehicle. The truck eventually crashed into a fence near a wooded area adjacent to Henderson Junior High School, and its occupants fled on foot. Woodall and Graves followed on foot and found Frederick Marshall, who was wearing a blue shirt, in the woods and arrested him.

Twenty-five yards from the truck, Hinman saw Albert Marshall, who was wearing a red coat, and ordered him to the ground at gunpoint. The officers immediately asked, "Where's the gun?" Colclasure handcuffed and searched Albert Marshall, and Marshall stated that he had thrown the gun when he got out of the truck. The officers found an empty holster strapped to his ankle and a box of nine-millimeter jacketed hollowpoints in his left jacket pocket. Woodall searched the appellant's truck and found Shealey's wallet containing the credit cards. The gun was never found.

The evidence presented at trial established that after the aggravated robbery and theft of property, one man wearing a red jacket and another wearing some type of blue clothing left in a small red pickup truck. Officers immediately pursued the truck, and after the truck crashed, they pursued the suspects on foot. Both appellants were soon arrested. Albert Marshall was wearing a red jacket, and Fredrick Marshall was wearing a blue shirt. Albert Marshall admitted to throwing a gun away and was found in possession of ammunition and an empty gun holster. The stolen wallet was found in the truck. Based on the foregoing evidence, we

conclude that the trial court did not err in finding that there was substantial evidence to support the appellants' convictions for aggravated robbery and theft of property.

Albert Marshall also argues that his statement regarding his disposal of the weapon should have been suppressed because he was in police custody and had not been informed of his *Miranda* rights at the time he gave the statement. We disagree and conclude that this issue is controlled by *New York v. Quarles*, 467 U.S. 649 (1984).

At the suppression hearing, Officer Maria Colclasure testified that she participated in the pursuit of the red truck involved in the armed robbery at the Holiday Inn Select. After the truck crashed near a wooded area by Henderson Junior High School, the occupants of the truck fled on foot. Colclasure and Officer Hinman apprehended Albert Marshall. While Hinman kept Albert Marshall on the ground at gunpoint, Colclasure handcuffed Albert Marshall and searched him for the weapon that was used during the robbery. Colclasure asked Albert Marshall what he had done with the gun and whether he had the gun on him. Colclasure testified that she asked Albert Marshall these questions for the officers' safety and to ensure that Albert Marshall did not have the weapon on him or in the immediate area. Albert Marshall told Colclasure that he had thrown the gun out of the truck window just before they crashed. Colclasure further testified that at the time she asked these questions, Albert Marshall was in custody and had not been advised of his *Miranda* rights.

In *Quarles*, a woman approached two police officers and told them that she had just been raped. She gave the police a description of her assailant and stated that he had just entered a supermarket and was carrying a gun. *Id.* at 651-52. One officer entered the supermarket and saw Quarles run toward the rear of the store. *Id.* at 652. The officer stopped Quarles, searched him, and found that he was wearing an empty shoulder holster. *Id.* After handcuffing Quarles, the officer asked him where the gun was. *Id.* Quarles nodded toward some empty cartons and told the officers that "the gun is over there." *Id.* The officer then recovered the weapon, formally placed Quarles under arrest, and informed him of his *Miranda* rights. *Id.*

The United States Supreme Court noted that while in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court "extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police," the Fifth Amendment "does not prohibit all incriminating admissions." *Id.* at 654. The Court held that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence...." *Id.* at 655. The Court observed as follows:

> The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

Id. at 657. The Court held as follows:

> We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers ... in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

Id. at 657-58.

Similarly, aware that a weapon had been used in the aggravated robbery, Colclasure asked Albert Marshall questions regarding the location of the gun. Colclasure testified that she asked these questions for the safety of the officers, as Albert Marshall may still have had the gun on his person or in the immediate area. Also extant were the same concerns as those in *Quarles* regarding public safety, such as the chance that an accomplice or a student or

passerby in the immediate vicinity of the junior high school might discover the weapon. Thus, as in *Quarles*, "overriding considerations of public safety justifi[ed] the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon." *Id.* at 651.

Affirmed.

ROAF, J., and HAYS, S.J., agree.

David P. ROWLETT *v.* Laura BUNTON

CA 99-336 6 S.W.3d 372

Court of Appeals of Arkansas
Division I
Opinion delivered December 8, 1999

Stevan E. Vowell, for appellant.

No response.

JOSEPHINE LINKER HART, Judge. Appellant, David Rowlett, appeals an order awarding appellee, Laura Bunton, a lump-sum percentage of his inheritance as child support. He asserts that inheritance is not income for purposes of setting child support. We agree and reverse and remand.

On November 4, 1994, the Arkansas Department of Human Services (ADHS) obtained a judgment establishing appellant as the father of DRR and requiring appellant to pay to the ADHS, as assignee of appellee's child-support rights, $40 per week in child-support payments.[1] On June 22, 1995, the court entered a judgment in the amount of $7500 against appellant for retroactive child support to be paid to the ADHS at the rate of $25 per week.

On February 24, 1998, appellee filed a motion requesting that she be awarded a lump-sum child-support payment of one-half of an inheritance received by appellant. On May 19, 1998, at a hearing on the motion, appellant admitted to receiving an inheritance of approximately $149,000 on December 17, 1997, and he

[1] Although appellant does not raise the issue, we recognize that the ADHS filed the original pleadings in this cause, and appellee, whose child-support rights had been assigned to the ADHS, failed to intervene pursuant to the procedure set out in Ark. R. Civ. P. 24. Appellant, however, does not raise this issue on appeal and, in any event, does not provide an adequate record to address the issue.

contended that his inheritance should not be considered in setting child support. In its order filed October 1, 1998, the court found that appellant's inheritance was income for child-support purposes and modified the child support and required appellant to pay fifteen percent of his inheritance as child support.

Appellant's sole argument on appeal is that the court erred by concluding that inheritance is income for the purposes of setting child support. "On appeal, a chancellor's conclusion of law is not given any deference; our review is *de novo*." *Houston v. Houston*, 67 Ark. App. 286, 287, 999 S.W.2d 204, 205 (1999).

In *Halter v. Halter*, 60 Ark. App. 189, 959 S.W.2d 761 (1998), this court upheld the chancellor's refusal to award a lump-sum percentage of inheritance as child support because inheritance was not income. In *Halter*, "income" referred to income as defined in the federal income-tax laws. *See In re: Guidelines for Child Support*, 314 Ark. 644, 863 S.W.2d 291 (1993). This court held that inheritance could not be considered income for child-support purposes because the definition of "income" under the federal tax laws excluded property acquired by gift, bequest, devise, or inheritance. *Halter, supra.* Any earnings generated from inherited property could, however, be considered as income for child-support purposes. *Id.*

On October 1, 1997, the definition of "income" for child-support purposes was amended to provide in part as follows:

> Income means any form of payment, periodic or otherwise, 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 less proper deductions....

Ark. Sup. Ct. Admin. Order No. 10 (1999). This revised definition of "income," which applies to this case, does not preclude our reliance on *Halter*, at least by analogy. The revised definition includes only employment earnings or payments based on employment benefits. Further, the revised definition specifically provides that income must be a payment due to an individual. Inheritance is not a payment that is due an individual from employment or employment benefits, but is akin to a gift from the deceased. Had our supreme court intended that inheritances and gifts be consid-

ered as income when assessing child-support obligations, the court would have so provided in the revised definition of income. The absence of gifts and inheritances in the definition is especially noteworthy since gifts and inheritances were excluded under the prior definition of income by the court. However, any interest or other income gained from appellant's inheritance should be considered when calculating his child-support obligation.

Reversed and remanded.

ROAF, J., and HAYS, S.J., agree.

Donald O. ATCHISON, Jr. *v.* STATE of Arkansas

CA CR 98-1293 5 S.W.3d 491

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered December 8, 1999
[Petition for rehearing denied January 12, 2000.*]

* GRIFFEN, J., would grant.

William R. Simpson, Jr., Public Defender; *Tim Blair*, Deputy Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Mac Golden*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. Appellant, Donald (Don) O. Atchison, Jr., appeals from a sentence given by the trial court following his guilty plea to one count of sexual abuse in the first degree and a plea of *nolo contendere* to one count of arson. After reviewing a presentence report and the sentencing ranges found in Ark. Code Ann. § 5-4-401 (Repl. 1996), the trial court sentenced Atchison to ten years' imprisonment for sexual abuse in the first degree and five years' imprisonment for arson with the sentences to be served consecutively. On appeal, Atchison contends that during the sentencing phase of trial, the trial court erred in permitting the State to present evidence of offenses for which he had not been convicted.

The evidence presented in the record showed that, from January through April of 1997, Don Atchison sexually molested his girlfriend's young son. On February 23, 1998, Atchison entered the pleas mentioned above, and the trial court conducted a sentencing hearing on March 25, 1998. At the hearing, the victim's mother and two law enforcement officials testified for the prosecution as witnesses. However, prior to the testimony of Detective Jeff Wataski, the prosecutor asked the circuit judge for permission to consider a statement of *Miranda* rights signed by Atchison in regard to a sexual-abuse allegation that Atchison had fondled another young child. At that point, the circuit judge told the prosecutor that "I'm going to consider it if you want to proffer it."

Jeff Wataski thereafter testified that on March 11, 1998, he and Detective Mike Shepherd came in contact with Atchison and read Atchison his *Miranda* rights. Wataski testified that Atchison understood and signed the statement-of-rights form. When the prosecutor moved to admit the *Miranda* rights form into evidence, defense counsel objected on grounds that the officers violated Atchison's Sixth Amendment rights when they questioned Atchison with knowledge that he had a sentencing hearing set for this case and that Atchison was represented by counsel at that time. Defense counsel further objected on the ground that Wataski's testimony was irrelevant because it focused on an incident that occurred after the present crimes were committed. The circuit judge overruled defense counsel's objections and allowed the prosecutor to proceed. The following colloquy occurred after the circuit judge stated to defense counsel that he would note his objections for appeal purposes:

> PROSECUTOR: As to relevance, again, that is in the sentencing and if this is a situation where there are multiple victims of sex offenders that it is admissible.
>
> THE COURT: But he's only been charged with those at this point, he's not been convicted, correct?
>
> PROSECUTOR: That's correct. But, again, that's evidence that the Court can consider.
>
> THE COURT: That's where I think that you and I differ in our agreement but you may proceed.

The circuit judge allowed the *Miranda* rights form to be admitted into evidence.

The next witness called on behalf of the State was Detective Mike Shepherd. He testified that on March 11, 1998, he was assigned to investigate Atchison concerning allegations of fondling a five-year-old child in the North Little Rock area, other than his girlfriend's child. He testified that during his investigation, he found that Atchison's personal computer contained several photographs of child pornography. He stated that Atchison appeared to be coherent when the officers read him his rights and when he signed his name on the rights form. Shepherd further testified that Atchison gave a voluntary, taped statement about the allegations and that Shepherd had a transcribed version of the interview to

present to the court. At that point, the defense counsel renewed his previous objection. However, the circuit judge overruled the objection and allowed the State to mark the statement for identification. The prosecutor was then able to elicit testimony from Shepherd that Atchison admitted to a history of molesting children, including Atchison's own daughter. Shepherd testified that Atchison sought rehabilitation some eight years ago. Defense counsel objected once again to Shepherd's testimony on the basis that the taped version of Atchison's statement should have been presented to the trial court instead of the officer's recollection. The trial court sustained the objection. Shortly thereafter the circuit judge pronounced sentence.

Atchison does not dispute the victim-impact testimony offered by the victim's mother in this case. However, Atchison does contend that the trial court erred in allowing the State to introduce evidence concerning the March 11, 1998, allegation of sexual abuse. In support of this point, he argues that the record reflects that the trial court considered this evidence in making its sentencing decision.

In the present case, the circuit judge did state that he relied on the presentence report in departing from the sentencing standards grid under Ark. Code Ann. § 16-90-803 (1987). In regard to the presentence report, the circuit judge made the following remarks:

> I see what the grid shows that [*sic*] the presumptive sentence to be, but because of the details listed in the pre-sentence report, which I have gone over rather carefully, both before the hearing started this morning and since that time, it will be the judgment and sentence of the Court that on Count I, the arson charge, the defendant is ordered to serve a term of five years in the Arkansas Department of Correction. On Count II, the sexual abuse charge, he is sentenced to serve a term of ten years in the Arkansas Department of Correction and those terms will be served consecutively one to the other.

Here, the trial court announced that it relied on the presentence report, without objection from appellant. Further, appellant has not abstracted the presentence report in the record on appeal. It is a fundamental rule that arguments will not be considered where the supporting testimony or evidence has not been abstracted. *Hill v. State*, 337 Ark. 219, 988 S.W.2d 487 (1999). Information necessary for a proper understanding of the questions

presented to the court must be contained within the abstract. *Id.* 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).

Because the presentence report provides the basis for appellant's contention that his sentence was "at least in part" based upon the additional sexual-abuse allegation against him, we cannot say that the trial court committed error in sentencing appellant.[1] For these reasons, the trial court's decision is affirmed.

Affirmed.

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

JENNINGS, J., concurs.

GRIFFEN, J., dissents.

JOHN E. JENNINGS, Judge, concurring. While I agree with the majority opinion, there is another reason why this case must be affirmed: the evidence in question is specifically permitted by statute. Arkansas Code Annotated section 16-97-103(6) provides that at a sentencing hearing the court may consider evidence of aggravating circumstances. Arkansas Code Annotated section 16-90-804(d)(2)(F) includes as an aggravating factor that "the offense was a sexual offense and was part of a pattern of criminal behavior with the same or different victims under the age of eighteen years manifested by multiple incidents over a prolonged period of time." Therefore, the evidence in issue was relevant to sentencing.

WENDELL L. GRIFFEN, Judge, dissenting. Notwithstanding the "fundamental rule" that arguments will not be considered where the supporting testimony or evidence has not been abstracted, *see Hill v. State*, 337 Ark. 219, 988 S.W.2d 487

[1] The dissent cites *Walls v. State*, 336 Ark. 490, 986 S.W.2d 397 (1999), as the controlling authority in this case. However, we distinguish the present case from *Walls*. In *Walls*, the supreme court reversed and held that the circuit judge abused his discretion "when he allowed testimony about the Stocks murders in as victim-impact evidence *and when he held Walls responsible for those murders in fixing his sentence.*" *Id.* at 501, 986 S.W.2d at 403 (emphasis added). In the present case, however, Atchison has failed to abstract the presentencing report, which he contends the trial court considered in determining his sentence. The record on appeal is limited to what is abstracted. *K.M. v. State*, 335 Ark. 85, 983 S.W.2d 93 (1998).

(1999), I would reverse the result reached below and remand this case to the trial court for resentencing. I do not condone appellant's conduct in molesting children. However, our supreme court has held that it is fundamentally unfair to punish a person, even a child molester, based on evidence of conduct for which he was neither convicted nor charged. *Walls v. State*, 336 Ark. 490, 986 S.W.2d 397 (1999).

Donald Atchison has appealed the sentence he received in the Pulaski County Circuit Court of five years' imprisonment for arson and ten years' imprisonment for sexual abuse in the first degree, to be served consecutively. Atchison specifically challenged the sentencing determination for sexual abuse and argues that the trial court erred by allowing the State to introduce evidence during the sentencing phase of subsequent criminal activity for which he had not been convicted. He pled guilty to the sexual-abuse charge based on the allegation that from January 1, 1997, through April 30, 1997, appellant engaged in sexual contact with a person, not his spouse, who was less than fourteen years old. The victim was his girlfriend's four-year-old son. Appellant's girlfriend testified about the effect of the incident on herself and her children. Appellant did not object to that victim-impact testimony.

During the sentencing phase the State — despite timely objections by defense counsel and cautioning by the trial judge — introduced evidence of a subsequent investigation involving appellant. Through testimony by a Little Rock detective, Jeff Wataski, the State introduced the statement of a *Miranda* rights form that Wataski read to appellant on March 11, 1998, in connection with charges in another case that he and Officer Mike Shepherd investigated based on allegations that appellant fondled a five-year-old child in North Little Rock and that police officers had discovered ten to twenty thousand pornographic pictures on appellant's computer, many of which were of children. Defense counsel objected to the officer's verbal account of the taped statement and argued that the tape should have been placed into evidence. The trial court agreed and called a recess to allow the State to introduce the tape, but the State never did so. The trial judge stated when he imposed sentencing that he would depart from the sentencing grid because of details in a presentence report.

Appellant was not charged in this case with any of the conduct that Detectives Shepherd and Wataski testified about involving other children. He certainly was not convicted based on that conduct; he entered a guilty plea only to the allegation that he molested the son of his girlfriend, not another child. It is quite revealing that the prosecution introduced evidence about alleged molestation of other children during the sentencing phase but never charged appellant concerning that conduct. Equally revealing is that the trial judge told counsel for the State before the testimony adduced through Wataski and Shepherd was introduced, "I think you're committing reversible error . . . ." In overruling defense counsel's relevance objection to Wataski's testimony, the trial judge stated, "I think you're right, Mr. Blair. Ms. Ator seems to think she's right, so if I'm going to err, I guess I ought to err on the side of your argument, but she seems so sure that she's correct I'm going to overrule your objection but let it be noted for appeal purposes."

I reject the idea that a guilty plea exposes an accused to anything that the prosecution chooses to introduce during the sentencing phase, whether or not it is pertinent to the offense for which he was charged. The rights of an accused person are violated when such evidence is offered because the prosecution is not required to prove the allegations beyond a reasonable doubt before subjecting an accused to criminal punishment. If the prosecution is unwilling or unable to prove allegations of alleged criminal conduct beyond a reasonable doubt after affording the accused the right to confront those allegations during the guilt phase, it has no business trying to get the benefit of a conviction by tossing those unrelated allegations into the sentencing phase in a different case.

The fact that the presentence report mentioned the same allegations but was not challenged when offered into evidence does not erase the objections that were timely made and which should have been sustained. The presentence report was simply cumulative of evidence that had already been improperly admitted into evidence over timely objections. The fact that appellant's sentence for the sexual-abuse charge was within the statutory range does not render the State's conduct less objectionable or the trial court's error harmless. Even the trial judge acknowledged that the prosecution was committing reversible error.

Our supreme court put this question clearly to rest in *Walls v. State, supra,* when it reversed Jack Walls's sentence following his guilty plea to five counts of rape and a plea of *nolo contendere* to one count of rape. The trial judge sentenced Walls to two forty-year terms and four life terms in prison, to be served consecutively, following a sentencing hearing. At the sentencing hearing the trial judge permitted the State to introduce testimony from the grandmothers of Heath Stocks, one of the rape victims who was convicted of murdering his parents and sister. Stocks had pled guilty and been sentenced to life in prison without parole. The grandmothers testified about the murders, the victims of the murders, and the effects of those murders on their grandson (Stocks). Although the trial judge overruled defense objections, the supreme court reversed and remanded the case for re-sentencing. Justice Brown concluded the majority opinion as follows:

> We hold that the circuit judge abused his discretion (1) *when he allowed this testimony about the Stocks murders in as victim-impact evidence,* and (2) when he held Walls responsible for those murders in fixing his sentence.
>
> This issue really brings into sharp focus the protections afforded defendants in the criminal justice system. No matter how reprehensible the crimes committed, it is an article of faith in criminal law that we do not sentence for crimes that have not been proven. Nor should victim-impact evidence be used as a vehicle for testimony that Walls was an accessory to the murder of the Stocks family. We recognize how difficult a second sentencing hearing will be for the victims and their families. Nevertheless, if the criminal justice system is to have any credence at all, it must adhere to certain basic principles. It is unfair in the extreme for the sentencing judge to consider testimony of an uncharged, unproven crime for sentencing purposes under the aegis of victim-impact testimony.

Id. at 501, 986 S.W.2d at 403. (Emphasis added.)

Accordingly, I would reverse and remand this case for resentencing based upon the abuse of discretion committed by the trial judge. Even if he is to receive the maximum sentence permitted for his crime, fundamental fairness demands that appellant be sentenced for the crime he committed, not for other bad conduct for which he has not been tried or convicted, and which has no bearing on his punishment for molesting his girlfriend's son.

James FLOWERS *v.* NORMAN OAKS CONSTRUCTION CO., Inc.

CA 99-221 6 S.W.3d 118

Court of Appeals of Arkansas
Divisions II, III, and IV
Opinion delivered December 8, 1999
[Petition for rehearing denied January 12, 2000.*]

* PITTMAN, JENNINGS, and ROAF, JJ., and HAYS, S.J., would grant.

Baxter, Jensen, Payne, Young & Smith, by: *Terence C. Jensen*, for appellant.

Roberts Law Firm, P.A., by: *Mike Roberts* and *J. Mark White*, for appellee.

OLLY NEAL, Judge. James Flowers appeals the Workers' Compensation Commission's determination that his work-related injury was substantially occasioned by the use of alcohol and was not compensable. He contends that the Commission erred in finding that he was intoxicated at the time of his injury and in its application of Ark. Code Ann. § 11-9-102(5)(B)(iv) (Repl. 1996). We agree, and reverse and remand this matter to the Commission.

On December 6, 1997, appellant was employed as a framer-carpenter by appellee Norman Oaks Construction, Inc., when he fell approximately twenty feet to the ground from scaffolding, frac-

turing his spine. Appellant was transported to the hospital by ambulance, where he was admitted and subsequently underwent spinal fusion. Appellant filed a claim for workers' compensation benefits that was controverted by appellee.

At the administrative hearing, appellant testified that he had not consumed any alcohol on the day of his accident. He did testify, however, that he had consumed beer the night before; that he went to work the next morning wearing the same clothes he had been wearing during the previous night's drinking; and that he did not brush his teeth before leaving for work.

Appellee introduced medical records from the hospital and emergency response personnel that indicated the smell of "ETOH" or alcohol about appellant's breath. However, appellee did not offer medical test results to show the presence of alcohol in appellant's system. The Commission determined that there was sufficient "presence" of alcohol to invoke the statutory presumption that appellant's injury was substantially occasioned by the use of alcohol. The Commission also determined that appellant had failed to rebut the presumption by presenting proof by a preponderance of the evidence that his injury was not substantially occasioned by the use of alcohol. This appeal followed.

■ Appellant contends on appeal that the Commission erred in its application of Ark. Code Ann. § 11-9-102(5)(B)(iv). When reviewing an appeal from the Workers' Compensation Commission, we view the evidence in a light most favorable to the Commission's decision and affirm if the decision is supported by substantial evidence. *Southern Hospitalities v. Britain*, 54 Ark. App. 318, 925 S.W.2d 810 (1996). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* We will not reverse the Commission's decision unless fair-minded persons could not have reached the same conclusion when considering the same facts. *Id.*

Under Arkansas Code Annotated section 11-9-102(5):

> (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 a physician's orders.

(b) the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his performance of services to have impliedly consented to reasonable and responsible testing by a properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

At the administrative hearing, appellee presented the testimony of Steven Coleman. Mr. Coleman testified that he is a contractor and that appellee had been hired as a subcontractor and was working on one of his projects on December 6, 1997. He testified that he inspected the work site prior to and after appellant's accident, and found beer cans the week after appellant's December 1997 accident. He denied, however, ever seeing appellant consume alcohol, and could not say that the beer cans he found had been left at the site by appellant.

Charles Smith testified that, in December of 1996, he was working as a house-framer on the house that was under construction next door to the house that appellant was framing. He testified that on one occasion he saw appellant open his coat and reveal one or two cans of beer in the pockets of his coat. He also testified that he witnessed appellant fall through the rafters as he was decking the roof and land on the floor joists below. However, his testimony was unequivocal that the fall he witnessed was not the accident that is the subject of this appeal. Smith testified further that he did not see appellant consume any alcohol, and did not witness appellant's December 6, 1997, fall.

Appellee also presented evidence of appellant's prior DWI convictions that occurred during the five-year period that preceded the December 1997 accident. The Commission concluded that the reports of medical personnel noting the smell of alcohol about appellant's breath were sufficient proof of presence to trigger the statutory presumption that appellant's accident was substantially occasioned by the use of alcohol, and that the testimony presented by appellant was not sufficient to rebut the presumption.

Appellant questions the method by which "presence" may be established, and contends that when the provisions of Ark. Code Ann. § 11-9-102(B)(iv) are read together there is a requirement that the presence of alcohol in the employee's body be determined by reasonable and responsible testing performed by trained medical or law enforcement personnel. Appellee counters that the smell of alcohol is sufficient to trigger the statutory presumption of the presence of alcohol.

A cardinal rule of statutory construction is to give effect to the intent of the legislature. *ERC Contractor Yard Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998). The well-established approach for determining the intent of the legislature is to look first at the plain language of the statute and, giving the words their plain and ordinary meaning, construe the statute just as it reads. *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997). If the language of the statute is not ambiguous and plainly states the intent of the legislature, then we will look no further. *Id.*

Arkansas Code Annotated section 11-9-102(5)(B)(iv) provides that the "presence" of an illegal drug in the claimant's system triggers a mandatory rebuttable presumption that the claimant's injury was substantially occasioned by the use of alcohol or illegal drugs. *See Ester v. National Home Ctrs., Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998). However, there is no statutory requirement that a certain quantity of an illegal drug or alcohol be proved in order to show its presence. *ERC Contractor Yard Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998).

Appellee points out that in some cases the appellate courts have found the presence of illegal drugs sufficient to trigger the statutory presumption, where the only evidence of presence was marijuana metabolites. *See Ester, supra. See also Brown v. Alabama Elec. Co.*, 334 Ark. 35, 970 S.W.2d 807 (1998); *Graham v. Turnage Employment Group*, 60 Ark. App. 150, 960 S.W.2d 453 (1998); *Morrilton Manor v. Brimmage*, 58 Ark. App. 252, 952 S.W.2d 170 (1997). However, the presumption of "presence," in the cited cases, resulted from medical testing of the claimant's blood or urine. *Id.*

Although Arkansas Code Annotated section 11-9-102(5)(B)(iv)(c) provides that an employee impliedly consents to

medical testing, we do not read the statute to require that the presence of alcohol may only be proved through medical testing. Rather, we read the statute to establish an injured worker's implied consent to medical testing, much like the implied consent that a motorist by operation of a motor vehicle on a public roadway, gives to chemical, blood, urine, or breath testing for determining the alcohol or controlled-substance content of his or her blood. *See* Ark. Code Ann. § 5-65-202 (Repl. 1997). Moreover, we recognize that in those instances in which there is testimony that a claimant was seen consuming alcohol prior to his accident, had slurred speech, and was unsteady on his feet, such evidence of consumption may be sufficient proof of the "presence" of alcohol in his system to trigger the rebuttable presumption.

In the present case, there was no proof presented of the "presence" of alcohol in appellant's system. Although medical personnel testified that there was a "smell" of alcohol about appellant' s breath, we cannot find sufficient proof of "presence" in his system to trigger the presumption. This is particularly so because the evidence presented in this case does not negate the reasonable hypothesis that the "smell" of alcohol recorded by medical personnel may have come from appellant's previous night's drinking; especially in light of appellant's testimony that he drank several beers the night before his accident, that he slept in his clothes and wore the clothes to work the next morning, and that he did not brush his teeth prior to departing for work.

The Commission's decision is reversed, and this matter is remanded to the Commission with instructions to award benefits.

Reversed and remanded.

HART, STROUD, and GRIFFEN, JJ., agree.

MEADS, J., concurs.

PITTMAN, JENNINGS, ROAF, JJ., and HAYS, S.J., dissent.

MARGARET MEADS, Judge, concurring. I agree with the result in this case because I do not believe the Workers' Compensation Commission could reasonably conclude that appellant was intoxicated at the time of his injury based on the proof before it. As the majority points out, there were no medical test

results offered into evidence to establish the presence of alcohol in appellant's system. Thus, the presumption created by Ark. Code Ann. § 11-9-102(5)(B)(iv)(b) (Repl. 1996) should not have been raised.

The majority believes Ark. Code Ann. § 11-9-102(5)(B)(iv) does not require medical testing to establish the presence of alcohol. I disagree. In my opinion, whenever a statute allows a presumption to be raised, there should be absolute proof of the facts that create the presumption, because of the significant impact the presumption has on the party's burden of proof. *See ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998); *Morrilton Manor v. Brimmage*, 58 Ark. App. 252, 952 S.W.2d 170 (1997). Moreover, in every case previously decided by this court or our supreme court which relies upon this statute, a blood-alcohol or drug-screen test has been administered that established the presence of alcohol or drugs as a fact. *See ERC Contractor Yard & Sales v. Robertson, supra*; *Ester v. National Home Ctrs., Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998); *Woodall v. Hunnicutt Constr.*, 67 Ark. App. 196, 994 S.W.2d 490, (1999); *Express Human Resources III v. Terry*, 61 Ark. App. 258, 968 S.W.2d 630 (1998); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998); *Ester v. National Home Ctrs., Inc.*, 61 Ark. App. 91, 967 S.W.2d 565 (1998); *Graham v. Turnage Employm't Group*, 60 Ark. App. 150, 960 S.W.2d 453 (1998), (*review den.* 334 Ark. 32, 970 S.W.2d 808 (1998)); *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998), (*review den.* 334 Ark. 35, 970 S.W.2d 807 (1998)); *Morrilton Manor v. Brimmage, supra*; *Jefferson v. Munsey Products, Inc.*, 55 Ark. App. 105, 930 S.W.2d 396 (1996); and *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996).

As our supreme court stated in *ERC Contractor Yard & Sales v. Robertson*,

> [T]he basic fact that will invoke the application of the presumption is the presence of alcohol. The plain language of Ark. Code Ann. § 11-9-102 provides that *once the presence of alcohol is established as a fact*, there is a presumption that any injury or accident was substantially occasioned by the use of alcohol. The statute does not quantify the term "presence." Therefore, alcohol is present whenever any amount of alcohol is revealed, no matter how small.

335 Ark. at 69, 977 S.W.2d at 215 (emphasis added).

Here, the presence of alcohol in claimant's body has not been established as a fact, and the presumption should not have been triggered.

ANDREE LAYTON ROAF, Judge, dissenting. I agree with the prevailing judges' interpretation of Ark. Code Ann. § 11-9-102 (5)(B)(iv) (Repl. 1996), and their conclusion that this statute does not require a test by medical or law enforcement personnel to establish the presence of alcohol in order to trigger the statutory presumption that an injury or accident was substantially occasioned by the use of alcohol. However, I do not agree with their conclusion that there was "no proof presented" of the presence of alcohol in Flowers's system, and, because Flowers also failed to present evidence rebutting the statutory presumption, I would affirm the Commission's finding that Flowers's injuries were not compensable.

Flowers's argument on appeal is that the Commission erred in finding that he was intoxicated at the time of his accident. However, the Commission did not find that Flowers was intoxicated, nor does the statute require such a finding. The Commission instead found that the evidence established the presence of alcohol, and that Flowers failed to rebut the presumption that its use substantially occasioned his accident and injuries. The issue to be addressed by this court is thus whether substantial evidence supports these findings.

When this court reviews workers' compensation cases, it views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and will affirm if those findings are supported by substantial evidence. *Aeroquip, Inc. v. Tilley*, 59 Ark. App. 163, 954 S.W.2d 305 (1997). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue on appeal is not whether this court 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, this court must affirm the Commission's decision. *Id.* It is not the province of the court of appeals to substitute its judgment concerning matters of credibility for that of the Commission. *Williams v. St. Vincent Infirmary*, 59 Ark. App. 148, 954 S.W.2d 302 (1997). It is the function of the Commission to determine the credibility of the witnesses and the weight given to their testimony.

Whaley v. Hardee's, 51 Ark. App. 166, 912 S.W.2d 14 (1995). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997). In *Franklin Collier Farms v. Bullard*, 33 Ark. App. 33, 800 S.W.2d 438 (1990), this court held that circumstantial evidence is competent evidence to support a finding in a workers' compensation case.

Here, there were the chart annotations from the paramedics and the emergency-room nurse documenting that they smelled alcohol on Flowers. There was also the circumstantial evidence of the empty beer cans found on the site and the fact that Flowers had previously brought alcohol to the job. Hospital records indicate that Flowers stated that he drank about a twelve-pack or six-pack every day. Finally, Flowers admitted to consuming six to eight beers just hours before his 9:00 a.m. accident. Although Flowers claimed to have stopped drinking at around 11:00 p.m. on the previous evening and attributed the smell of alcohol to his failure to brush his teeth that morning, it is well settled that the Commission is not required to believe this portion of his testimony. Moreover, the presumption is triggered by any amount of alcohol, so it is irrelevant whether or not the quantity was sufficient to intoxicate Flowers. *See, e.g., Continental Express v. Harris,* 61 Ark. App. 198, 965 S.W.2d 811 (1998).

As to whether Flowers rebutted the presumption, as he must when the presence of a proscribed substance has been shown, the evidence that he presented on this issue was so sparse as to make it all but inevitable that the Commission would find that he did not meet his burden. Neither of the two co-workers who were present at the site when Flowers fell, and who later accompanied him to the hospital, testified on his behalf. Flowers instead relied exclusively on his own testimony, which in essence stated that he lost his balance and fell while he was trying, unaided, to position a two-foot by twelve-foot plank on a pump jack, while he stood on another plank some twenty-four feet above the ground. Losing one's balance is simply not so inconsistent with intoxication as to compel the Commission, or this court on review, to conclude that the accident was not substantially occasioned by the presence of alcohol. *Cf. ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998); *Continental Express, supra.*

Because there is substantial direct and circumstantial evidence to support the Commission's decision, I cannot say that reasonable minds could not reach the Commission's conclusions, and I would affirm.

PITTMAN and JENNINGS, JJ., and HAYS, S.J., joins in this dissent.

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

CA CR 99-343 6 S.W.3d 801

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered December 15, 1999

Baim, Gunti, Mouser, Robinson & Havner, by: *Greg Robinson*, for appellant.

Mark Pryor, Att'y Gen., by: *Kelly S. Terry*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was charged with first-degree murder in connection with the death of Chis Odom. Although questions relating to appellant's intent and state of mind were sharply disputed at his jury trial, there was no serious dispute concerning the events that transpired. There was evidence that appellant was romantically involved with Karen Castleberry, and that Ms. Castleberry had previously dated the victim. The appellant, Ms. Castleberry, and another friend went to a tavern on October 3, 1997. The victim was present at the tavern. Appellant played pool, and afterwards asked the victim to discuss something with him in the alley. After they grappled for a short time, appellant shot the victim twice. Appellant, Ms. Castleberry, and their friend left hastily in Ms. Castleberry's auto. Shortly afterward the auto was stopped by a policewoman. Appellant leapt out of the auto before it had fully stopped and fled. Ms. Castleberry and the other friend were taken into custody. They gave statements implicating appellant, who was apprehended soon afterward. At trial, appellant admitted shooting the victim, but testified that he was being choked by the victim and shot him in self-defense because he feared for his life. Appellant was convicted

of first-degree murder and sentenced to forty years' imprisonment. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in denying his request for a mistrial on the grounds that the prosecution improperly commented on his right to remain silent. Appellant also contends that the trial court erred in failing to prevent spectators at the trial from wearing buttons bearing the photograph of the victim, and in refusing to admit evidence showing that the victim had methamphetamine in his system at the time of his death. We affirm.

We first consider appellant's argument that the trial court erred in denying his request for a mistrial on the grounds that the prosecution has improperly commented on his right to remain silent. Although it is true that the prosecution is prohibited from commenting on a defendant's post-arrest, post-*Miranda* warning silence, *Doyle v. Ohio*, 426 U.S. 610 (1976), the prosecutor's comment in the case at bar was in the context of appellant's testimony that he shot the victim and fled from police because he was afraid. The prosecutor's question, "Did it ever cross your mind to stop and tell the police the truth?" was directed specifically to impeaching appellant's explanation of the reason for his flight — *before* he was Mirandized — and we think that *Doyle* therefore does not apply. *See Fletcher v. Weir*, 455 U.S. 603 (1982). However, even if the prosecutor's question were capable of being understood as going toward appellant's post-*Miranda* silence, we would not agree that a mistrial was mandated. The Arkansas Supreme Court has held that a limiting instruction will suffice to cure a *Doyle* violation where, as here, the possible prejudice could have been cured by an admonition to the jury. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999). Similarly, in *Wilkins v. State*, 324 Ark. 60, 66, 918 S.W.2d 702, 705-706 (1996), the Arkansas Supreme Court said that:

> [A] mistrial is a drastic remedy which should be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing the trial or where any possible prejudice cannot be removed by admonishing the jury or some other curative relief. *Bullock v. State*, 317 Ark. 204, 876 S.W.2d 579 (1994). An admonition is the proper remedy where the assertion of prejudice is highly speculative. *Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994). Again, the absence of prejudice becomes apparent here in light of the fact that there was neither direct

> testimony in reference to Wilkins's silence, nor did Wilkins's attorney attempt to cure any alleged prejudice with a request for an admonition. This court has held that the failure to request a cautionary instruction or admonition may not inure to the appellant's benefit on appeal. *Stanley v. State*, 317 Ark. 32, 875 S.W.2d 493 (1994).

We hold that any prejudice resulting from a misunderstanding of the prosecutor's question would likely have been cured by an admonition, and that the trial court therefore did not err in denying appellant's motion for a mistrial. *See Muldrew v. State*, 331 Ark. 519, 963 S.W.2d 580 (1998).

Next, appellant contends that the trial court erred in refusing to prohibit the spectators from wearing buttons bearing a photograph of the victim. Although we are not unsympathetic to this argument, we are unable to address it on the record before us. None of the buttons or the images portrayed on them are in the record; furthermore, there is no evidence in the record regarding the jurors' reactions to the buttons. As we said in *Kenyon v. State*, 58 Ark. App. 24, 34-35, 946 S.W.2d 705, 710-11 (1997):

> [I]t has not been demonstrated that the jury saw the badges being worn by some spectators or, if they did, that this affected their ability to be fair jurors. Also, it is not clear that the jury members, if they saw that some people were wearing badges, could tell what was on them. Appellant did not question the panel with regard to whether they saw the buttons and could tell what they were and whether this would influence their ability to sit fairly on the jury. Appellant has not demonstrated prejudice, as is necessary in order for this court to reverse, *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1985 (1985), and has failed to demonstrate that the trial court abused its discretion in denying his motion for mistrial.

The appellant in the present case has likewise failed to demonstrate prejudice, and we must therefore affirm on this point.

Finally, appellant argues that the trial court erred in excluding evidence that the victim had methamphetamine in his system at the time of his death. Appellant argued that, because the victim had a powerful and dangerous drug in his system, appellant was right to be afraid for his life, and therefore was justified in killing the victim in self-defense. This argument might be merito-

rious if there had been any evidence to show that appellant knew that the victim was taking methamphetamine, or that the victim's behavior was such that appellant could reasonably have inferred the victim was under the influence of the drug. However, no such evidence appears in the record. We think that the evidence of methamphetamine in the victim's blood was only conditionally relevant to the question of appellant's state of mind and, the other conditions not having been shown, it was not error to exclude it. *See* Ark. R. Evid. 104(b).

Affirmed.

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

ROAF, J., dissents.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse and remand this case for a new trial because the trial court erred in overruling Mr. Cagle's objection relating to the presence of spectators at the trial who were wearing buttons with the victim's picture on them. The trial judge refused to take any action whatsoever, and accordingly, I do not agree with the majority that Cagle should be required to demonstrate prejudice under these circumstances.

In the course of the two-day trial, the victim's family members showed up wearing buttons with the victim's picture on them. On the first day, Cagle requested that the judge order the family to remove the badges, but the trial court refused, and stated that he "found nothing particularly prejudicial about it." On the second day, Cagle again objected to the presence of the button-wearing spectators, claiming that there were many more and that they were strategically stationed at the courthouse entrances and exits. The trial judge ordered the prosecution to tell the victim coordinator to make them move if they were "posted around the courthouse," but declined to "dictate" what the spectators could or could not wear.

Cagle argues that the presence of spectators who were wearing buttons with the victim's picture on them denied him his right to a fair trial. He contends that the instant case is not controlled by *Kenyon v. State*, 58 Ark. App. 24, 946 S.W.2d 705 (1997), a case in which this court, confronted by a similar situation where spectators were wearing buttons bearing one of the victims' pictures, affirmed

the trial court's denial of a mistrial motion made midway through *voir dire*, because Kenyon could not demonstrate prejudice where he had declined the trial court's invitation to question the jurors to determine if they saw the buttons and were affected by them. Cagle contends that his case is distinguishable because of the "outrageous number" of buttons and paraphernalia posted throughout the courthouse, which, unlike *Kenyon*, remained throughout the whole trial because of the trial judge's failure to intervene, and because the trial judge failed to give him an opportunity to question the jury to determine the prejudicial effects of the paraphernalia. Finally, in his reply brief, Cagle urges this court to find the presence of spectators wearing victim badges so inherently prejudicial as to constitute an "impermissible risk of prejudice." *See Holbrook v. Flynn*, 475 U.S. 560 (1986)(holding the presence of four uniformed and armed state troopers stationed in the first row of a trial of six armed robbery co-defendants was not so inherently prejudicial as to constitute an impermissible risk of prejudice). Portions of Cagle's argument have merit.

Central to the issue of a fair trial is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Clemmons v. State*, 303 Ark. 265, 795 S.W.2d 927 (1990)(quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). Spectator misconduct can be grounds for reversal. *See generally* Jay M. Zitter, Annotation, *Disruptive Conduct of Spectators in Presence of Jury During Criminal Trial As Basis For Reversal, New Trial, or Mistrial*, 29 A.L.R.4th 659.

I reject Cagle's assertion that *Kenyon* is distinguishable because the number of button-wearing spectators was greater in the instant case, because *Kenyon* is silent as to the number of individuals wearing badges. Also unpersuasive is Cagle's contention that *Kenyon* is distinguishable because the trial judge failed to give him an opportunity to question the jury to determine the prejudicial effects of the paraphernalia. The record indicates that Cagle did not assert this right at trial, which was his duty to do. *See Williams v. State*, 17 Ark. App. 173, 705 S.W.2d 896 (1986). Moreover, Cagle now contends on appeal that it would be "most unpractical" to conduct such an inquiry because it would draw attention to presence of the buttons on the spectators.

However, *Kenyon* is distinguishable in one crucial respect: the trial judge did not take any steps to stop the spectators from wearing the buttons inside the courtroom. While it is true that on the second day of the trial the trial judge instructed the prosecutor to limit the exposure of the jurors to spectators who were allegedly stationed throughout the courthouse, because it was "bad taste," he refused to order the spectators to remove the buttons and instead stated that he was "not going to dictate what they can wear." In this key respect, this case is very different from *Kenyon.*

While I have not found an Arkansas case that reverses and grants a new trial because of spectator misconduct, apparently this is because the trial judge in almost every such case took appropriate action. *See Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996); *Venable v. State*, 260 Ark. 201, 538 S.W.2d 286 (1976); *Bradshaw v. State*, 206 Ark. 635 (1944); *Pendergrass v. State,* 157 Ark. 364 (1923); *Zinn v. State*, 135 Ark. 342 (1918); *Rhea v. State*, 104 Ark. 162 (1912). The only contrary authority is *Jackson v. State*, 245 Ark. 331, 432 S.W.2d 876 (1968), in which the trial court denied the defendant's mistrial motion without further action, when during a lunch break, six jurors had seen the mother of the victim crying in the courtroom. However, this case is not entirely inconsistent with the other cases due to the brief exposure of only a portion of the jury to the situation, which apparently resolved itself before the trial judge was apprised of it. Even something as prejudicial as seeing a defendant in shackles will not be found to be inherently so if it is nothing more than a brief, inadvertent exposure. *Hill v. State*, 285 Ark. 77, 685 S.W.2d 495 (1985) (citing *United States v. Carr*, 647 F.2d 867 (8th Cir.1981)).

Kenyon v. State, supra, certainly is consistent with these cases inasmuch as the problem had apparently been eliminated by the prosecutor asking the spectators to remove the badges even before the defense brought the problem to the trial court's attention. While the trial judge in *Kenyon* denied the defendant's mistrial motion, which was made midway through *voir dire*, when the trial had not yet commenced, he nonetheless offered the appellant an opportunity to prove it was warranted, which the defendant apparently refused. In *Kenyon,* the trial judge was clearly exercising discretion, so the extreme remedy of a mistrial was not warranted. *See also People v. King*, 544 N.W.2d 765 (Mich. App. 1996)(holding that the trial court did not err in denying a mistrial where wearing

the three-inch diameter buttons was ordered stopped by the trial court on what was likely the only day they were worn); *Mitchell v. State*, 884 P.2d 1186 (Okla. Crim. App.1994)(trial court ordered family members to remove pre-crime photographs of victim, ordered the buttons they were wearing removed when they simply pulled the picture off them, and threatened to have any spectator removed and held in contempt for failure to comply with court orders); *State v. Bradford,* 864 P.2d 680 (Kan. 1993)(trial court ordered buttons removed as soon as it was brought to his attention). Certainly this would have been a different case if the trial judge had ordered the badges removed, which is apparently all that Cagle requested. Moreover, to require Cagle to demonstrate prejudice in a situation where the trial court found the badges "not particularly prejudicial," and in effect overruled his objection, is illogical.

In *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), the Ninth Circuit reversed the denial of a writ of *habeas corpus*, finding that the presence of spectators wearing buttons inscribed with the words "Women Against Rape" was inherently prejudicial and denied the defendant a fair trial. Similarly, in *State v. Franklin*, 327 S.E.2d 449 (W. Va. 1985), a case cited by the Ninth Circuit in *Risley*, the West Virginia Supreme Court held that the obvious presence of badge-wearing members of Mothers Against Drunk Drivers did irreparable damage to the defendant's right to a fair trial and the trial court's failure to take action was reversible error. In the instant case, there was a similar refusal to take action over the course of a two-day trial, and Cagle was likewise denied a fair trial as a consequence.

I respectfully dissent.

Daniel Black DILLARD *v.* Lynda PICKLER,
George Pickler, and Edna Bussey

CA 99-333 6 S.W.3d 128

Court of Appeals of Arkansas
Division III
Opinion delivered December 15, 1999

Craig L. Henry, for appellant.

Cary E. Young, for appellees.

JOHN MAUZY PITTMAN, Judge. This is an adverse-possession case. Appellant Daniel Dillard appeals the Lafayette County Chancery Court's order granting the appellees' counterclaim requesting that the court quiet title in them to a forty-acre parcel of unenclosed timberland in Lafayette County. We affirm.

To understand the issue that appellant presents, we must first review the manner in which the parties acquired their respective interests in the forty acres of timberland at issue. The history of the parties' respective interests in the land dates back to October 1913 when the Lafayette County Chancery Court entered a decree partitioning a larger parcel of land that included the forty acres at issue. In this decree, the chancery court awarded the forty acres at issue to the Woodmore family, which consisted of six siblings — Mary Woodmore, Martha Woodmore, Robert Woodmore, Jona Woodmore, Lacie Allen, and Lillie Pearl Collins. In 1932, the land was forfeited to the State for nonpayment of property taxes. In 1936, two of the Woodmore siblings, Lacie Allen and Lillie Pearl Collins McGlothin, paid the delinquent property taxes and received title to the land from the State. In March 1953, Lacie Allen and Lillie Pearl McGlothin sold the land to appellee Edna Bussey and her husband Harry Bussey, who died in 1992. The Busseys received from Lacie and Lillie a warranty deed to the entire forty-acre parcel. The Busseys paid property taxes on the land from 1953 to 1992. Appellee Lynda Pickler is the daughter of Harry and Edna Bussey. Her interest in the land is based on having received an undivided one-half interest in the land from her mother in 1993 in an executor's deed and by a quitclaim deed that appellee Edna Bussey executed in

January 1998. Appellee George Pickler is appellee Lynda Pickler's husband, and his interest in the land derives from that of his wife.

Appellant Daniel Dillard claims a one-half interest in the land. Appellant acquired his interest in the land in 1993. In 1993, appellant worked in an abstract company in Lafayette County. At that time he realized that the heirs of the Woodmore siblings might have an interest in the forty acres. By 1993, none of the six Woodmore siblings were alive. Only two of them had had children. Jona Woodmore had a son named Jonah Johnson. Mary Woodmore had a daughter named Daisy Thomas Butts. By 1993, neither Jonah Johnson nor Daisy Thomas Butts was alive; however, Jonah's widow, Effie Johnson, and Daisy's widower, Linton Butts, were still living. In 1993, appellant purchased from Effie Johnson and from Linton Butts their respective interests, as the heirs of the six Woodmore siblings, in the forty acres. Appellant received warranty deeds from both Effie Johnson and Linton Butts. In 1993, appellant began paying property taxes on his one-half interest in the land.

Proceedings began in chancery court in June 1997 when appellant filed a petition requesting that title to one-half of the forty acres of timberland be quieted in him and that the land be partitioned. In July 1997, appellees filed a response to appellant's quiet-title petition in which they denied that appellant had any interest in the land. In January 1998, appellees filed an amended response to appellant's petition and also filed a counterclaim in which they requested that title to the land be quieted in them.

The case went to trial in chancery court in September 1998. At trial it was established that the forty acres at issue was unenclosed timberland. Moreover, appellees established that Harry and Edna Bussey had, after purchasing the land in 1953 from Lacie Allen and Lillie Pearl McGlothin, paid property taxes on it from 1953 to 1992. Appellees also proved that, on several occasions, Harry and Edna Bussey had received proceeds from the sale of timber on the land and had also received the proceeds from two oil and gas leases on the land. The appellees also presented proof that, from 1953 to 1992, no one had tried to establish any ownership interest in the land, other than Harry and Edna Bussey. However, appellant established that the Busseys had never actually possessed the land, had never enclosed the land with a fence, and had never improved the land. The chancery court took the case under advisement and

permitted the parties to submit posttrial briefs. In December 1998, the chancery court handed down an order granting appellees' counterclaim requesting that title to the land be quieted in them. In its order the court noted that appellees Edna Bussey and Lynda Pickler own the land "by virtue of title documents and adverse possession...." After the chancery court entered its order, the parties filed a set of stipulations with the court. One of these stipulations was: "Lillie and Lacie's undivided interests are currently of paper title in [appellees]. Effie and Daisy's indicated interests are currently of paper title in [appellant]."

Appellant challenges the chancery court's conclusion that Harry and Edna Bussey adversely possessed the forty acres of timberland at issue. According to appellant, the appellees failed to establish that the Busseys adversely possessed the land because appellees failed to prove that the Busseys gave actual or constructive notice to the Woodmore siblings, or their heirs, that they had purchased the forty acres from two of the Woodmore sisters, Lacie Allen and Lillie Pearl McGlothin.

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. *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999); Ark. R. Civ. P. 52(a). 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 to their testimony. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997).

Appellant's contention that the chancery court erred in finding that appellees owned the land at issue by adverse possession rests on a well-established body of case law principles. We recently set forth these principles as follows:

> It is well settled that, in order to establish title by adverse possession, appellee had the burden of proving that she had been in possession of the property continuously for more than seven years and that her possession was visible, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner. The proof

> required as to the extent of possession and dominion may vary according to the location and character of the land. It is ordinarily sufficient that the acts of ownership are of such a nature as one would exercise over her own property and would not exercise over that of another, and that the acts amount to such dominion over the land as to which it is reasonably adapted. Whether possession is adverse to the true owner is a question of fact. *See Walker v. Hubbard*, 31 Ark. App. 43, 787 S.W.2d 251 (1990); *Hicks v. Flanagan*, 30 Ark. App. 53, 782 S.W.2d 587 (1990).

McLaughlin v. Sicard, 63 Ark. App. 212, 216-17, 977 S.W.2d 1, 3 (1998) (quoting *Moses v. Dautartas*, 53 Ark. App. 242, 244, 922 S.W.2d 345, 346 (1996)).

Because, in the 1930s, the Woodmore siblings owned the forty acres of timberland as co-tenants, our analysis is guided by the legal principles pertaining to the ownership of land by co-tenants and the adverse possession of land by one co-tenant hostile to the interests of other co-tenants. With regard to the issue of adverse possession, the possession of one tenant in common is the possession of all the tenants in common. *Graham v. Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990); *Mitchell v. Hammons*, 31 Ark. App. 180, 792 S.W.2d 333 (1990). Because possession by a co-tenant is not ordinarily adverse to other co-tenants, each having an equal right to possession, a co-tenant must give actual notice to other co-tenants that his possession is adverse to their interests or commit sufficient acts of hostility so that their knowledge of his adverse claim may be presumed. *Wood v. Wood*, 51 Ark. App. 47, 908 S.W.2d 96 (1995); *Mitchell v. Hammons, supra*. A co-tenant is presumed to hold in recognition of the rights of his co-tenants, and this presumption continues until an actual ouster is shown. *Wood v. Wood, supra*. When one of several co-tenants redeems land previously forfeited for nonpayment of property taxes, the redeeming co-tenant acquires no superior right to the land and the redemption inures to the benefit of all of the co-tenants. *Barr v. Eason*, 292 Ark. 106, 728 S.W.2d 183 (1987); *Wood v. Wood, supra*.

When a co-tenant executes a deed to a stranger to the title, purporting to convey the entire property, the deed constitutes color of title. When the grantee enters into exclusive possession under such deed, the seven-year period for adverse possession begins to run in favor of the grantee and against all the other co-tenants of the grantor. *Ulrich v. Coleman*, 218 Ark. 236, 235 S.W.2d

868 (1951); *see Marshall v. Gadberry*, 303 Ark. 534, 798 S.W.2d 99 (1990); *Mitchell v. Hammons, supra.* However, where the stranger-grantee does not enter into exclusive possession under the deed, the seven-year period for adverse possession does not begin to run absent some other manner of notice, actual or constructive, to the other co-tenants. *See Barr v. Eason, supra; Parsons v. Sharpe,* 102 Ark. 611, 145 S.W. 537 (1912). A stranger-grantee's possession of color of title and payment of property taxes alone, without actual or constructive notice to the remaining co-tenants of the stranger-grantee's purchase of the land, is not sufficient to vest title in the stranger-grantee, *Barr v. Eason, supra,* but the payment of taxes over a long period of time may raise a strong presumption of his adverse claim. *Hirsch v. Patterson,* 269 Ark. 532, 601 S.W.2d 879 (1980) (citing *Brasher v. Taylor,* 109 Ark. 281, 159 S.W. 1120 (1913)). Where one co-tenant has actual notice that his fellow co-tenants believe that he has no interest in the land at issue, the other co-tenants can adversely possess the land if the co-tenant with actual notice does nothing for many years and the other co-tenants pay property taxes on the land for many years, execute oil and gas leases to the property, and receive the proceeds from the sale of timber. *Hirsch v. Patterson, supra.*

Appellees presented evidence at trial that, from 1953 to 1992, Harry and Edna Bussey had paid property taxes on the land, had on several occasions received the proceeds from the sale of timber on the land, and also had on two occasions received the proceeds from the execution of oil and gas leases on the land. Proof of this conduct by the Busseys was sufficient to support a finding of adverse possession of the land if the heirs of the Woodmore siblings had actual or constructive notice that Lacie Allen and Lillie Pearl McGlothin had sold the land to the Busseys in 1953. *See Hirsch v. Patterson, supra.* At trial, through the testimony of Lillie Mae Whitfield, who was a lifelong friend of Daisy Thomas Butts, appellees presented evidence that both Daisy Thomas Butts and Jonah Johnson were aware in the 1950s that the Busseys had purchased the land at issue from their aunts, Lacie Allen and Lillie Pearl McGlothin. Appellant stipulated after trial that his one-half interest in the land was based on the interest of Effie Johnson and Daisy Thomas Butts. Lillie Mae Whitfield's testimony would support a finding that appellant's predecessors-in-interest had actual notice that Lacie Allen and Lillie Pearl McGlothin had sold the land to Harry and

Edna Bussey in 1953. Given the proof of actual notice by appellant's predecessors-in-interest and the lack of any action taken by them, the Busseys' payment of taxes for forty years, and the Busseys' conduct with regard to the land, the chancery court did not err in concluding that the Busseys adversely possessed the forty acres. *See Hirsch v. Patterson, supra.*

For the reasons set forth above, we affirm the order that the Lafayette County Chancery Court entered in this case granting appellees' request that title to the land at issue be quieted in them.

Affirmed.

NEAL and MEADS, JJ., agree.

Stanley GILES, Administrator
of the Estate of Rosie Lee Anderson *v.*
SPARKMAN RESIDENTIAL CARE HOME, INC., *et al.*

CA 99-93 6 S.W.3d 140

Court of Appeals of Arkansas
Division IV
Opinion delivered December 15, 1999

The Boyd Law Firm, by: *Brent P. Gasper* and *Charles Phillip Boyd, Jr.*, and *Grayson, Holleman & Grayson*, for appellants.

Laser, Wilson, Bufford & Watts, P.A., by: *Alfred F. Angulo, Jr.* and *Donna L. Gay*, for appellee Sparkman Residential Care Home, Inc.

Mitchell, Williams, Selig, Gates & Woodyard P.L.L.C., by: *Tim E. Howell*, for appellee Raymond R. Remmel, M.D.

JOHN E. JENNINGS, Judge. On May 1, 1995, Rosie Anderson wandered away from the Sparkman Residential Care Home and was never seen alive or heard from again. On March 4, 1997, a dog brought a skull to its owner's residence that was located within a two-mile radius of the residential care facility. The skull was identified as the remains of Ms. Anderson; various bones were later discovered as well. Given the paucity of evidence, the state crime lab was unable to determine the cause of death, although it was reported that her skull had not been fractured. In this wrongful-death action against various health-care providers, it was the appellant's theory that Ms. Anderson had met her death after suffering a seizure caused by not receiving proper medication. At trial the court directed a verdict in the appellees' favor on the basis that appellant had failed to prove proximate cause because the cause of death was unknown, making it equally plausible that Ms. Anderson had expired due to natural causes or at the hand of some other third person.

On appeal, appellant contends that the trial court erred in directing a verdict and that he was entitled to recover on the lost-chance theory. We find merit in the first issue, and we reverse and remand for a new trial.

Rosie Anderson, who was age forty-nine at the time of her disappearance, was mentally ill. Her principal diagnosis was schizophrenia, but she had also been a psychogenic water drinker. She also suffered from a seizure disorder that made her subject to grand mal seizures. These conditions were regulated by a regimen of medication. There was testimony that there were times when she would do reasonably well, followed by periods of deterioration that would occur when she stopped taking her medication. Consequently, she required supervision, and over the course of her adult life she had either been in the state mental hospital, nursing homes, or in the care of her family. There was some evidence indicating that she had a tendency to wander.

On March 30, 1995, Ms. Anderson was transferred from a nursing home to the appellee Hot Spring County Medical Center for psychiatric admission because she had become violent and

uncooperative. There she came under the care of appellee, Dr. Raymond Remmel. After her condition had become stabilized, Ms. Anderson was released to the home of her sister on April 12. While there she became uncooperative and agitated and would disappear for periods of time. Her sister could not tell whether she was taking her medication, and she returned Ms. Anderson to the appellee hospital on April 19. After being stabilized, on Thursday, April 27, she was transferred to the appellee Sparkman Residential Care Home, a nonrestrictive facility that may dispense but is not authorized to administer or supervise the taking of medication. Records indicate that the day Ms. Anderson arrived she did not receive her evening or night dosages of medication but that she was offered medication the next morning. That morning, however, she suffered two seizures and was taken to the appellee hospital for treatment. She was returned to Sparkman that afternoon, and she remained confused, tired, and unable to participate in activities that weekend. Records show that her medication was dispensed on Saturday and Sunday. She disappeared sometime early Monday morning.

On the issue of proximate causation, appellant presented the testimony of psychiatrist Dr. Robert Gale. It was his opinion that Ms. Anderson could not have survived without her medication. Dr. Gale testified that, without question, Ms. Anderson would have had a seizure within thirty-six to forty-eight hours after her disappearance, based on a pattern that had been established over the past ten years. He explained that after a grand mal seizure a person is left in a confused or even comatose state that may last for a day and a half; that memory loss may occur; that such a person would be subject to injury from a fall; and that the victim may bite or swallow her tongue. He said that Ms. Anderson would not have been able to care for herself after suffering a seizure.

■ Appellant first argues that the trial court erred in ruling that he had failed to offer adequate proof of proximate causation. We agree. When considering a motion for a directed verdict made by a defendant, the plaintiff's evidence, and all reasonable inferences therefrom, are examined in the light most favorable to the plaintiff. *Arthur v. Zearley,* 337 Ark. 125, 992 S.W.2d 67 (1999). A directed-verdict motion should be granted only if the evidence would be so insubstantial as to require a jury verdict for that party to be set aside; evidence is insubstantial when it is not of sufficient force or character to compel a conclusion one way or the other, or if it does not

pass beyond mere suspicion or conjecture. *Dodson v. Charter Behav. Health Sys., Inc.*, 335 Ark. 96, 983 S.W.2d 98 (1998).

Proximate cause is defined as that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). It can, of course, be proved by either circumstantial or direct evidence. *St. Paul Fire & Marine Ins. Co. v. Brady*, 319 Ark. 301, 891 S.W.2d 351 (1995). To make a prima facie case the plaintiff must offer evidence that would tend to eliminate other causes that may fairly arise from the evidence so that the jury not be left to speculation and conjecture in deciding between two equally probable possibilities. *Id.* However, it is not necessary that the plaintiff negate entirely the possibility that the defendant's conduct was not a cause. *Hill v. Maxwell*, 247 Ark. 811, 448 S.W.2d 9 (1969); *Biddle v. Jacobs*, 116 Ark. 82, 172 S.W. 258 (1914). It is enough that the plaintiff introduce evidence from which reasonable men might conclude that it is more probable than not that the event was caused by the defendant. *Hill v. Maxwell, supra.* When there is evidence to establish a causal connection between the negligence of the defendant and the injury, it is proper for the case to go to the jury. *Dodson v. Charter Behav. Health Sys., Inc.*, 335 Ark. 96, 983 S.W.2d 98 (1998).

Appellant relies in part on *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692 (11th Cir. 1993). There an elderly nursing home resident, who was suffering from schizophrenia, mental retardation, and hypertension, wandered away one winter morning. Her body was never found, but her death was later established under state law creating a presumption of death after a lapse of time. After a jury returned a verdict in favor of the estate, the district court granted the defendants' motion for judgment notwithstanding the verdict. On appeal, the court disagreed with the trial court's conclusion that the evidence failed to establish proximate causation as a matter of law. Instead, the court held that the facts strongly supported an inference of death by exposure based on evidence that the decedent had disappeared in January; expert testimony that she would have died from exposure after two days; and proof that the nursing home was surrounded by 3,000 acres of untamed woods. Although the precise cause of death could not be known, the appellate court was satisfied that the evidence supported an explanation for the cause of death that was sufficiently articulated so that

the jury was not permitted to engage in an unallowable degree of speculation.

■ We are persuaded by the *Jackson* court's reasoning. Appellant presented expert testimony that it was highly probable that Ms. Anderson would suffer a seizure if she did not have her medication and that the effects of the seizure would leave her vulnerable to injury, and helpless. Ms. Anderson was only forty-nine years old when she disappeared, and other than her mental illnesses and seizure disorder, she suffered from no other physical ailments. On these facts, we hold that appellant presented sufficient proof of proximate cause to have the issue submitted to the jury.

Although appellant has asked us to consider in our review a portion of Dr. Gale's testimony that was proffered but ruled inadmissible by the trial court, we decline to do so. The trial court excluded the testimony, and thus it played no part in its decision. In addition, appellant has not argued that the trial court's ruling was error.

■ Appellant also argues that it should be entitled to recover under the "lost-chance" theory, citing *Blackmon v. Langley*, 293 Ark. 286, 737 S.W.2d 455 (1987). Appellant did not ask the court for a ruling on this issue, and we do not address issues that are raised for the first time on appeal. *Sutter v. Payne*, 337 Ark 330, 989 S.W.2d 887 (1999).

■ We also note that appellee Hot Spring County Medical Center contends that it was entitled to a directed verdict because it was not negligent. The trial court's directed-verdict ruling spoke only to the issue of proximate causation; the ruling did not address the culpability, if any, of the individual defendants. In the absence of a ruling, we decline to address this issue. Moreover, the trial court directed the verdict at the conclusion of Dr. Gale's testimony after being informed that, although appellant had other witnesses to offer, none of them concerned the issue of proximate causation. Because appellant had not yet completed his case, deciding this issue would be premature.

Reversed and remanded.

PITTMAN and ROAF, JJ., agree.

David Edward TOWNSEND *v.* STATE of Arkansas

CA CR 98-1228 6 S.W.3d 133

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered December 15, 1999

Charles M. Duell, Public Defender, for appellant.

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

JOHN E. JENNINGS, Judge. David Edward Townsend was charged with the offenses of manufacturing a controlled substance (methamphetamine), possession of drug paraphernalia, and aggravated assault. Pursuant to Rule 24.3 of the Arkansas Rules of Criminal Procedure, he entered a negotiated plea of guilty to the charge of possession of drug paraphernalia, preserving the right to appeal the denial of his motion to suppress evidence, and was sentenced to two years probation. On appeal, appellant contends that the nighttime search was not justified, that there was no probable cause for the issuance of the warrant, and that the good-faith exception does not apply. We affirm on the first two points raised and do not reach the third.

This case turns on the sufficiency of an affidavit submitted to support the issuance of a search warrant. The affidavit is lengthy, consisting of four pages, but the information it contains can be fairly summarized as follows. Detective Dave Mitchell of the 19th Judicial District Drug Task Force applied for the search warrant on May 20, 1997. He stated that a female had been arrested at 2:00 a.m. the previous morning and that a hypodermic syringe had been found on her person. At the police department, she offered to volunteer information concerning illegal drug activity taking place at a residence in Bentonville. The informant stated that a Charles Meadors was manufacturing methamphetamine in the garage of the residence, identified as #7 McIntosh, but that Meadors conducted sales of the drug elsewhere at the Dairy Queen parking lot. The informant further stated that Meadors would dispose of the leftover materials used in the manufacturing process at a dumping site on Rainbow Road located on the left side of a bridge that was under construction. The informant described Meadors's vehicle as being a gray or primered color Camaro and said that a sixties model Ford Mustang would be sitting on the left side of the house.

Detective Mitchell received this information at 9:30 a.m. on May 19. He was unable to locate the informant, so he proceeded to the construction site on Rainbow Road. While searching the left side of the bridge, a road department employee told Mitchell that he had just bulldozed an apparent burn pile. Mitchell inspected the area of the burn pile and found a melted Equate-brand antihistamine bottle, two coffee filters with possible residue, melted plastic lye bottles, two one-gallon camp fuel cans, and several melted plastic baggies. Mitchell stated that, based on his experience and training, these items were commonly used and were necessary in the process of manufacturing methamphetamine.

Detective Mitchell then traveled to the Meadors residence, accompanied by a police officer who provided further information disclosed by the informant. They observed a gray Camaro in the driveway and a blue Mustang beside the house, which was as described by the informant.

Mitchell placed phone calls to the informant's parents and her boyfriend and gave them his pager number. He was later contacted by the informant and an interview was arranged for 9:00 p.m. at the police station. During the interview, the informant stated that

Meadors would produce methamphetamine in the residence on a weekly basis. She advised that, within the last week, Meadors had produced a large milk jug of methamphetamine, which was kept in the closet of Meadors's bedroom. The informant told Mitchell that she had once been present during the entire manufacturing process. She described the process of how Equate tablets were broken down into pure ephedrine, to which acetone was added and placed in cookware on the stove. She observed the addition of iodine crystals to the mixture and saw several other chemicals bearing skull and crossbones on the label. The informant also observed bottles of lye and mason jars equipped with coffee filters on top that were used to strain the mixture. She said that she was present when trash was dumped and burned at the site on Rainbow Road. She was also present when Meadors instructed another man to obtain iodine crystals, which she later learned had been stolen.

During the interview, the informant drew a detailed map of the residence and surrounding premises, showing the location of the methamphetamine lab. She admitted that on occasion she had purchased methamphetamine at the residence. The informant also advised that there were several handguns of unknown caliber in the residence and that a vicious dog was kept in the back yard. She had been in the residence as recently as May 18, when she observed marijuana, pipes used for smoking marijuana, and a set of scales containing a white powdery substance.

The residence was said to be located at the end of a *cul-de-sac.* The house was further described as having three windows on the front side.

Mitchell asked for permission to execute the warrant at night because the location of the residence was such that officers approaching the residence could be easily observed, because there were firearms and a vicious dog at the residence, and because any methamphetamine located at the residence could be disposed of easily.

■ We first address appellant's contention that the affidavit failed to set forth sufficient facts for the execution of the warrant at night. Rule 13.2(c) provides that, before a nighttime warrant is issued, the issuing judicial officer must have reasonable cause to believe that:

(i) the place to be searched is difficult of speedy access; or

(ii) the objects to be seized are in danger of imminent removal; or

(iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy.

The use of the word "or" makes it clear that the existence of any one of these factors may justify a nighttime search. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

In this instance, the issuing magistrate authorized the execution of the warrant at night based on all three factors mentioned in Rule 13.2(c), and the trial court upheld the magistrate's determination in denying the motion to suppress. In reviewing a trial court's ruling on a motion to suppress because of an alleged insufficiency of the affidavit, we make an independent determination based upon the totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *]Coleman v. State,* 308 Ark. 631, 826 S.W.2d 273 (1992).

It has been consistently held that the affidavit must set out facts showing reasonable cause to believe that circumstances exist which justify a nighttime search. *Hall v. State,* 302 Ark. 341, 789 S.W.2d 456 (1990). Conclusory language that is unsupported by facts is not sufficient. *Richardson v. State,* 314 Ark. 512, 863 S.W.2d 572 (1993). For instance, in *Garner v. State,* 307 Ark. 353, 820 S.W.2d 446 (1991), check marks had been placed beside conclusory statements that mirrored the language found in Rule 13.2. Because the affidavit contained no facts to support those conclusions, the supreme court reversed the denial of the motion to suppress. The lack of a factual basis was also evident in *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990). There, the affidavit recited only that illegal drugs were present in the appellant's residence and that marijuana had been purchased there within the past seventy-two hours. The court considered those facts insufficient to justify the execution of the warrant at night. More recently in *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999), the supreme court determined that neither the strong odor of ether coming from the residence, the affiant's fear of an explosion, nor his statement that the incriminating evidence might be moved or destroyed provided reasonable cause to believe that the objects to be seized were in danger of imminent removal.

The court considered the affiant's assertions to be conclusory in nature and lacking in factual support.

On the other hand, nighttime searches have been sustained when there are underlying facts to support a finding of exigent circumstances. In *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996), the affidavit contained information that the road leading to the residence was muddy and filled with potholes and that it was situated such that the officers would have to approach the residence on foot for a distance of 250 yards. It was also stated that the occupants had been using methamphetamine for six months and that they feared being watched and approached by law enforcement authorities. Further, it was suspected that firearms were present in the house based on a recent report of a concerned citizen who had heard automatic gunfire coming from the residence. In addition, the affidavit recited that methamphetamine was sold at the house throughout the night and that removal of the contraband by distribution was likely. In upholding the nighttime search, the supreme court held that the affidavit "presented specific data and fact-based conclusions regarding the difficulty of access, the possible removal of evidence, and the dangers presented to the officers."

In *Langford v. State*, 332 Ark. 54, 962 S.W.2d 358 (1998), it was stated in the affidavit that the drugs in the residence were packaged in a manner that their destruction or removal could be easily accomplished; that the appellant had threatened an informant with a semi-automatic weapon within the past week and was thus believed to be armed and dangerous, making the element of surprise inherent in a nighttime search essential to the safety of the officers; that the appellant would be leaving the residence the next morning, thus giving rise to the belief that the drugs would be removed; and that the residence was located on a hill overlooking the only road that provided access to the property. Based on this information, the court concluded that there was a sufficient factual basis for a nighttime search.

Also, in *Coleman v. State*, 308 Ark. 631, 826 S.W.2d 273 (1992), it was stated in the affidavit that an informant had purchased cocaine contained in a clear plastic bag the same night that the application for the warrant was made and that the drugs located in the house were packaged and maintained in a manner that their destruction or removal could be easily accomplished. There, it was

held that there was reasonable cause to believe that the appellant had additional drugs in the residence that were packaged so that they could be easily destroyed or removed. In *Coleman*, the court also discussed the affiant's use of language generated by a word processor's memory bank that the residence was "so situated that the approach of the officers serving the warrant can be readily detected." The court likened the use of this computer-generated phrase to the check-marked language it deemed insufficient in *Garner v. State, supra.* The court commented, however, that it was regrettable that the affiant had omitted his knowledge of the residence being located on a *cul-de-sac* with only one way of entering, that the appellant watched for cars approaching the house, and that the appellant had a gun.

■ In the case at bar, the issuing magistrate knew that the house was located on a *cul-de-sac*, indicating that there was only one way for the police officers to approach the house. The magistrate also knew that there were firearms and a vicious dog present at the house. In addition, the affidavit disclosed that the methamphetamine was being kept in a single container, that leftover materials used in the manufacturing process were disposed of and burned at a distant location, and that sales of the drug were conducted away from the home. The affidavit does not rest on mere conclusions. There are facts which reveal the difficulty of access, the potential for the removal of evidence, and the dangers the officers would face, which gave cause for legitimate concern for the officers' safety. We hold that there was a sufficient factual basis to support the execution of a nighttime search.

■ Appellant also contends that the trial court erred in concluding that the good-faith exception found in *United States v. Leon* would apply even if the nighttime search was not justified. In *Leon*, 468 U.S. 897 (1984), the Court held that the Fourth Amendment exclusionary rule should not be applied to exclude evidence obtained by police officers acting in reasonable reliance on a search warrant that is ultimately found to be invalid. Because we find no defect in the warrant, there is no reason for us to discuss, hypothetically, whether the good-faith exception would have applied.

Appellant next argues that there was no probable cause for the issuance of the warrant. He contends that the information known

to the officer was conclusory and that there was no corroboration of the material allegations made by the informant. We disagree.

In deciding whether to issue a warrant, the magistrate should make a practical, commonsense determination based on the totality of the circumstances set forth in the affidavit. *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983). It is the duty of the reviewing court to simply ensure that the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *Brannon v. State,* 26 Ark. App. 149, 761 S.W.2d 947 (1988). The information given by the informant was specific and revealed the details of an ongoing methamphetamine manufacturing operation. The information she provided was based on her own personal observations of recent criminal activity; she made statements that tended to incriminate herself; and portions of her account were independently verified by Officer Mitchell. The trial court's decision to deny the motion to suppress on this ground is not clearly erroneous. *See Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

Affirmed.

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

BIRD, J., concurs.

GRIFFEN, J., dissents.

SAM BIRD, Judge, concurring. While I agree with the majority opinion that this case should be affirmed, I write separately because I do not agree that the affidavit was sufficiently specific to support the State's request for a nighttime search, but rather I would affirm because the good-faith exception applies in this case.

The majority opinion notes that the affidavit for the search warrant was quite lengthy. However, the part of the affidavit seeking to justify a nighttime search warrant was very brief, and read as follows:

> Affiant hereby requests that he be allowed to execute this warrant at night, because the location of the residence is such that officers approaching the residence could be easily observed, and there are firearms and a vicious dog located at the residence.

> Furthermore, any methamphetamine located at the residence could be easily disposed of.

I do not believe that that language is sufficient to establish the existence of exigent circumstances that justify a nighttime search. Nighttime search warrants have been invalidated on several occasions by our supreme court when the facts supporting one or more exigent circumstances have been found wanting. *See Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999) (citing *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991); *State v. Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991); *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990); *State v. Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980)). In *Fouse v. State*, *supra*, the supreme court discussed the well-established rule that conclusory language in the affidavit submitted to support a search warrant, unsupported by facts, is insufficient to justify a nighttime search. In *Fouse*, the affidavit submitted read, in part:

> It has been my experience and I know that the process of manufacturing methamphetamine takes approximately four hours and that the chemicals used to manufacture methamphetamine are volatile and subject to explode or at the least cause a fire and can be a danger to surrounding houses in a residential setting such as this. There is also an emminent (sic) danger that the items and hardware used to manufacture methamphetamine may be moved or destroyed and the methamphetamine product may be transported and/or sold.

337 Ark. at 20, 989 S.W.2d at 149. The court held that the affidavit was conclusory, and reversed the trial court's refusal to suppress evidence resulting from a nighttime search.

In *State v. Broadway*, the court stated:

> An affidavit should speak in factual and not mere conclusory language. It is the function of the judicial officer, before whom the proceedings are held, to make an independent and neutral determination based upon facts, not conclusions, justifying an intrusion into one's home.

269 Ark. at 218, 599 S.W.2d at 723.

In the case at bar, the affidavit simply states that the location of the residence is such that the approaching officers could be easily observed, that there are firearms and a vicious dog at the residence,

and that the methamphetamine could be easily disposed. I suspect that the affidavit's description of appellant's residence would apply to a large number, if not an overwhelming majority, of the residences in this state, and that the very nature of methamphetamine renders it easily disposable, wherever it may be located. The affidavit does no more than make assertions, unsupported by facts. In light of *Fouse v. State*, and *Garner v. State*, *supra*, it is hard for me to conclude that the affidavit relied on in the case at bar is sufficiently specific to justify execution of the warrant at night.

However, I would affirm this case based upon the good-faith exception set forth in *United States v. Leon*, 468 U.S. 897 (1984), where it was held that an objective good-faith reliance by a police officer on a facially valid search warrant will avoid the application of the exclusionary rule in the event that the magistrate's assessment of probable cause is found to be in error. *See United States v. Leon, supra; Langley v. State*, 66 Ark. App. 311, 990 S.W.2d 575 (1999). The test under *Leon* is not whether the police officers executing the search warrant subjectively believed that they were complying with the law. Rather, the test is whether a reasonably well-trained police officer would believe that probable cause exists for a nighttime search. *See Fouse v. State, supra.* In applying the good-faith exception, our supreme court has stated that the objective standard is not met when a police officer only presents suspicions regarding removal and the municipal judge only repeats the boilerplate language. *Fouse v. State, supra.* However, in the case at bar, there is nothing in the record to suggest that the officers in this case acted other than in an objectively reasonable manner. Furthermore, there is nothing in the record to suggest that they had any doubts about the technical sufficiency of the search warrant. *State v. Blevins*, 304 Ark. 388, 802 S.W.2d 465 (1991). The affidavit was four pages long, setting forth testimony from various informants regarding activities in the appellant's house. In addition, Detective Mitchell had traveled to the residence accompanied by a police officer who provided additional information disclosed by an informant. Furthermore, the informant had described how the persons in the home would dispose of the methamphetamine. Under these circumstances, I would conclude that a reasonably well-trained police officer would have believed that probable cause existed to conduct a nighttime search, notwithstanding the lack of specificity in the affidavit.

Therefore, while I do not believe that the facts set forth in the affidavit are sufficiently specific for a nighttime search, I concur that this case should be affirmed based upon the good-faith exception.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse and remand appellant's conviction following his conditional plea of guilty to the charge of possession of drug paraphernalia and his sentence (two years of supervised probation and $500 fine). Contrary to the majority, I consider reversal mandated because Arkansas Rule of Criminal Procedure 13.2 (c) details that a search warrant may only be executed at night as follows:

> Upon a finding by the issuing judicial officer of reasonable cause to believe that: (i) the place to be searched is difficult of speedy access; or (ii) the objects to be seized are in danger of imminent removal; or (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy . . . .

The established law in Arkansas is that a search warrant shall be executed between the hours of 6 o'clock a.m. and 8 o'clock p.m., and the three exceptions to this restriction are stated in the aforementioned rule. Ark. R. Crim. P. 13.2(c). A factual basis must be stated in the affidavit, or in sworn testimony, before a nighttime search warrant may be validly issued. *Coleman v. State*, 308 Ark. 631, 826 S.W.2d 273 (1992). Where there is no factual basis in the affidavit to support a nighttime search, but the affidavit instead speaks in mere conclusory language, the Arkansas Supreme Court has affirmed a trial judge's decision to suppress evidence seized pursuant to a nighttime search. *State v. Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980). In *State v. Martinez*, 306 Ark. 353, 356, 811 S.W.2d 319, 321 (1991), our supreme court also affirmed a trial judge's decision to suppress evidence seized in a nighttime search where a warrant merely recited (i) that arrangements had been made to purchase a controlled substance from the accused; (ii) that it was believed that the accused stored the controlled substance at his residence; (iii) and that the proposed sale was expected to occur at his residence. In doing so, the supreme court mentioned that the affidavit submitted to the issuing magistrate was silent with respect to anything regarding reasonable cause to believe that the controlled substance (marijuana in that case) would be destroyed or removed before the next morning. *Id.*

These decisions dictate reversal and remand of appellant's conviction and sentence. The affidavit for search warrant submitted to Bentonville Municipal Judge John Skaggs by Detective Dave Mitchell of the 19th Judicial District Drug Task Force simply affirmed the following regarding the reasons for requesting authorization to execute the search warrant at night:

> Affiant hereby requests that he be allowed to execute this warrant at night, because the location of the residence is such that officers approaching the residence could be easily observed, and there are firearms and a vicious dog located at the residence. Furthermore, any methamphetamine located at the residence could be easily disposed of.

This language is as conclusory as that held unacceptable in *Martinez, supra.*

Although the briefs mention that the residence to be searched was situated in a *cul-de-sac,* Mitchell's affidavit did not reference that factor as a reason for needing to execute the warrant at nighttime. Mere presence of a dog, vicious or docile, should not determine whether a search warrant can be executed at nighttime. And given that there are many residences throughout Arkansas where firearms can be found — either with or without the presence of dogs and whether located on a *cul-de-sac* or not — it does not follow that the presence of firearms makes a nighttime search necessary to protect the safety of the searching officers or to ensure that the search will be successful. The better logic is that people are more likely to fetch their guns when confronted in their homes at night by uninvited others than during the daytime, no matter where they live, whether they are law-abiding or law-breakers, or whether they have dogs or not.

Roxanne H. FOX *v.* Glen E. FOX

CA 99-410 7 S.W.3d 339

Court of Appeals of Arkansas
Division II
Opinion delivered December 15, 1999

Kinard, Crane & Butler, P.A., by: *Mike Kinard*, for appellant.

No response.

SAM BIRD, Judge. Appellant Roxanne Fox brings this appeal stating that the trial court erred in holding that it did not have subject-matter jurisdiction to hear matters pertaining to alimony and child support and in finding that appellee Glen Fox has a valid and enforceable money judgment against appellant. We affirm.

Roxanne Fox and Glen Fox were married in 1990 and made their home in Louisiana. A child was born to them in 1993. In

1996, the parties were divorced by order of the District Court of St. John the Baptist Parish, Louisiana. The parties were given joint custody of the child; appellant was awarded physical custody subject to appellee's visitation. The Louisiana judge allocated the parties' assets, and the order stated, in pertinent part:

> IT IS ORDERED, ADJUDGED AND DECREED that Roxanne H. Fox is hereby allocated the following assets in her possession valued at $17,285.00:
>
> ....
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT Glenn Fox is hereby allocated the following assets in his possession valued at $124,517.32:
>
> ....
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Glen Fox is hereby allocated the mortgage on the family home valued at $70,748.24.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Roxanne Fox owes Glenn Fox a reimbursement for the payment of community debts with his separate money which reimbursement is limited to one-half of net estate of the community or one-half of $71,000.00.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Roxanne Fox owes Glenn Fox $35,500.00 cash for reimbursement of payment of community debts.

The judge also denied appellant's request for alimony.

In August 1996, appellant and the child moved to Columbia County, Arkansas, and, at some point, appellee moved to Texas. In March 1998, appellant filed a complaint in the Columbia County Chancery Court for modification of the Louisiana custody and visitation order pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA), found at Ark. Code Ann. §§ 9-13-201—9-13-228 (Repl. 1998). In his answer, appellee admitted that he was a resident of Texas and that jurisdiction of this custody modification proceeding was in Arkansas. He denied that appellant should have sole custody of the child and affirmatively requested that the Louisi-

ana custody order be modified to increase his access to the child and to more specifically define the rights of the parties.

In May 1998, appellant filed a motion to enjoin appellee's enforcement in Arkansas of the Louisiana court's December 17, 1996, judgment allocating the parties' property and purporting to award a $35,500 judgment to appellee.

Appellant argued that this judgment was "self-satisfying" and stated: "The unequal distribution of the community property ... was undertaken by the Court so that the sums adjudged to be due by [appellant] to [appellee] would be satisfied immediately because of the transfer of an unequal share of the property to [appellee] as his distribution of the assets of the marriage." Thus, appellant argued, she owed appellee nothing under the judgment. She asked the chancellor to order appellee to file a satisfaction of judgment in Columbia County, Arkansas, and in St. John the Baptist Parish, Louisiana.

Appellant filed an amended complaint in July 1998, alleging a change in circumstances and asking for an increase in child support and an award of alimony. Appellee denied that the requested relief was warranted and raised the affirmative defense of *res judicata* as to the claim for alimony.

A hearing was held on September 9, 1998, and, after presentation of appellant's case, the judge granted appellee's motion for directed verdict on the issue of modification. The chancellor then entered an order finding that, under the UCCJA, the Arkansas court has subject-matter jurisdiction of the issues of custody, visitation, child support, and "related issues." He modified the Louisiana order as to appellee's visitation rights and increased his child-support obligation. The issues of alimony and enjoinment of the judgment were reserved for decision after the parties had submitted briefs.

In his posttrial brief, appellee conceded the Arkansas court's jurisdiction to hear the custody and visitation claims under the UCCJA but argued that it lacked subject-matter jurisdiction to entertain appellant's claims for alimony and an increase in child support. According to appellee, the UCCJA is limited to child-custody and visitation issues and expressly excludes determinations involving child support or other monetary obligations. Appellee

also argued that, under the Uniform Interstate Family Support Act (UIFSA), Ark. Code Ann. §§ 9-17-101—9-17-905 (Repl. 1998), the Arkansas court does not have jurisdiction to modify the Louisiana order as to alimony. Appellee noted that Louisiana has also enacted UIFSA and has continuing, exclusive jurisdiction of the spousal-support issue.

Appellee filed a motion to set aside the order modifying child support on the ground that the Arkansas court is without authority to modify a foreign child-support order under the UCCJA. He argued that, although UIFSA can confer jurisdictional authority upon Arkansas courts to modify child-support orders of other states, even under UIFSA the Arkansas court was without jurisdiction to modify this Louisiana child-support order. Appellee asserted that, under UIFSA, before a child-support order of another state can be modified by a court of this state, the order must first be registered pursuant to the procedures set forth in the statute; this, appellant did not do. Further, appellee argued, even if appellant had registered the Louisiana child-support order, this state would not have jurisdiction to modify it because appellant is a resident of Arkansas and all of the parties had not filed written consent to this state's court assuming continuing, exclusive jurisdiction over the order. *See* Ark. Code Ann. § 9-17-611 (Repl. 1998).

In response, appellant argued that when appellee asked that the Louisiana custody order be modified, jurisdiction for all purposes attached. Appellant did not dispute appellee's interpretation of the UIFSA provisions, but argued that this case is different because it began under the UCCJA, which confers jurisdiction on the Arkansas court. According to appellant, when the Arkansas chancery court acquired subject-matter jurisdiction of the custody issue pursuant to the UCCJA, under the "clean-up doctrine," it acquired subject-matter jurisdiction of all other issues pending between the parties.

The chancellor entered an order finding that he had exceeded his authority in modifying the child-support order because the UCCJA does not confer jurisdiction to decide issues of child support or any other monetary obligations. As for appellant's clean-up doctrine argument, he stated: "The parties are before this Court under a special uniform jurisdiction act. No other subject-matter jurisdiction attaches except that which is specifically authorized

pursuant to the UCCJA." He also found that the court did not have subject-matter jurisdiction to address the issue of spousal support and noted that appellant's only recourse is to return to the state of Louisiana for redress. Regarding appellant's attempt to enjoin the registration of the Louisiana judgment, he stated:

> While this Court is without the benefit of the thinking and rationale the Louisiana court utilized to arrive at its judgment, what is clear is that the Louisiana judgment is unambiguous. In fact, it leaves any reasonable person who reads same with a clear impression that [appellant] owes [appellee] $35,500.00, cash, for reimbursement of payment of community debts.
>
> The Court would submit to you that the Louisiana judgment speaks for itself. There is no indication from this judgment that it is, in any way, self-satisfying. Accordingly, the Court declines to enjoin the execution of this judgment.

Appellant argues on appeal that the chancery court erred in finding that it lacked subject-matter jurisdiction to decide the child-support and alimony issues and that it misinterpreted the Louisiana order awarding judgment to appellee.

■ The stated purposes of the UCCJA are to avoid jurisdictional conflict with courts of different states, to promote cooperation between courts so that the custody decree is rendered by the state that can best decide the case, to discourage continuing controversies over child custody, to deter abductions, and to avoid relitigation of custody decisions. *Garrett v. Garrett*, 292 Ark. 584, 732 S.W.2d 127 (1987). The statute's basic jurisdictional concept is that the child's home state should have preeminent authority to determine custody and visitation and that authority should be respected elsewhere. *Bruner v. Tadlock*, 338 Ark. 34, 991 S.W.2d 600 (1999). *See also Elam v. Elam*, 39 Ark. App. 1, 832 S.W.2d 508 (1992).

■ Clearly, under the UCCJA, the Arkansas court does not have jurisdiction of the child-support or alimony issues. The UCCJA is solely for custody disputes between residents of different states and does not confer jurisdiction on the chancery court to enter an order for support of minor children absent a divorce proceeding. *Amos v. Amos*, 282 Ark. 532, 669 S.W.2d 200 (1984). Further, Ark. Code Ann. § 9-13-202(2) (Repl. 1998) defines the term "custody determination" as "a court decision and court orders and instructions providing for the custody of a child, including

visitation rights. It does not include a decision relating to child support or any other monetary obligation of any person ...."

Appellant argues that, under the clean-up doctrine, the Arkansas court had jurisdiction to decide the issues of child support and alimony after it properly acquired jurisdiction of the custody and visitation issues. Pursuant to the clean-up doctrine, a court of chancery or equity may obtain jurisdiction over matters not normally within its purview. *Douthitt v. Douthitt,* 326 Ark. 372, 930 S.W.2d 371 (1996). Under the clean-up doctrine, the chancery court, having acquired jurisdiction for equitable purposes, may retain all claims in an action and grant all relief, legal or equitable, to which the parties in the lawsuit are entitled. *Bright v. Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992). Unless equity is wholly incompetent to grant the relief sought, objection to its jurisdiction is waived if no motion to transfer to law is made, *id.,* and questions of the adequacy of the remedy at law are waived when raised for the first time on appeal. *Crittenden County, Arkansas v. Williford*, 283 Ark. 289, 675 S.W.2d 631 (1984). It is well settled that, when a court of equity acquires jurisdiction for one purpose, it retains jurisdiction for all purposes, provided the original object of the suit is clearly within equity's jurisdiction and there is no adequate remedy at law. *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995).

There is no question that, in Arkansas, issues of child support and alimony must be heard in chancery. However, the clean-up doctrine is concerned with the power of a court of equity to decide legal questions; it has no application to the question of whether the courts of this state have the power to modify the orders of foreign courts. If no Arkansas court has the power to modify a foreign court's order, it is irrelevant whether the issues sound in equity or in law. Therefore, we agree with the chancellor that the chancery court did not have jurisdiction to hear the child-support and alimony issues.

Appellant also argues that the chancellor misconstrued the Louisiana decision giving judgment to appellee and that he should have enjoined its registration in Arkansas. As a general rule, judgments are construed like any other instrument; the determinative factor is the intention of the court, as gathered from the judgment itself and the record. *Magness v. McEntire,* 305 Ark. 503, 808 S.W.2d 783 (1991). In interpreting a lower court's order, the

court looks to the language in which the order is couched and whether the evidence supports the ruling. *Id.* From our review of the language of the judgment, we cannot say that the chancellor misconstrued the Louisiana order.

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.

Harold BELL, Jr. *v.* STATE of Arkansas

CA CR 99-217 7 S.W.3d 343

Court of Appeals of Arkansas
Division III
Opinion delivered December 15, 1999

G.B. "Bing" Colvin, Public Defender, for appellant.

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

WENDELL L. GRIFFEN, Judge. *Before [an officer] places a hand on the person of a citizen in search of anything, he must have constitutionally adequate reasonable grounds for doing so.*[1]

Harold Bell, Jr., appeals from the decision of the Drew County Circuit Court finding him guilty of a Class A misdemeanor possession of marijuana, and sentencing him to one year in jail with a fine of $500.00. Appellant asserts for purposes of this appeal that the trial court erred when it denied his motion to suppress the 0.7 grams of marijuana found in his pocket. We reverse and remand.

On June 30, 1997, pursuant to an informant's tip, officers of the Drew County Sheriff's Office went to a pool hall in Wilmar, Arkansas, to investigate a report that drugs and alcohol were being sold there. Upon arrival, Officer Rabb approached Bell, who was sitting on the hood of a car near the front of the yard, and asked for identification. Bell stated that he had no identification. Officer Rabb then told Bell to stand up and asked if he had any weapons. Bell said that he was not armed. After noticing a bulge in Bell's left rear pants pocket, Rabb frisked Bell for weapons. Rabb testified that "[the bulge] felt like a plastic bag with what felt like a vegetable-like substance in the pocket." Raab then removed the contents of the appellant's pocket and discovered that it was marijuana. Bell was charged and convicted of misdemeanor possession of marijuana.

Bell's attorney objected to the scope of the search during trial, where the following exchange occurred:

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[1] See *Pettigrew v. State*, 64 Ark. App. 339 984 S.W. 2d 72 (1998) (Citing *Sibron v. New York*, 392 U.S. 40 at 41, 20 L.Ed. 2d 917, 88 S.Ct. 1889 (1968)). In the *Sibron* case, Chief Justice Warren, who delivered the opinion for the Court, stated that when an officer is conducting a safety pat-down for weapons, the officer must be able to demonstrate particular facts from which he reasonably inferred that the individual was armed and dangerous.

> THE COURT: Okay. Let me ask you, Mr. Colvin, [counsel for appellant] if, is reasonable suspicion or probable cause necessary for a safety pat down?
>
> MR. COLVIN: No, sir. Not a safety pat down.
>
> THE COURT: Okay.
>
> MR. COLVIN: And I'm not complaining about the pat down. I'm complaining about the fact that they went beyond the search once they were, once they were secure in their mind that Harold Bell, Junior did not have a gun. Now when he saw a bulge, he patted him down and felt of that area. Automatically he saw it was a plastic baggie and was not a weapon. He had no authority, whatsoever, to go further.
>
> THE COURT: So you maintain if you touch a bulge, and if the officer in his opinion determines the bulge to be contraband—
>
> MR. COLVIN: That's too bad.
>
> THE COURT: —you can't do anything about it?
>
> MR. COLVIN: No, sir. He cannot do anything about it. Because there are so many things that we as citizens carry in our pockets . . . [a]nd when the police department, law enforcement officers in general satisfy themselves that it is not a weapon when they are doing a search that's solely for a pat down, they must go on.

It is clear from this exchange that Bell's attorney challenged the scope of the frisk. Thus, the argument preserved for purposes of appeal is that Rabb violated the Bell's Fourth Amendment rights, pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), and *Minnesota v. Dickerson*, 508 U.S. 366 (1993), when Rabb determined that the bulge in his pocket was not a weapon, and did not end the search.

The Fourth Amendment to the Constitution of the United States protects the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. *Kearse v. State*, 65 Ark. App. 144, 986 S.W.2d 423 (1999); *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). Frequently the Fourth Amendment rights of citizens are balanced with the need for police to conduct their duties. *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998). In *Frette*, the supreme court explained that there are three types of encounters between the police and private citizens. The first and least intrusive

encounter is when an officer merely approaches an individual on a street and asks if he is willing to answer a question. *Id.* Because the encounter is in a public place and is consensual, it does not constitute a "seizure" within the meaning of the Fourth Amendment. The second police encounter is when the officer may justifiably restrain an individual for a short period of time if he has an "articulable suspicion" that the person has committed or is about to commit a crime. *Id.* The initially consensual encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. The final category is the full-scale arrest, which must be based on probable cause. *Id.*

In reviewing the denial of a motion to suppress, we make an independent examination based on the totality of the circumstances, and will reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998). A constitutionally valid intrusion into the lives of citizens by police must pass the safeguards contained in the Arkansas Rules of Criminal Procedure. Rule 3.4 of the Arkansas Rules of Criminal Procedure states:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer . . . may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others.[2]

It is clear that the safeguards put into place by the Fourth Amendment, the *Terry* decision, and the Arkansas Rules of Criminal Procedure were disregarded as Rabb searched Bell. In *Dickerson*, the United States Supreme Court addressed what has been dubbed the "Plain Feel Doctrine" and stated:

> Consistent with the Federal Constitution's Fourth Amendment, a police officer may seize nonthreatening contraband detected during a protective pat-down search of a person whom the officer has briefly stopped based on the officer's reasonable conclusion that criminal activity may be afoot with respect to such person, where the officer is justified in believing that the person is armed and

[2] Rule 3.4 is the Arkansas standard for applying the ruling in *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968).

> presently dangerous to the officer or to others nearby, so long as the officer's search is strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others, because (1) the "plain-view" doctrine — under which police officers may seize an object without a warrant if the officers are lawfully in a position from which they view the object, its incriminating character is immediately apparent, and the officers have a lawful right of access to the object — has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search; (2) if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons, and the warrantless seizure of the object if it is contraband is justified by the realization that resort to a neutral magistrate under such circumstances would often be impractical and would do little to promote the objectives of the Fourth Amendment; and (3) a suspect's privacy interests are not advanced by a categorical rule barring the warrantless seizure of contraband plainly detected through the sense of touch, since (a) the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure, (b) even if it were true that the sense of touch is generally less reliable than the sense of sight, such fact suggests only that officers will less often be able to justify seizures of unseen contraband, (c) the Fourth Amendment's requirement that officers have probable cause to believe that an item is contraband before seizing it insures against excessively speculative seizures, and (d) the seizure of an item whose identity is already known occasions no further invasion of privacy.

Minnesota v. Dickerson, *supra* at 366. In *Dickerson*, the Court suppressed evidence of the respondent's possession of crack cocaine because it was shown that the arresting officer had to manipulate the object in the pocket of the respondent before determining that it was contraband. This manipulation amounted to an illegal search as the identity of the contraband was not apparent.

The present case is analogous to *Dickerson*. Raab was justified in frisking the appellant for weapons. When his initial frisk yielded no weapons, the search should have ended. The holding in *Dickerson* does not permit an officer to search a suspect for contraband under the guise of a weapons search. Because it is clear from the facts that Officer Rabb had to manipulate the bulge in Bell's rear

pocket to determine that it was contraband, this type of search is contrary to the permissible scope outlined in *Dickerson.*

The trial court's determination that the scope of the search did not violate the Fourth Amendment as applied in *Dickerson, supra,* was clearly against the preponderance of the evidence.

Reversed and remanded.

ROBBINS, C.J., and HAYS, S.J., agree.

James COLE, Jr. *v.* STATE of Arkansas

CA CR 99-315 6 S.W.3d 805

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered December 15, 1999
[Petition for rehearing denied January 19, 2000.]

Montgomery, Adams & Wyatt, PLC, by: *James W. Wyatt*, for appellant.

Mark Pryor, Att'y Gen., by: *James R. Gowen, Jr.*, Asst. Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. James Cole, Jr., was convicted in a bench trial for possession of a controlled substance with intent to deliver and for the possession of drug paraphernalia. Cole was sentenced to forty-two months in the Arkansas Department of Correction on each charge with the sentences to run concurrently. On appeal, Cole contends that the trial court erred in denying his motion to suppress the drugs and paraphernalia found as the fruit of an illegal search. Because Cole failed to preserve the issue, we have no choice but to affirm his conviction without addressing the merits of his argument.

Around 2:15 p.m. on August 28, 1997, Detective Rick Dunaway received a tip from an anonymous caller that a white male would be leaving the Hideaway Club in North Little Rock with approximately three grams of methamphetamine. The caller also stated that the person would be driving an orange Ford Mustang with white racing stripes. Detective Dunaway testified that he and Investigating Officer Vereen arrived at the Hideaway Club and within fifteen minutes of receiving the tip he observed a vehicle matching the description provided by the caller leaving the parking lot.

Dunaway requested a marked police vehicle to perform a traffic stop on this car. Patrolman Darren Archer responded, performed the stop, and placed the driver into the back seat of the patrol car. James Cole was identified as the driver of the vehicle. Dunaway and Vereen proceeded to search the Mustang. Dunaway

found a digital scale under the seat of the vehicle. Archer testified that when Dunaway and Vereen took Cole out of the patrol car and into custody, Archer discovered a plastic bag that was later confirmed to contain methamphetamine. Archer testified that he had searched his own vehicle before placing Cole into the back seat of the patrol car and knew that it was empty. The record reflects that Cole filed a motion to suppress the evidence on April 10, 1998. At the bench trial held on November 2, 1998, Cole orally moved to suppress the evidence and dismiss the charges after the State rested its case; the trial court denied the motion. Cole appeals.

The State cites to the case of *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998), in support of its contention that Cole failed to preserve the merits of this issue on appeal because he failed either to renew his written motion to suppress at the start of trial or object to the introduction of the evidence when it was offered by the State. In *Stewart*, the supreme court held that it is not necessary to make a contemporaneous objection when the defendant renews a motion to suppress the evidence at the beginning of a bench trial, stating:

> In reaching this conclusion, we are not unmindful of two recent cases where we held that a contemporaneous objection is required in order to preserve for appeal issues that were raised in a motion in limine. *Slocum v. State,* 325 Ark. 38, 924 S.W.2d 237 (1996); *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995). We, however, find these cases distinguishable because they involved jury trials, instead of a bench trial as in this case. If a contemporaneous objection is not made at the time the evidence is offered during a jury trial, the proverbial bell will have been rung and the jury prejudiced. *However, when the contested evidence is mentioned during a bench trial, there is no risk of prejudice because a trial judge is able to consider evidence only for its proper purpose.* Similarly, in *Strickland v. State,* 322 Ark. 312, 909 S.W.2d 318 (1995), we held that litigants are not required to make a motion challenging the sufficiency of the evidence during cases tried before the court instead of a jury.

[Emphasis added.]

Here, however, there is nothing in the abstract or the record showing that the trial court ever ruled on Cole's written motion to suppress prior to the start of trial. It was not until after the State had introduced its evidence and had rested that Cole made an oral motion to suppress and to dismiss the charges. It is the

responsibility of the appellant to bring forth a record that demonstrates error. Except for a few narrow exceptions, it is well-settled that in order to preserve an issue for appeal the appellant must make an objection contemporaneously with the alleged error. *Stewart v. State, supra* (citing *Smith v. State,* 330 Ark. 50, 953 S.W.2d 870 (1991)). Although a contemporaneous objection is not required in a bench trial in the present circumstances, *Stewart v. State, supra,* strongly suggests that the motion to suppress must at least be orally raised or renewed at the beginning of trial.

The dissenting judges believe that this court can infer that the trial court and counsel agreed prior to trial to have the suppression motion heard simultaneously with the State's evidence, and it certainly appears that such was the case. However, we are not granted the discretion to fill in missing gaps in the record through inference. The State has pointed out this problem in its brief, Cole has not even filed a reply brief, and his counsel had a means to attempt to correct the record but did not do so. *See Hood v. State*, 324 Ark. 457, 920 S.W.2d 854 (1996).

Affirmed.

BIRD, STROUD, and NEAL, JJ., agree.

PITTMAN and JENNINGS, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. The majority holds that appellant's argument that he was subjected to an illegal search was not properly preserved and affirms the case on that basis. Because I disagree with the majority's view on this threshold issue, I dissent.

The critical question in my view is whether the trial court agreed to consider the motion simultaneously with the evidence on the merits. *See Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998). It is clear to me that this is what the trial court did. Prior to trial the appellant filed a motion to suppress based on the illegality of the search. No separate hearing was held on the motion. At trial considerable time was devoted to the basis of and circumstances surrounding the stop of the appellant and the subsequent search. At the close of the evidence appellant again moved to suppress based on the illegality of the search and stated his reasons to the court. The prosecuting attorney responded to the argument on the merits.

He did not argue to the court that the argument had been waived or that the issue had not been sufficiently developed. The trial court then denied the motion to suppress based upon the totality of the circumstances.

From the foregoing it is sufficiently clear to me that the motion to suppress was in fact heard simultaneously with the merits of the case. I would therefore reach the merits of the argument.

PITTMAN, J., joins in this dissent.

Phillip G. WHISNANT *v.* Barbara J. WHISNANT

CA 98-1527 6 S.W.3d 808

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 15, 1999

James F. Lane, P.A., for appellant.

Helen Rice Grinder, for appellee.

ANDREE LAYTON ROAF, Judge. In this divorce case, Phillip G. Whisnant appeals an order of the Faulkner County Chancery Court denying his Ark. R. Civ. P. 59 motion for a new trial. In his motion, Phillip argued that certain payments he made during the pendency of the parties' divorce action should be credited against his share of the marital debt. On appeal, he argues that the chancellor erred in denying him: 1) credit for payments he made directly to appellee Barbara J. Whisnant or to others to preserve the marital residence prior to its sale; 2) credit for one-half of the total payments he made on marital debt between the parties' 1995 separation and the August 6, 1998 final order; and 3) the relief he sought in his motion. We affirm as modified.

The parties married on July 20, 1963. On April 13, 1995, Phillip petitioned for divorce. Barbara answered the complaint on April 24, 1995, and later filed a counterpetition for divorce on September 7, 1995. A hearing was held on the divorce petitions on November 6, 1995. At that hearing, Phillip told the chancellor that

he was not contesting the divorce, and he was excused from the proceeding, with the understanding that the marital-property issues would be reserved. At that time, the parties also represented to the trial judge that they believed that they had a buyer for the marital residence. At that hearing, Barbara's trial counsel also stated, "We will reserve the issue of the retirement benefits collected by Mr. Whisnant pending this divorce because there are some equitable arguments to be made by Mr. Whisnant regarding assistance with some of the house payments pending the divorce so the Court will have to decide that later." Subsequently, a divorce decree was filed for record on February 29, 1996, that reserved division of the marital property. In an order filed on February 27, 1996, also entered pursuant to the November 6, 1995, hearing, the chancellor approved the sale of the marital home and equal division of the proceeds.

Two subsequent hearings were held on the property/debt-division issues, neither of which are abstracted. A brief hearing was held on December 18, 1996, in which a single witness, Barbara's aunt, testified that certain items of personal property were gifts from Phillip to Barbara. That hearing is of no consequence to this appeal. However, a final hearing was held on February 10, 1998, in which the parties were allotted only thirty minutes total. Arguments of counsel concerned Barbara's motion for contempt and the amount of Phillip's retirement that he owed to Barbara. Phillip did not raise the set-off issue for payments that he had made on the marital debt. However, the chancellor acknowledged that his duty pursuant to the hearing was in part to "make a ruling on all the rulings that I haven't ruled on yet."

In a June 12, 1998, letter opinion, the chancellor divided personal property and marital debt and found Phillip in contempt for failure to fully pay one-half of his retirement benefits. In a letter to counsel filed for record on August 6, 1998, the chancellor recused. The final order dividing the marital property and debt was filed one hour later.

On August 14, 1998, Phillip filed a Rule 59 motion for a new trial or an amendment of the August 6, 1998, order. In his motion, in pertinent part, he requested a credit of $3,913.45 for payments he had made during the pendency of the divorce to maintain the marital household and a credit for $5,553.13, which represented

one-half of the $11,413.13 that he had paid since the parties' separation in March of 1995 as payments on the marital debt. He also alleged that the finding of contempt was in error because he had complied with his obligation under the order. There was no action taken on the motion within thirty days; however, Barbara filed a response after the thirty days had elapsed, contending that the grounds that Phillip had relied upon for a new trial were not cognizable under Rule 59(a).

On appeal, Phillip argues that the trial court erred in denying him credit for payments he made directly to Barbara or to others to preserve the marital residence prior to the sale of the marital residence. He contends that Barbara acknowledged that he might have "equitable arguments" concerning house payments that he made and payments that he made on the marital debt, and he argues that the trial court erred in not taking those arguments up in his motion for a new trial. We disagree.

Rule 59 states in pertinent part:

> (a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party: (1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party; (3) accident or surprise which ordinary prudence could not have prevented; (4) excessive damages appearing to have been given under the influence of passion or prejudice; (5) error in the assessment of the amount of recovery, whether too large or too small; (6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law; (7) newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial; (8) error of law occurring at the trial and objected to by the party making the application. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Liberal construction of Phillip's new-trial motion suggests that it may be grounded in Rule 59(a)(5), (6), or (8). However, Phillip's failure to raise his argument to the trial court precludes

review of this point. Phillip does not argue that he raised any "equitable arguments" to the trial court prior to his Rule 59 motion, and Phillip's abstract fails to show that he made his "equitable arguments" to the trial court. These arguments should have been raised to the chancellor before the entry of the order. In *Sharp County v. Northeast Ark. Planning & Consulting Co.*, 269 Ark. 337, 602 S.W.2d 627 (1980)(*modified on other grounds*, 275 Ark.172, 628 S.W.2d 559 (1982)), a case involving Rule 59(a)(6), the supreme court held that where evidence was not before the trial court originally and was, therefore, not considered in its findings of fact, such evidence cannot be used as a basis for a motion for a new trial, since a motion for a new trial cannot be used to bring into the record that which does not otherwise appear in the record. Furthermore, in *Burge v. Pack*, 301 Ark. 534, 785 S.W.2d 207 (1990), the supreme court stated that a Rule 59 motion cannot be used to raise arguments not made to the trial court before the entry of judgment.

The dissent correctly states that a decision on whether or not to grant a motion for a new trial calls for an exercise of discretion on the part of the trial court; this point is well supported by the two cases it cites in which the trial court granted a new trial. However, it does not follow that this or any case must be reversed for failure to exercise discretion where there has been no action taken on a new-trial motion. The appellant's abstract reflects only that a motion for a new trial was timely filed with the clerk and that the appellee filed a response after the thirty days in which the trial court had to act on the motion had passed. There is no indication in the abstract or in appellant's argument that he did more than simply file the motion, at a time when he knew the trial judge had recused. There is simply no indication that the appellant ever called the motion to the attention of any judge or requested that any action be taken on it. In *Terrell v. State*, 294 Ark. 461, 744 S.W.2d 734 (1988), the supreme court stated that it is the duty of the party filing a motion for a new trial to present the motion to the trial court within thirty days of filing, and if the matter cannot be heard within those thirty days, the moving party is obligated to request the court to set a date for hearing on that motion.

As for Phillip's argument that the trial court erred in denying him credit for one-half of the total payments he made on marital debt prior to the August 6, 1998 order, we note that both the chancellor's letter opinion and the order subsequently entered

lists by name the parties' marital debts and provides that each party shall be responsible for one-half of these debts from the date of separation in March 1995. We do not agree with Barbara's contention that the chancellor failed to rule on the issue simply because the dollar amount of each debt is not set out in the letter opinion. Accordingly, Phillip is entitled to set off one-half of the payments that he made since the stated date of separation toward those marital debts designated in the final order against the arrearage, attorney fees, and the portion of his retirement awarded to Barbara.

Affirmed as modified.

BIRD, GRIFFEN, JJ., and HAYS, S.J., agree.

PITTMAN and HART, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. This is an unusual case raising questions concerning the authority of a chancellor to act after he recuses. The parties were granted a divorce in 1996 by a decree that reserved certain issues relating to property and marital debt for future adjudication. After two subsequent hearings, the chancellor adjudicated the remaining property and debt issues in a letter opinion dated June 3, 1998. By a letter dated August 5, 1998, the chancellor notified the parties that he was recusing, but no order transferring this case to another division or appointing another judge appears in the record. The order memorializing the June 3 letter opinion was entered on August 6, 1998. On August 14, 1998, appellant filed a motion for a new trial. No hearing was conducted and the motion was deemed denied by operation of law after the passage of thirty days. *See* Ark. R. App. P.—Civil 4(b). Appellant subsequently filed a timely notice of appeal.

Appellant contends, *inter alia*, that it was error to fail to consider his motion for a new trial. I agree. Although a motion for a new trial will be deemed denied by operation of law if the trial court neither grants nor denies the motion within thirty days of its filing pursuant to Ark. R. App. P.—Civil 4(b), whether or not the motion should be granted is a matter calling for an exercise of discretion on the part of the trial court. *See, e.g., Suen v. Greene*, 329 Ark. 455, 947 S.W.2d 791 (1997);*Lawson v. Lewis*, 276 Ark. 7, 631 S.W.2d 611 (1982). In the present case, it appears that no exercise of discretion took place because no judge was assigned to the case at the time the motion for a new trial was under submission. Because

there has been a failure to exercise discretion, I would reverse and remand for a chancellor to be appointed, if necessary, and for the chancellor to exercise his discretion on this issue.

I respectfully dissent.

HART, J., joins in this dissent.

DOUGLAS TOBACCO PRODUCTS CO., Inc. *v.*
Betty GERRALD and Second Injury Fund

CA 99-642 8 S.W.3d 39

Court of Appeals of Arkansas
Division II
Opinion delivered December 22, 1999

Lee Joseph Muldrow and *William Stuart Jackson*, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellee Betty Gerrald.

Terry Pence, for appellee Second Injury Fund.

JOHN B. ROBBINS, Chief Judge. The parties in this workers' compensation case stipulated that appellee Betty J. Gerrald suffered a compensable back injury while working for appellant Douglas Tobacco Products on October 4, 1994. Subsequent to the injury, she was assigned a thirteen percent permanent partial impairment rating to the body as a whole. The issues before the Workers' Compensation Commission were the extent of any wage-loss disability and, if any disability benefits were awarded, whether appellee Second Injury Fund was liable. After a hearing, the Commission found that Ms. Gerrald was entitled to fifty percent wage-loss disability benefits, and that Second Injury Fund had no liability. Douglas Tobacco Products now appeals, arguing that the Commission erred in not apportioning liability to the Second Injury Fund, and in finding that Ms. Gerrald had sustained a fifty percent wage-loss disability. Ms. Gerrald cross-appeals, contending that she is permanently and totally disabled and that the Commission erred in limiting her wage-loss benefits to only fifty percent. We affirm the award for fifty percent wage-loss disability, but reverse the Commission's decision that found the Second Injury Fund without liability.

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

the same conclusions if presented with the same facts. *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

At the hearing before the Commission, Ms. Gerrald testified that she began full-time employment for Douglas Tobacco Products in 1972. Her duties included driving to various stores and stocking cigarettes, candy, and other products. Ms. Gerrald testified that her job required squatting, bending, stooping, and lifting.

Ms. Gerrald stated that, on October 4, 1994, she was lifting soft drinks from the floorboard of her car when she injured her back. She went to the doctor the next day, and eventually came under the care of Dr. Tom Fletcher. Dr. Fletcher performed surgeries at the L4-L5 and L5-S1 levels, and, according to Ms. Gerrald, her condition worsened after the surgeries. She stated that she has been unable to work since the date of her compensable injury, and that although she loved her job and wanted to return to work, her physical condition prevented her from doing so. She testified:

> Some mornings I can't get out of bed. Some mornings I can't walk. Sometimes I get in a chair and I can't get out of the chair. Out of a typical week, this happens to me three or four days of the week. Some weeks I can't get out of the house all week, and some weeks I can get out three or four days. You never know when you wake up in the morning.

On cross-examination, Ms. Gerrald acknowledged that she had a similar episode in 1990 when she reached to pick up a book out of her car, twisted, and hurt her back. As a result of that incident, she was in the hospital for seven or eight days, but then returned to work. Then, in 1992, she slipped on a wet floor and suffered further difficulty with her back. However, after presenting to the doctor following the 1992 incident, Ms. Gerrald recalled missing no work and could not remember being placed on any physical restrictions.

The medical evidence presented at the hearing showed that, after the 1990 incident, Ms. Gerrald was diagnosed with mild degenerative changes of the lower lumbar spine with disk desiccation at the L4-L5 and L5-S1 levels. At that time, Dr. Freddie Contreras reported, "I would expect her to go on to make a full recovery with no permanent medical impairment." After the 1992

incident, Ms. Gerrald was diagnosed with mild to moderate degenerative disc disease as well as herniations at both L4-L5 and L5-S1.

Dr. Anthony Russell examined Ms. Gerrald subsequent to her surgeries and reported:

> Gerrald returns today continuing to have pain in her back and right lower extremity. A new complaint consists of pain in the left hip and down the left leg. This goes to the foot and does appear to involve the top of the foot. The pain is significant. She can't sleep at night. She is not able to sit or stand for extended periods of time. She has had a significant amount of trouble with pain when she leans forward for any reason. I acknowledge the fact that Gerrald is very likely having significant pain.

Dr. Russell also gave an opinion regarding the factors contributing to her impairment rating, and concluded that eight percent was present in 1992, while an additional five percent was caused by the multiple-level surgeries following her compensable injury. He further reported:

> By reviewing the medical records, it is easy to establish that the patient showed progressive deterioration of her lumbar spine over successive MRI scans. The initial MRI scan performed in March 1990 showed only mild degenerative changes of the lower lumber spine and disk desiccation at L4-L5 and L5-S1. In May 1992, the patient underwent a second MRI scan, that at this time first documented the presence of a small central disk herniation at L4-L5 and the right paracentral herniated disk at L5-S1. The patient was also noted at that point to have spondylolysis at L5-S1. The patient reported the injury to her lumbar spine while moving the drinks from the back seat in early October 1994. A subsequent MRI scan performed on 10/21/94 again showed a small, posterior herniation of L4-L5 and L5-S1 disk and degenerative arthritis. There appears to have been little, if any, change in the studies of 1994 when compared to the study of 1992. Of course, this is comparing radiologist's interpretation only.
>
> It would appear that the disk herniations present in 1994 were also present in May 1992. It appears that the incident in October 1994 that ultimately prompted surgical decompression, served only to aggravate a pre-existing condition. Again, this is based on the near perfect correlation between the radiologist's report of May 1992 as compared to the October 1994 study. Therefore, it would

> appear that the pre-existing manifest as early as 1992 was a major contributing factor to her ultimate surgical procedure in 1995.

Judy Benson, a vocational rehabilitation specialist, evaluated Ms. Gerrald's potential to return to work. Ms. Benson interviewed Ms. Gerrald and examined a functional-capacity evaluation as well as the relevant medical records. Ms. Benson concluded that, while Ms. Gerrald is limited to jobs that are light or sedentary, she was not completely unable to work. Taking into account Ms. Gerrald's background and physical limitations, Ms. Benson suggested jobs such as home-based telephone marketing, or employment as a receptionist or cashier.

Appellant's first argument for reversal is that the Commission erred in failing to apportion any of the wage-loss disability benefits to Second Injury Fund. Arkansas Code Annotated section 11-9-525(a)(1) and (2) (Repl. 1996) provides that the Second Injury Fund is established and designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in the employer's employment. *POM, Inc. v. Taylor*, 325 Ark. 334, 925 S.W.2d 790 (1996). The appellant correctly asserts that the test that is used to determine whether the Second Injury Fund must share liability for compensating an injured worker was stated in *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), as follows:

> First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial *disability* or *impairment*. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. [Emphasis in original.]

Id. at 5, 746 S.W.2d at 541. The appellant argues that, because the evidence clearly established all three of the above elements, the Commission erred in failing to find Second Injury Fund liable for any of the wage-loss benefits.

We agree that the three elements set out in *Mid-State Constr. Co. v. Second Injury Fund, supra*, were established in this case. The first element was clearly satisfied because all parties agreed that

Ms. Gerrald suffered a compensable injury. The Commission acknowledged that the second element was also established given that it credited Dr. Russell's opinion that Ms. Gerrald was eight percent permanently impaired prior to the compensable injury. However, the Commission specifically found that, because the prior impairment did not combine with the compensable injury to produce her current disability status, Second Injury Fund was free from liability. This finding was not supported by substantial evidence.

In ruling that the prior impairment and compensable injury did not combine to produce the fifty percent disability, the Commission relied on its decision in *Ellison v. Therma-Tru*, which it filed on June 11, 1998. In that case, it was determined by the Commission that, although five percent of claimant's six percent anatomical impairment was due to a preexisting disk disease, Second Injury Fund was nonetheless not liable because the disk disease was asymptomatic prior to the compensable injury. However, subsequent to the filing of the Commission's opinion in the instant case, we reversed it in a published opinion, *Ellison v. Therma-Tru*, 66 Ark. App. 286, 989 S.W.2d 987 (1999). In reversing, we held that fair-minded people could not agree that the combined effect of appellant's work-related injury and her preexisting condition did not combine to produce her current disability.

As in *Ellison v. Therma-Tru*, *supra*, the Commission in this case erred in failing to find that the third element of the *Mid-State* test was not satisfied. The medical evidence revealed that Ms. Gerrald was diagnosed with disk desiccation at the L4-L5 and L5-S1 levels in 1990, and with herniations at these levels in 1992. Significantly, these are the levels that were surgically treated following her 1994 injury. Moreover, Dr. Russell attributed the majority of Ms. Gerrald's permanent impairment rating to conditions that preexisted the compensable injury. He also gave the opinion that her back condition as diagnosed in 1992 "was a major contributing factor to her ultimate surgical procedure in 1995." While it is true that Ms. Gerrald missed only a week of work after the 1990 incident, and missed no work after the 1992 incident, a claimant's ability to return to work after her prior injuries is not determinative of Second Injury Fund liability. *See POM, Inc. v. Taylor, supra*; *Hawkins Constr. Co. v. Maxwell*, 325 Ark. 133, 924 S.W.2d 789 (1996). Given the medical evidence presented in this case, we find that substantial evidence does not support the Commission's deter-

mination that the injuries did not combine to produce the permanent impairment, and that Second Injury Fund was not liable for a portion of the disability benefits.

Appellant's remaining argument is that the Commission erred in awarding a fifty percent wage-loss disability. Arkansas Code Annotated section 11-9-522(b)(1) (Repl. 1996) provides:

> In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity.

The appellant notes that Ms. Gerrald has more than twenty years' experience in sales and was described by the vocation rehabilitation specialist as being personable and professional. The appellant further points out that the specialist identified several jobs that she thought to be suitable, and that many of these jobs paid more than Ms. Gerrald was making at the time of her compensable injury. Finally, appellant submits that Ms. Gerrald's failure to return to work was in part the result of her lack of motivation. Under these circumstances, it is contended that the fifty percent wage-loss disability award was excessive.

We find substantial evidence to support the wage-loss disability awarded by the Commission. The medical evidence indicated that Ms. Gerrald's physical abilities are limited and that she remains in a substantial amount of pain. Furthermore, Ms. Gerrald's testimony revealed that her condition has worsened since the surgeries to the point where she is often immobile. She testified that on some days she cannot get out of the house or even walk. Although there was evidence that there may be some jobs available to Ms. Gerrald, there was ample evidence to support the finding that she has suffered a fifty percent reduction in her wage-earning capacity.

Finally, we turn to Ms. Gerrald's cross-appeal. She contends that the Commission erred in finding that she was only fifty percent wage-loss disabled. She notes that, although the vocational specialist thought that suitable jobs were available, she received no offers of employment. Ms. Gerrald asserts that, due to her physical disabili-

ties brought on by the compensable injury, she is completely unable to work. She also contends that the Commission failed to state facts in support of its award, and urges this court to remand for specific findings of fact.

We conclude that the Commission stated sufficient facts in support of the fifty percent wage-loss disability award, and that the award is supported by substantial evidence. The Commission noted in its opinion that Ms. Gerrald's compensable injury resulted in a significant amount of anatomical impairment that clearly impedes her ability to return to the work force. However, it also acknowledged the fact that several sedentary jobs were identified by the vocation specialist, but that Ms. Gerrald showed little motivation to pursue any employment possibilities. Lack of motivation to return to work can be considered by the Commission in awarding wage-loss benefits. *Bradley v. Alumax*, 50 Ark. 13, 899 S.W.2d 850 (1995). Based on the evidence presented, we affirm the Commission's finding that Ms. Gerrald was entitled to no more than a fifty percent wage-loss disability.

For the foregoing reasons, we affirm the Commission's wage-loss award. However, we reverse and remand to the Commission with respect to its determination that the Second Injury Fund was not liable for payment of the wage-loss benefits.

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

PITTMAN and HART, JJ., agree.

Marvin CARMICAL and Margaret E. Carmical
v. David McAFEE

CA 99-430 7 S.W.3d 350

Court of Appeals of Arkansas
Division II
Opinion delivered December 22, 1999
[Petition for rehearing denied January 26, 2000.]

J.R. Nash, for appellants.

Snellgrove, Langley, Lovett & Culpepper, by: *Todd Williams*, for appellee.

JOSEPHINE LINKER HART, Judge. In September 1997, appellants Margaret and Marvin Carmical, mother and son, filed a complaint against appellee, David McAfee, in circuit court, alleging that he had committed against them acts of malicious prosecution, abuse of process, and several other intentional torts by filing, in April 1993, a lawsuit against them and the City of Beebe, Arkansas, asking the court to preclude appellants from obtaining a permit to build a storage building on their vacant lot zoned residential. The court granted appellee's motion for summary judgment, and, on appeal, we affirm.

The case at bar, plus the 1993 lawsuit and an earlier suit filed in 1988, all involve an application made by appellant Marvin Carmical to the Beebe Planning Commission in October 1985 seeking permission to build a storage building on a vacant lot, the approval of the permit by the zoning ordinance enforcement officer, and the Beebe Board of Adjustment's rescission of that building permit. Marvin Carmical's application to the Planning Commission requested permission to construct a forty-foot by fifty-foot storage building, as an accessory building, on an unimproved lot owned jointly by appellants, and located across the street from their home. There was no request on the application for permission to construct a main residence or any indication that appellants would build a house or other main building on the lot in the future. The Beebe zoning ordinance enforcement officer approved the building-permit application.

In November 1985, appellee, an owner of lots located near appellants' property, filed with the Beebe Board of Adjustment a complaint alleging that the zoning ordinance enforcement officer

had improperly issued the building permit to Marvin Carmical because Beebe's zoning ordinance did not permit a storage building to be built as an accessory building on a vacant lot that had been zoned single-family residential. In December 1985, the Board of Adjustment agreed with appellee and rescinded the building permit. The Board concluded that a storage building could be built as an accessory building on a single-family residential lot only if it were "a subordinate building to a main building."

In 1988, appellants sued the city alleging that the Board illegally rescinded the building permit. Appellants litigated this matter in both state and federal court. Part of the history of this litigation is set forth in*Carmical v. City of Beebe*, 316 Ark. 208, 871 S.W.2d 386 (1994), and in *Carmical v. City of Beebe*, 302 Ark. 339, 789 S.W.2d 453 (1990). In March 1993, the Board voted to reinstate the building permit issued to Marvin Carmical in October 1985.

In April 1993, appellee filed a complaint against appellants and the city arguing that appellants did not intend to construct any structure on their vacant lot other than an accessory building. Appellee alleged that appellants' permit was granted in violation of the Beebe zoning code because an accessory building is a subordinate building, which could only be built when the use is incidental to and located on the same lot as the main building. Appellee noted that under the zoning ordinance and Ark. Code Ann. § 14-56-416(b)(2)(B)(i)(b) (1987), the Board could not permit, as a variance, any use of property that is not permitted under the zoning ordinance. He asked that Beebe be ordered to rescind the reinstated building permit and appellants be prohibited from constructing the accessory structure upon their vacant lot.

In April 1993, appellants filed an answer asserting that the Board had properly reinstated Marvin Carmical's building permit and that they intended to construct a residence on their vacant lot "within a reasonable time." In May 1993, appellee filed an amended complaint alleging that the Board's reinstatement of the building permit was illegal because appellants had not filed a new building-permit application. In addition, appellee alleged that the Board had abused its discretion by reinstating the 1985 building permit because the time to administratively appeal the rescission of the building permit had expired. Appellants responded and asserted that, in February 1993, Marvin Carmical did apply to the Beebe

Planning Commission for a new permit to build a storage building on their vacant lot. In January 1995, appellee moved for summary judgment, and the court denied appellee's motion. Thereafter, the court granted appellee's request to nonsuit the case.

In September 1997, appellants filed a complaint in circuit court against appellee that is the subject of this appeal. In this complaint, appellants alleged that appellee, by filing a complaint against them in April 1993, had committed against them acts of malicious prosecution, abuse of process, and several other intentional torts. Appellants requested that the circuit judge recuse from the proceedings, but the circuit judge denied the motion. Appellee moved for summary judgment in June 1998, and the circuit judge, after hearing oral argument from counsel, handed down a letter opinion stating that he intended to grant appellee's summary-judgment motion. Appellants requested reconsideration of that decision and renewed their recusal request. In January 1999, the court entered an order denying appellants' renewed recusal request and granting appellee's summary-judgment motion.

The standard of review of a trial court's granting a motion for summary judgment was recently explained as follows:

> 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 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, this 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. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*; *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997); *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998). After reviewing undisputed facts, summary judgment should be denied if under the evidence reasonable men might reach different conclusions from the undisputed facts. *See, Leigh*

Winham, Inc. v. Reynolds Ins. Agency, 279 Ark. 317, 651 S.W.2d 74 (1983).

George v. Jefferson Hosp. Ass'n, Inc., 337 Ark. 206, 210-11, 987 S.W.2d 710, 712 (1999). A trial court should grant summary judgment to a defendant if he or she conclusively shows that some fact essential to the plaintiff's cause of action is lacking and the plaintiff is unable to offer substantial evidence to the contrary. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995); *Akridge v. Park Bowling Center, Inc.*, 240 Ark. 538, 401 S.W.2d 204 (1966).

Appellants assert that the circuit court erred in granting appellee's motion for summary judgment because there were genuine issues of material fact remaining to be litigated in appellants' claim that appellee committed five intentional torts against them: 1) malicious prosecution; 2) abuse of process; 3) outrage; 4) intentional interference with use and enjoyment of property; and 5) violation of the appellants' rights guaranteed to them by the Arkansas Civil Rights Act of 1993, Ark. Code Ann. §§ 16-123-101-08 (Supp. 1999). Appellants also maintain that the circuit court erred in granting appellee's summary-judgment motion because there were genuine issues of material fact remaining to be litigated regarding whether appellee should be liable for punitive damages. Appellants also maintain that the circuit judge erred in denying their requests that he recuse from the proceedings. We disagree and affirm.

The circuit court did not err in granting summary judgment on appellants' claim that appellee committed the act of malicious prosecution by filing the 1993 complaint against them and the city. Appellants could not prove the lack of probable cause, an essential element of malicious prosecution. To prove malicious prosecution, the plaintiff must establish each of the following elements: 1) an earlier proceeding instituted or continued by the defendant against the plaintiff; 2) termination of the proceeding in favor of the plaintiff; 3) absence of probable cause for the proceeding; 4) malice on the part of the defendant; and 5) damages. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996); *Kellerman v. Zeno*, 64 Ark. App. 79, 983 S.W.2d 136 (1998). Proof of absence of probable cause is an essential element in a claim for malicious prosecution. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox, supra; Smith v. Anderson*, 259 Ark. 310,

532 S.W.2d 745 (1976). The allegedly malicious prosecution can be a civil proceeding. *See, e.g., Farm Serv. Coop., Inc. v. Goshen Farms, Inc.*, 267 Ark. 324, 590 S.W.2d 861 (1979); *Citizens' Pipe Line Co. v. Twin City Pipe Line, Co.*, 183 Ark. 1006, 39 S.W.2d 1017 (1931). In the context of malicious prosecution, probable cause means such a state of facts or credible information which would induce an ordinarily cautious person to believe that his lawsuit would be successful. *See McLaughlin v. Cox, supra; Harmon v. Carco Carriage Corp.*, 320 Ark. 322, 895 S.W.2d 938 (1995). Probable cause is to be determined by the facts and circumstances surrounding the commencement and continuation of the legal action. *Kellerman v. Zeno, supra.* In order to have a probable-cause basis to file a lawsuit, a person need only have the opinion that the chances are good that a court will decide the suit in his favor. RESTATEMENT (SECOND) OF TORTS § 675 comment (f) at 460 (1977). The question is not whether the person is correct in believing that his complaint is meritorious, but whether his opinion that his complaint is meritorious was a reasonable opinion. *Id.* A person need have only a reasonable opinion that his complaint is meritorious because, "[t]o hold that the person initiating civil proceedings is liable unless the claim proves to be valid would throw an undesirable burden upon those who by advancing claims not heretofore recognized nevertheless aid in making the law consistent with changing conditions and changing opinions." *Id.* A person's refusal to believe an improbable explanation from someone that he subsequently sues does not amount to substantial evidence that he lacked probable cause to file the lawsuit. *See Kroger Co. v. Standard*, 283 Ark. 44, 670 S.W.2d 803 (1984). The issue of lack of probable cause in a malicious-prosecution case may be decided as a matter of law on summary judgment only if both the facts relied upon to create probable cause and the reasonable inferences to be drawn from the facts are undisputed. *Harmon v. Carco Carriage Corp., supra; Cox v. McLaughlin*, 315 Ark. 338, 867 S.W.2d 460 (1993).

Our analysis of whether appellee had probable cause to file suit against appellants requires us to review the pertinent provisions of Beebe's zoning ordinance to determine whether it was reasonable for appellee to believe that a court would prohibit appellants from constructing the storage building. In addition, appellee must have also had a probable-cause basis for believing that appellants did not intend to construct a main building on their vacant lot.

The appellants' vacant lot is located in an area of Beebe zoned for single-family residences. Beebe's zoning ordinance states that property zoned for single-family residences may be used for "[a]ccessory buildings which are not a part of the main buildings." The zoning ordinance defines "accessory buildings and uses" as follows:

> An accessory building is a subordinate building or a portion of the main building, the use of which is clearly incidental to, or customarily found in connection with, and (except as otherwise provided in this Ordinance) located on the same lot as, the use of the main building or principal use of the land. An accessory use is one which is clearly incidental to, or customarily found in connection with, and on the same lot as, the main use of the premises . . . .

The ordinance also defines "main or principal building" as, "A building in which is conducted or intended to be conducted, the main or principal use of the lot on which said building is located." Moreover, the ordinance defines "principal use" as, "The specific primary purpose for which land, building, or structure is used or intended to be used."

Because zoning ordinances are in derogation of the common law, we must strictly construe them in favor of the property owner. *See Blundell v. City of West Helena*, 258 Ark. 123, 522 S.W.2d 661 (1975); *City of Little Rock v. Andres*, 237 Ark. 658, 375 S.W.2d 370 (1964). However, although zoning ordinances must be strictly construed in favor of the property owner, this rule does not compel a contrived result when common sense points elsewhere. *Tillery v. Meadows Construction Co.*, 284 Ark. 241, 681 S.W.2d 330 (1984). Of course, the basic rule of statutory construction is to give effect to the intent of the legislative body that enacted the statute. *Central & Southern Co. v. Weiss*, 339 Ark. 76, 3 S.W.3d 294 (1999). Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *Id.* In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* We construe statutes so that no word is left void, superfluous, or insignificant and that meaning and effect are given to every word in the statute if possible. *Id.*

The gist of appellee's complaint was that the storage building that appellants intended to construct on their vacant lot would not be an accessory building because it would not be located on the same lot as a "main building." Appellants maintain that there was not probable cause for appellee to believe that a court would interpret the pertinent provisions of Beebe's zoning ordinance to prohibit their construction of a storage building, as an accessory building, on their vacant lot. Appellants' contention in this regard is erroneous. While there are no relevant cases in Arkansas, cases from other jurisdictions hold that an accessory building cannot be constructed on a lot that has no main building.

The "same lot" restriction is a common part of the definition of "accessory building" in municipal zoning ordinances. *See, e.g., Bryan v. Board of Adjustment*, 491 So.2d 254 (Ala. Civ. App. 1986); *Board of County Commissioners v. Thompson*, 493 P.2d 1358 (Colo. 1972); *A. C. Guhl v. Par-3 Golf Club, Inc.*, 231 S.E.2d 55 (Ga. 1976); 101A C.J.S.*Zoning & Land Planning* § 152 at 472-73 (1979). In interpreting municipal zoning ordinances, some jurisdictions give the "same lot" restriction on accessory buildings a strict interpretation. For example, the Rhode Island Supreme Court has held that two lots owned by the same person are not the "same lot" for the purpose of permitting an accessory use of one of the lots if the two lots are separated by a public highway. *Sanfilippo v. Board of Review*, 188 A.2d 464 (R.I. 1963). Two jurisdictions have held that adjoining, separate lots owned by the same person are not the "same lot" for the purpose of establishing an accessory use on one lot incidental to a principal use conducted on the other lot. *Adley v. Paier*, 167 A.2d 449 (Conn. 1961); *Larsen v. Town of Colton*, 973 P.2d 1066 (Wash. App. 1999). Several jurisdictions have interpreted the "same lot" restriction in municipal zoning ordinances to prohibit an accessory building if it is not located on the same lot as a principal building. *Kowalski v. Lamar*, 334 A.2d 536 (Md. Ct. Spec. App. 1975); *Lowry v. City of Mankato*, 42 N.W.2d 553 (Minn. 1950); *Sinon v. Zoning Bd. of Appeals*, 497 N.Y.S.2d 952 (N.Y. App. Div. 1986); *Kelley v. Zoning Hearing Bd.*, 554 A.2d 1026 (Pa. Commw. Ct.), *rev. denied*, 562 A.2d 828 (1989); *Sojtori v. Douglass Township Bd. of Supervisors*, 296 A.2d 532 (Pa. Commw. Ct. 1972); *Hein v. Town of Foster Zoning Bd.*, 632 A.2d 643 (R.I. 1993); *Sanfilippo v. Board. of Review, supra; City of Warwick v. Campbell*, 107 A.2d 334 (R.I. 1954). Given the weight of this authority, we conclude that

the circuit court did not err in determining that there was probable cause for appellee's complaint against appellants insofar as it was reasonable for appellee to believe that a court would interpret the pertinent provisions of Beebe's zoning ordinance to prohibit appellants from erecting a storage building on their vacant lot.

Furthermore, the circuit court properly determined that appellee had probable cause to believe that appellants would not erect a main building on their vacant lot. Neither appellant Marvin Carmical's October 1985 application for a permit to build a storage building on the vacant lot nor his February 1995 application stated that appellants intended to build a main building there. The spaces on both applications regarding building information for a main building were left blank. Moreover, after appellee filed his April 1993 complaint, appellants never submitted an amended building-permit application to the Beebe Planning Commission stating that they would erect a main building on their vacant lot. Further, in a January 1998 deposition, appellant Margaret Carmical admitted that appellants had never consulted with a contractor about building a house on the vacant lot. She admitted in that deposition that since the circuit court had entered an order granting appellee's request for entry of a judgment of nonsuit in appellee's lawsuit, neither she nor her son have submitted an application to the Beebe Planning Commission requesting a permit to build a house on their vacant lot. In a January 1998 deposition, appellant Marvin Carmical admitted that nothing had "been done in terms of buildings on the property."

Appellants argue that there are genuine issues of material fact remaining to be litigated regarding whether appellee knew that they intended to build a house on their vacant lot. According to appellants, appellee was aware that they intended to build a house on their vacant lot after they built the storage building. This argument, however, misses the point. The issue before the circuit court was not whether appellants actually intended to construct a house or main building on their vacant lot but, instead, whether appellee had probable cause to believe that appellants would not do so. We conclude that the circuit court did not err in concluding that appellee had probable cause to believe that appellants would not construct a main building on their vacant lot.

Appellants also assert that appellee's filing of his complaint amounted to an act of malicious prosecution because he did

not appeal the Board of Adjustment's reinstatement of the building permit. According to appellants, appellee was able to raise before the circuit court several issues that he could not have raised had he styled his pleading as an appeal. This argument is meritless. Arkansas Code Annotated section 14-56-425 (Repl. 1998) states that appeals from final action taken by municipal zoning boards of adjustment "may be taken to the circuit court of the appropriate county where they shall be tried de novo according to the same procedure which applies to appeals in civil actions from decisions of inferior courts...." Pursuant to that statute, "appeals" to circuit court are not limited proceedings where the circuit court merely conducts a substantial-evidence review but, instead, are trials de novo. *See Arkansas Power & Light Co. v. City of Little Rock*, 243 Ark. 290, 420 S.W.2d 85 (1967); *see also Quapaw Quarter Assn. v. Board of Zoning Adjustment*, 261 Ark. 74, 546 S.W.2d 427 (1977).

Appellants also argue that the circuit court erred in granting summary judgment because it remained open whether appellee had disclosed all the material facts known by him to his attorney when he filed the complaint. We do not address this issue because appellee had probable cause for his complaint. Whether the defendant in a malicious-prosecution case made a full, fair, and truthful disclosure to an attorney of the material facts known to him and then acted in good faith upon his attorney's advice in prosecuting his suit need be addressed only if the defendant lacked probable cause to prosecute his lawsuit. *See McLaughlin v. Cox, supra; Machen Ford-Lincoln-Mercury, Inc. v. Michaelis*, 284 Ark. 255, 681 S.W.2d 326 (1984).

Appellants argue that appellee filed his complaint against them with malice. In support of the assertion, they introduced affidavits and testimony by deposition to the effect that appellee disliked them and had sued them with the malicious intention of harassing them and depriving them of the use of their vacant lot. The elements of lack of probable cause and malice are not equivalent and neither necessarily flows as a legal presumption from the establishment of the other. *Cordes v. Outdoor Living Ctr., Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). Proof of malice does not, of itself, give rise to an inference of lack of probable cause. *Cordes v. Outdoor Living Ctr., Inc., supra; Farm Serv. Coop. v. Goshen Farms, Inc., supra; Price v. Morris*, 122 Ark. 382, 183 S.W. 180 (1916). If probable cause to support the filing of the lawsuit is present, a

subsequent action for malicious prosecution will fail even if the initial suit was prosecuted in a spirit of ill will or with malice. *Cordes v. Outdoor Living Ctr., Inc., supra; Price v. Morris, supra.* Appellants' proof of appellee's alleged malice is simply irrelevant.

Appellants' inability to prove that appellee lacked probable cause also establishes that the circuit court did not err in granting summary judgment regarding their allegation of outrage. To succeed on an outrage claim, the plaintiff must prove four elements, one of which is that the defendant's conduct was extreme and outrageous and utterly intolerable in a civilized community. *See Brown v. Fountain Hill Sch. Dist.*, 67 Ark. App. 358, 1 S.W.3d 27 (1999). Given that appellee had probable cause, as a matter of law appellants cannot prove that appellee's conduct in filing the complaint was utterly intolerable in a civilized community.

For the same reason, we conclude that the circuit court did not err in granting summary judgment on appellants' claim that appellee committed the tort of intentional interference with use and enjoyment of property. Appellants fail to cite any decision by this court or the Arkansas Supreme Court which recognizes the tort of intentional interference with the use and enjoyment of property. Appellants maintain that this tort exists by way of analogy to the intentional tort of tortious interference with a contractual relationship or business expectancy. *See Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997). Assuming *arguendo* that the tort of intentional interference with use and enjoyment of property is cognizable in Arkansas, we conclude that appellants could not prove that appellee committed this tort because appellee's conduct in filing his complaint was not improper. A person commits intentional interference with a contractual relationship or business expectancy only by conduct that is improper. *See Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998). Filing a civil lawsuit is improper conduct for purposes of intentional interference if it is done with no belief in its merits or is done in bad faith. RESTATEMENT (SECOND) OF TORTS § 767 comment (c) at 30-1 (1979). Because appellants cannot show that appellee lacked probable cause to file his complaint, they cannot prove that appellee's conduct was improper.

We also conclude that the circuit court did not err in granting summary judgment regarding appellants' claim that appellee had violated a right guaranteed to them by the Arkansas Civil

Rights Act of 1993, Ark. Code Ann. §§ 16-123-101—108 (Supp. 1999). Appellants have no civil right to be free from a lawsuit filed against them if the lawsuit is based on probable cause. Appellants also assert that there are genuine issues of material fact remaining to be litigated concerning whether their civil rights were violated when they were treated differently than other people were treated by the members of the Board of Adjustment. According to appellants, the members of the Board of Adjustment violated their civil rights by interrupting appellant Margaret Carmical and by arguing with her when she appeared before the Board. According to appellants, they have been treated differently in this respect when they appeared before the Board by members who were relatives or friends of appellee. At most, appellants have merely raised a suspicion that appellee was somehow involved in orchestrating the different treatment to which they allege they have been subjected when they have appeared before the Board of Adjustment. A mere suspicion in the mind of the party against whom summary judgment is sought will not create a genuine issue of material fact. *See Biedenharn v. Hogue*, 338 Ark. 660, 1 S.W.3d 424 (1999); *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999).

Appellants also assert that the circuit court erred in granting summary judgment on their claim of abuse of process when he sued them in April 1993. A litigant commits this tort when he or she uses a judicial process to extort or coerce. *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998); *Union National Bank v. Kutait*, 312 Ark. 14, 846 S.W.2d 652 (1993). The elements of abuse of process are: 1) a legal procedure set in motion in proper form, even with probable cause and ultimate success; 2) the perversion of the legal procedure to accomplish an alternative purpose for which it was not designed; and 3) a willful act perpetrated in the use of process which is not proper in the regular conduct of the legal proceeding. *Routh Wrecker Serv., Inc. v. Washington, supra; McNair v. McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994). The key to recognition of abuse of process is the improper use of process after its issuance in order to accomplish a purpose for which the process was not designed. *Routh Wrecker Serv., Inc. v. Washington, supra; Harmon v. Carco Carriage Corp., supra.* Proof that a litigant filed a vexatious lawsuit is not sufficient by itself to prove that the litigant committed abuse of process because there must also be proof of a specific abusive use of process. *McNair v.*

McNair, supra; Morse v. Morse, 60 Ark. App. 215, 961 S.W.2d 777 (1998). Examples of misuse of process that have been found to constitute the tort of abuse of process are the service of an arrest warrant; delivery of an order to a sheriff for execution; personal service procured by fraud; or attachment or garnishment for a greatly excessive amount. *See McNair v. McNair, supra; Farm Service Coop., Inc. v. Goshen Farms, Inc., supra.* Judicial process has been defined as a comprehensive term which includes all writs, rules, orders, executions, warrants, or mandates issued by a court during the progress of a cause of action. *See Henderson v. Dudley*, 264 Ark. 697, 574 S.W.2d 658 (1978); *Smith v. Smith*, 28 Ark. App. 56, 770 S.W.2d 205 (1989). Appellants, however, could not prove that appellee committed a willful act perpetrated in the use of process which is not proper in the regular conduct of the proceeding.

Appellants argue that there were genuine issues of material fact remaining to be litigated regarding whether appellee had committed abuse of process when he sued them in April 1993 because, in the course of that litigation, appellee allegedly engaged in wrongful conduct. However, none of appellants' allegations amounts to a showing that appellee, in the course of the lawsuit, caused, in an abusive manner, the circuit court to issue some order, warrant or mandate; appellants merely allege that appellee prosecuted his 1993 lawsuit in bad faith.

We conclude that the circuit court properly granted summary judgment even though appellants requested in their complaint that they be awarded punitive damages. Appellants could not prove an essential element of each of the intentional torts that they alleged appellee committed. Thus, as a matter of law, they would not be entitled to punitive damages.

Appellants also contend that the circuit judge erred in denying their request that he recuse. They assert that the circuit judge should have recused because his former law partner had been the attorney for the City of Beebe in 1993 when appellee sued the city and appellants. Appellants also note that the circuit judge's former law partner also represented the city when they sued it and a number of city officials in 1988, after the Board of Adjustment had rescinded the building permit that had been issued to Marvin Carmical in October 1985. Appellants also maintain that the circuit judge should have recused because, in 1988, he posed for a photo-

graph that appeared in the local newspaper showing him at a groundbreaking ceremony with appellee and appellee's cousin. Finally, appellants assert that the circuit judge should have recused because, in the letter opinion that the judge handed down on July 29, 1998, he stated, "First, let me say I am bothered about the inflammatory language, the conclusionary assertions, the illogic, and the lack of definitiveness in [appellants'] filings. The documents submitted by [appellants] reek with venom. [Appellants] claim to have been abused and mistreated by people, but the evidence before me does not bear this out." Appellants' recusal arguments are meritless.

A trial judge is required to recuse from cases in which his or her impartiality might reasonably be questioned under Arkansas Code of Judicial Conduct, Canon 3E(1). *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998). The party requesting that the trial judge recuse bears the burden of proving that the trial judge should do so. *Sturgis v. Skokos, supra; Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996). A trial judge is presumed to be impartial. *Trimble v. State*, 336 Ark. 437, 986 S.W.2d 392 (1999); *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998). A trial judge's decision to recuse is within his or her discretion, and we will not reverse absent a showing of abuse of discretion. *Massongill v. County of Scott*, 337 Ark. 281, 991 S.W.2d 105 (1999); *Sturgis v. Skokos, supra*. An abuse of discretion can be proved by a showing of bias or prejudice on the part of the trial judge. *Sturgis v. Skokos, supra; Noland v. Noland*, 326 Ark. 617, 932 S.W.2d 341 (1996). However, a trial judge's development of opinions, biases, or prejudices during a trial do not make the trial judge so biased as to require that he or she recuse from further proceedings in the case. *Noland v. Noland, supra; Allen v. Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987); *Schwarz v. Moody, supra*. Absent some objective demonstration by the appellant of the trial judge's prejudice, it is the communication of bias by the trial judge which will cause us to reverse his or her refusal to recuse. *Noland v. Noland, supra; Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983). The mere fact of adverse rulings is not enough to demonstrate bias. *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999).

A trial judge is not required to recuse if his or her former law partner is counsel in the proceeding at hand. *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997). In this case, the circuit judge's former law partner was not counsel for either party, but had

merely represented the City of Beebe as defendant in two previous lawsuits, one filed by each party, that are part of the circumstances out of which this case arose. Further, the circuit judge was not required to recuse merely because, nine years before appellants filed their complaint in this case and before he was elected to a judgeship he had, as a legislator, attended a groundbreaking ceremony along with other officials, held in connection with the building of a retirement center owned in part by appellee. A trial judge is not required to recuse because of his or her life experiences. *See Gates v. State, supra*; *Ayers v. State, supra*. Finally, the circuit judge did not err in denying the appellants' requests that he recuse based upon his characterization, in the court's letter opinion, of the appellants' pleadings as containing inflammatory language, conclusory assertions, illogic and his characterization of appellants' documents as reeking with venom. A trial judge is not required to recuse because he or she has developed and expressed an opinion about the case at hand based on what the judge has learned from his or her participation in the case. *Arkansas State Bd. of Nursing v. Long*, 8 Ark. App. 288, 651 S.W.2d 109 (1983); 46 AM. JUR. 2d *Judges* § 150 (1994).

For the reasons set forth above, we affirm the circuit court's grant of appellee's summary-judgment motion.

Affirmed.

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

James Luther MILLER *v.* STATE of Arkansas

CA CR 99-52 6 S.W.3d 812

Court of Appeals of Arkansas
Division I and II
Opinion delivered December 22, 1999

[redacted]

Marsha Basinger, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Asst. Att'y Gen., for appellee.

OLLY NEAL, Judge. James Luther Miller was convicted by a jury of possession of cocaine and marijuana and sentenced to thirty years' incarceration on the cocaine-possession conviction. He was sentenced to one year's imprisonment in the county jail on the marijuana-possession conviction, and ordered to pay a $1000 fine. He argues on appeal that the trial court erred in refusing to grant his motion for a directed verdict.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, whether direct or circumstantial. *Brown v. State*, 315 Ark. 466, 869 S.W.2d 9 (1994). Evidence is substantial if it is of sufficient force

and character to compel a conclusion one way or the other beyond suspicion or conjecture. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). We will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State as appellee. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999).

At trial, Arkansas State Police Officer Tim Land testified that on February 23, 1997, he came into contact with appellant, who was a passenger in a vehicle driven by Michael Alexander. Officer Land became suspicious of the vehicle because it approached him from the rear and would not pass his vehicle although he slowed to thirty miles per hour. Land pulled his car into the median, and as the car passed he noticed that it did not have a license plate. He initiated a stop of the vehicle, and upon approaching the vehicle. he smelled the very strong odor of burned marijuana emanating from the vehicle. Land had the driver exit the vehicle, and after noting the odor of burned marijuana and alcohol on his person, administered field sobriety tests, which Alexander failed. Land called for assistance, and Alexander was transported to the county jail for a breathalyzer. According to Land, there were four occupants in the vehicle: Alexander, who was the driver; James Giles, who was sitting in the right front seat; Damon Albert, who was sitting in the rear seat behind the driver; and appellant, who was seated on the right rear seat.

Trooper Land recovered three rolling papers from three of the vehicle's occupants, but could not recall which three occupants possessed the papers. He also stated that he found three rocks of crack cocaine and marijuana in the pouch located on the back of the driver's seat, directly in front of Damon Albert.

The driver of the vehicle, Michael Alexander, testified that on the date in question he asked appellant if he wanted to ride to Hope, Arkansas, with him. He picked up Giles and Albert and took them to a residence in Hope, where they purchased crack cocaine. According to Alexander, appellant did not know that Giles and Albert were purchasing crack, and he did not know about the marijuana until it was smoked. However, Alexander later testified that all of the vehicle's occupants knew that the marijuana was in the vehicle because the marijuana was in the car before the group traveled to Hope.

Appellant contends that the evidence presented is not sufficient to justify a conviction for possession of cocaine and marijuana. It is not necessary for the State to prove literal physical possession of drugs in order to prove possession. Possession of drugs can be proved by constructive possession. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). Constructive possession can be implied when the drugs are in the joint control of the accused and another. *Id.* However, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. *Id.* There must be some additional factor linking the accused to the drugs. Other factors to be considered in cases involving automobiles occupied by more than one person are: (1) whether the contraband is in plain view, (2) whether the contraband is found within the accused's personal effects, (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it, (4) whether the accused is the owner of the automobile, or exercised dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest. *Plotts v. State,* 297 Ark. 66, 759 S.W.2d 793 (1988).

When viewed in the light most favorable to the State, we believe the evidence is sufficient to conclude that the jury had substantial evidence from which it could find that appellant constructively possessed marijuana. By way of analogy, we note that had the officer observed the marijuana in plain view inside of the vehicle, the evidence would be sufficient to compel the conclusion that appellant constructively possessed the marijuana. Here, although the marijuana was not in plain view, we believe that the fact that the police officer smelled marijuana upon approaching the vehicle tends to establish that appellant had knowledge of the presence of the marijuana. It is the knowledge of the existence of the contraband that provides substantial evidence of constructive possession.

Whether the evidence is sufficient to support the conviction of possession of cocaine presents a more difficult question. In *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994), we affirmed a conviction for possession of a controlled substance under facts similar to, but distinguishable from those present in the case at bar. In that case, appellants were stopped by a police officer, who upon approaching the vehicle, smelled alcohol and marijuana. A search of the vehicle revealed a small brass pipe used to smoke marijuana in

plain view in the front seat in immediate proximity to both appellants. The arresting officer observed that both appeared to have glassy eyes. In affirming the conviction we utilized the following rationale:

> Applying Plotts to the instant case there are factors in addition to the joint occupancy of the vehicle, from which the jury could find that appellants had joint control and dominion over the contraband. First, as to the small brass pipe, it was found in the front seat in immediate proximity to both appellants. Secondly, *an additional factor, which links both appellants to the marijuana and from which constructive possession could be found, is that the marijuana was in the back seat behind the driver's seat in an area most easily accessible to Joseph the passenger, but also accessible to James, the driver. . . .*

It is this highlighted portion of this court's analysis that gives us great cause for concern. This language seems to imply that constructive possession may be proved by merely showing that the defendant was an occupant of a vehicle where illegal contraband is found, in the absence of any additional factor linking the accused to the contraband. However, our case law makes it quite clear that the drugs must be found on the same side of the vehicle as the accused, or in close proximity to the accused. *Plotts, supra.*

The highlighted language in *Bond* should be consideredin conjunction with the other evidence presented, and not as the sole basis upon which a conviction for constructive possession can be sustained. We note that in *Bond* there was evidence, independent of occupancy of the vehicle, that was sufficient to sustain the conviction.

The dissent bases its contention that appellant's conviction should be affirmed on the supreme court's decision in *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995), wherein the court upheld a conviction for being a felon in possession of a handgun. In that case, the handgun was not in plain view, but the cab of the truck was so small that anyone inside of the vehicle had access to anything inside. The court discussed additional linking factors, such as the fact that the appellant had exercised dominion and control over the vehicle, and the fact that appellant testified that he had thoroughly cleaned the vehicle prior to using it and would have noticed any contraband in it. The court also noted that cocaine was found in plain view and the jury could have dismissed the

probability that the drugs or gun were in the vehicle before the appellant borrowed it.

In the present case, appellant was a rear-seat passenger in his friend's car when the vehicle was stopped by Trooper Land. The contraband found was not in plain view, was not under appellant's exclusive control, and was not found near the seat in which appellant was seated. There was no testimony that appellant acted suspiciously, and, there was no evidence of any contraband found on appellant's person. There was, however, testimony that appellant did not know that there was cocaine in the car until after the police searched the vehicle.

Based upon the evidence presented, we hold that the State did not present sufficient evidence of any factor, other than occupancy, to establish appellant's constructive possession of the cocaine. Appellant's conviction for possession of cocaine is reversed and dismissed. His conviction for possession of marijuana is affirmed.

HART, CRABTREE, and MEADS, JJ., agree in reversing the cocaine-possession conviction.

BIRD, STROUD, CRABTREE, and MEADS, JJ., agree in affirming the marijuana-possession conviction.

BIRD and STROUD, JJ., dissent from the majority's reversal of the possession of cocaine conviction.

HART, J., dissents from the majority's decision affirming the possession of marijuana conviction.

JOSEPHINE LINKER HART, Judge, concurring in part; dissenting in part. While I agree that the appellant's conviction for possession of cocaine must be dismissed, I would likewise reverse and dismiss his conviction for possession of marijuana. The Arkansas Supreme Court recently restated the standard of review in determining whether evidence sufficiently demonstrates constructive possession:

> [T]he State need not prove that the accused physically possessed the contraband to sustain a possession conviction. Indeed, if the location of the contraband was under the dominion and control of the accused, it is deemed constructively possessed. Although constructive possession can be implied when the contraband is in the

> joint control of the accused and another, joint occupancy, alone, is insufficient to establish possession or joint possession. ... [T]he State must prove some additional factor linking the appellant to the contraband. Specifically, the State must prove that the appellant exercised care, control, and management over the contraband, and that she knew the matter possessed was contraband.

Fultz v. State, 333 Ark. 586, 596, 972 S.W.2d 222, 226 (1998)(citations omitted).

In the case at bar, the majority does not set forth any factor linking the appellant to the marijuana. Rather, the majority concludes, "[W]e believe the fact that the police officer smelled marijuana upon approaching the vehicle tends to establish that appellant had knowledge of the presence of marijuana." Certainly, this does not establish that the appellant exercised care, control, or management of the contraband. And most certainly, "[m]ere presence, acquiescence, silence, or knowledge that a crime is being committed, in the absence of a legal duty to act," is not sufficient to establish criminal liability. *See Fight v. State*, 314 Ark. 438, 444, 863 S.W.2d 800, 803-04 (1993). This case strongly resembles that of *Kastl v. State*, 303 Ark. 358, 796 S.W.2d 848 (1990), in which the Arkansas Supreme Court found that evidence of beer cans beside the vehicle, beer found in the immediate proximity of the appellant in the vehicle, and the smell of beer on the appellant's person, were not sufficient evidence that the appellant, who was one of five people in the vehicle, constructively possessed the beer.

Relying on our words here, one can easily imagine a "parade of horribles" in which a person who is merely present will stand convicted for merely knowing about the presence of a controlled substance. Insofar as we abide under a just system of laws, this decision cannot stand.

SAM BIRD, Judge, dissenting. I respectfully dissent from the majority opinion in this case because I believe that there was sufficient evidence upon which a jury could find that the appellant was guilty of the crimes of possession of marijuana and cocaine on the basis that he constructively possessed both of those substances.

As the majority correctly notes, in order to convict the appellant on the charges, the State need not prove that he was in actual

possession. *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988). Constructive possession, which is the control or right to control the contraband, is sufficient and can be implied where the contraband is found in a place immediately and exclusively accessible to appellant and subject to his control. *Id.* Where there is joint occupancy of the premises where the contraband is found, some additional factor must be present linking the appellant to the contraband. *Id.* Other linking factors to be considered in cases involving automobiles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest. *Mings v. State,* 318 Ark. 201, 884 S.W.2d 596 (1994).

The appellant argues that none of these additional factors link him to the contraband. He argues that the contraband was not in plain view, that it was not in his personal effects, that it was not found on the same side of the car seat or in his close proximity, that he did not exercise dominion and control over it, and that he did not act suspiciously before or during the arrest. The majority apparently agrees with appellant. I do not. The contraband was found in the pouch on the back of the driver's seat. Although the contraband was not on the same side of the car as the appellant, it was certainly in close proximity to the other side of the back seat where appellant was seated.

The majority opinion, in its attempt to distinguish *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994), from the case at bar, states that *Bond* seems to imply that constructive possession may be proven by merely showing that the defendant was an occupant of a vehicle where illegal contraband was found. To the contrary, I believe that *Bond* simply stands for the well-established principle that a person in joint occupancy of an automobile who is in close proximity to contraband located within that automobile can be found to be in possession of the contraband within the meaning of Ark. Code. Ann. § 5-64-401 (Repl. 1997) *et seq*. It is apparent that in *Bond*, the appellant could have reached behind the driver's seat from the front passenger seat to gain access to the contraband. In the case at bar, appellant was seated in the right rear passenger seat

and the contraband, located in the pouch on the back of the driver's seat, was actually closer and more easily accessible to him than the contraband was in *Bond*.

I also disagree with the majority's opinion based upon *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995). In *Kilpatrick,* the supreme court upheld the conviction of a defendant for being a felon in possession of a firearm where the defendant was the driver of a car and the firearm was found underneath the passenger's seat that was occupied by another person. *Id.* In that case, the supreme court held that the firearm was in an area accessible to the defendant and that he was, therefore, in constructive possession of the firearm. *Id.* If the driver of a motor vehicle is deemed to be in possession of a firearm located beneath a passenger seat that is occupied by another person, I see no reason why the passenger in the back seat of an automobile cannot be deemed to be in possession of illegal drugs that are also located in the back seat. The majority attempts to distinguish *Kilpatrick* by noting that "the cab of the truck was so 'small that anyone inside the vehicle had access to anything inside." However, the record before us does not reveal that the back seat of the Ford Tempo automobile in which appellant was riding was any bigger that the cab of a truck. If the supreme court in *Kilpatrick* found that the driver of a truck constructively possessed a gun found under the passenger seat, it seems apparent that this court should find that appellant constructively possessed both the marijuana and cocaine found in the pouch behind the driver's seat to which appellant had immediate access.

Finally, to me, it is contradictory to hold, as the majority does, that, because the police officer smelled the aroma of marijuana smoke coming from the car, the appellant *is* guilty of possession of marijuana, but not guilty of possession of cocaine that was located in exactly the same place in the car as the marijuana. I acknowledge the well-established rule that the smell of marijuana coming from an automobile is sufficient to arouse suspicion and provide probable cause for a warrantless search of the vehicle. *McDaniel v. State,* 337 Ark. 431, 990 S.W.2d 515 (1999). However, I do not read *McDaniel* to mean that the mere smell of marijuana smoke coming from a vehicle is sufficient to convict a joint occupant of the vehicle of possession of marijuana found in the vehicle. In order to be convicted, the State must prove that the joint occupant was in close proximity to the contraband or that such possession was established

by virtue of the existence one of the other linking factors referred to in *Mings v. State, supra.* In this case, if the appellant was close enough in proximity to the marijuana that the officer smelled to be found guilty of its possession, I fail to see how the majority can say that there was not sufficient evidence to sustain the jury's verdict that appellant was guilty of possession of cocaine that was located in exactly the same place as the marijuana.

I am also troubled by the fact that the majority, in reversing this jury verdict, apparently gave considerable weight to the testimony of the driver of the vehicle, Michael Alexander, to the effect that appellant did not know about the presence of the cocaine. From my reading of the abstract of Alexander's testimony, there was so much contradiction in what he said that the jury might well have considered his credibility to be in doubt. Assessment of the credibility of witnesses is within the sole province of the jury, *Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999), and the jury obviously did not believe Alexander.

Because the appellant was in close proximity to the marijuana and the cocaine, and because appellant could have had dominion and control over both substances from his position in the right rear seat of the automobile, I would affirm appellant's convictions on the marijuana and cocaine possession charges. *See Bond v. State, supra,* and *Kilpatrick v. State, supra.*

STROUD, J., joins in this dissent.

Keith PACE *v.* Tommy CASTLEBERRY

CA 99-397 7 S.W.3d 347

Court of Appeals of Arkansas
Division I
Opinion delivered December 22, 1999

The Harper Law Office, PLLC, by: *Kenneth A. Harper* and *Greg Fallon*, for appellant.

No response.

WENDELL L. GRIFFEN, Judge. In this one-brief case, Keith Pace appeals from the order of the Bradley County Circuit Court dismissing his appeal from the Bradley County Municipal Court. The circuit judge found that Pace failed to perfect his appeal in the manner prescribed by Rule 9 of the Arkansas Inferior Court Rules. Specifically, the record of the municipal court proceeding was not lodged within thirty days, and Pace's notice of appeal failed to aver that the court clerk neglected to lodge the record within the thirty-day period.

The record shows that appellee Tommy Castleberry filed suit against Pace in the Bradley County Municipal Court alleging entitlement to $580 for brickwork Castleberry performed for Pace. On September 22, 1998, the municipal judge entered an order finding for Castleberry, and on October 21, 1998, Pace filed a notice of appeal to the circuit court for a full *de novo* review. Pace subsequently filed a counterclaim on November 5, 1998, alleging that Castleberry's brickwork exemplified poor workmanship.

The record from the municipal court proceeding was lodged on October 23, 1999, thirty-one days from the entry of the municipal court order. On November 24, 1998, Castleberry filed a motion to dismiss Pace's appeal because the transcript was not filed within thirty days and Arkansas Inferior Court Rule 9(c) was not complied with in order to extend the time to perfect the appeal. On January 7, 1999, the Bradley County Circuit judge entered an order finding that the appeal filed by Pace was not timely; consequently, the judge dismissed the appeal to circuit court with prejudice. Pace now appeals that dismissal.

On appeal, Pace argues that under *Rogers v. Tudor Ins. Co*, 325 Ark. 226, 925 S.W.2d 395 (1996), only substantial compliance with Rule 9(c) is required in order to adequately perfect an appeal. His notice of appeal to circuit court reads:

> Comes now Defendant, Keith Pace, by and through his attorneys of record, The Harper Law Office, and hereby gives Notice that Defendant appeals to this court from the judgment entered by the Municipal Court of Bradley County, Arkansas on September 22, 1998, having the Municipal Court number 98386.
>
> Defendant hereby attaches to and incorporates or will soon have forwarded to be incorporated by reference the entire record of the

> Municipal Court of Bradley County, as that record was prepared by the Municipal Court Clerk.

The notice was filed October 21, 1998. Attached to the notice of appeal was the affidavit of Greg Fallon, attorney for Pace. The affidavit, also filed October 21, 1998, read as follows:

> I am the attorney for the Defendant in the above matter. ... I have on this day requested the Municipal Clerk of Bradley County, Arkansas to prepare and certify the records of the inferior court proceeding herein for appeal. I make this statement pursuant to Arkansas Inferior Court rule 9(c).

The circuit court judge dismissed the appeal on the ground that the affidavit did not explicitly state that the clerk negligently failed to complete the record as required by the rule. Pace contends that this notice of appeal and affidavit, filed on the 29th day after the entry of judgment, constitutes substantial compliance with Rule 9(c) and adequately preserved his right of appeal.

Arkansas Inferior Court Rule 9 governs appeals from municipal court to circuit court and requires that such appeals be filed within thirty days of the entry of the judgment by filing the inferior court proceedings with the clerk of the circuit court. It is both mandatory and jurisdictional procedure to properly bring the matter before the circuit court, *Linberry v. State*, 322 Ark. 84, 907 S.W.2d 705 (1995), and this applies to criminal as well as civil appeals. *Laxton v. State*, 46 Ark. App. 148, 899 S.W.2d 479 (1995). In pertinent part, the rule reads as follows:

> (a) *Time for Taking Appeal.* All appeals in civil cases from inferior courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within thirty (30) days from the date of the entry of the judgment.
>
> (b) *How Taken.* An appeal from an inferior court to the circuit court shall be taken by filing a record of the proceedings had in the inferior court. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and upon payment of any fees authorized by law therefor. The appellant shall have the responsibility of filing such record in the office of the circuit clerk.
>
> (c) When the clerk of the inferior court, or the court in the absence of a clerk, neglects or refuses to prepare and certify a

> record for filing in the circuit court, the person desiring an appeal may perfect his appeal on or before the 30th day from the date of the entry of the judgment in the inferior court by filing an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the inferior court [or the inferior court] to prepare and certify the records thereof for purposes of appeal and that the clerk [or the court] has neglected to prepare and certify such record for purposes of appeal. A copy of such affidavit shall be promptly served upon the clerk of the inferior court [or the court] and the adverse party.

Our courts have held that under this rule, a filing of a notice of appeal is not required in an appeal from municipal court to circuit court; that merely filing such a notice of appeal within thirty days of the municipal court judgment does not suffice to perfect the appeal. *Ottens v. State*, 316, Ark. 1, 871 S.W.2d 329 (1994); *Laxton v. State, supra.*

Thus, under Arkansas Inferior Court Rule 9, the appellant has the burden of requesting the clerk to prepare and certify the record of the inferior court proceedings; the appellant is also charged with the responsibility of filing said record in the office of the circuit clerk. Arkansas Inferior Court Rule 9 (b). Alternatively, the appellant must file an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the inferior court to prepare and certify the record for purposes of appeal and that the clerk has neglected to prepare and certify such record for purposes of appeal. Failure to do so precludes the circuit court from having jurisdiction over the appeal. *See Board of Zoning Adjustment v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1997).

The case cited by Pace, *Rogers v. Tudor Ins. Co, supra,* stands for the proposition that substantial compliance is required to comply with Ark. R. App. P. 3(e). It does not address Inferior Court Rule 9. The rule clearly provides that the appellant must either actually lodge the record in the circuit court, or file an affidavit with the circuit court clerk stating that he has requested the inferior court clerk to prepare the record and the clerk has neglected to prepare and certify that record for purposes of appeal. Arkansas Inferior Court Rule 9(c). The affidavit submitted by Pace did not allege that the inferior court clerk neglected to file the record. Unless we are to construe the explicit language in Rule 9(c) that mandates such language be included in the affidavit to be mere surplusage, we

must reject Pace's argument that the affidavit submitted by his counsel substantially complied with the rule.

We are unable to dismiss the clear language of Rule 9(c) as Pace proposes. Accordingly, we hold that Pace's affidavit did not comply with the procedure prescribed by the rule, and that the circuit court properly dismissed his appeal.

Affirmed.

HART, J., and HAYS, Sp.J., agree.

Jimmie Leslie DAVIS *v.* STATE of Arkansas

CA CR 99-164 8 S.W.3d 36

Court of Appeals of Arkansas
Division IV
Opinion delivered December 22, 1999

Boyd & Buie, by: *M. Christina Boyd*, for appellant.

Mark Pryor, Att'y Gen., by: *C. Joseph Cordi Jr.*, Asst. Att'y Gen., for appellee.

MARGARET MEADS, Judge. Appellant, Jimmie Leslie Davis, entered a conditional plea of guilty to the offenses of possession of drug paraphernalia and possession of marijuana with intent to deliver, reserving his right to appeal the denial of his motion to suppress evidence pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure. He was sentenced to sixty months in the Arkansas Department of Correction on each count, with the sentences to run concurrently. His sole argument on appeal is that the trial court erred in denying his motion to suppress marijuana found in a search of his vehicle. We reverse and remand.

At the hearing on the motion to suppress, Constable James Shelton testified that on August 31, 1996, he pulled appellant over for failure to stop and signal at an intersection. Shelton testified that appellant got out of his truck after being pulled over, and at that time he could smell alcohol on appellant's breath. He asked appellant for his driver's license, and appellant complied. He patted appellant down for weapons but found nothing. Shelton did not perform any field sobriety tests on appellant, and he did not note in

his report that appellant had slurred speech, glassy eyes, or difficulty walking. A breathalyzer test administered to appellant indicated a 0.0 level of blood alcohol, and appellant was never charged with driving while intoxicated.

After searching appellant's person, Shelton told appellant he was going to look in his truck and walked over to appellant's vehicle. Shelton stated that he was visually looking for weapons and did not intend to search the vehicle until he smelled marijuana. Shelton testified that the first time he smelled marijuana was after he "stuck [his] head in the vehicle." Shelton then proceeded to search the vehicle and found two bags of marijuana in a brown paper bag inside a closed ice chest which was between the two seats of the truck.

On review of a trial court's denial of a motion to suppress, the appellate court makes an independent examination based upon the totality of the circumstances and will reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999). In determining whether the trial court's ruling was clearly against the preponderance of the evidence, the appellate court must review the evidence in the light most favorable to the State. *Id.*

Appellant does not contest the legality of the initial stop or the pat-down search of his person for weapons; rather, he contends that the trial court erred in denying his motion to suppress the marijuana seized from his truck because there was no reasonable cause to search the vehicle.

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons to be seized.

U.S. Const. amend. 4.

The United States Supreme Court first set forth the "automobile exception" in *Carroll v. United States*, 267 U.S. 132 (1925), recognizing the justification of a warrantless search of a vehicle based upon probable cause, due to the mobile nature of

vehicles. Rule 14.1 of the Arkansas Rules of Criminal Procedure provides that an officer may stop, detain, and search a vehicle in a public area without a search warrant and may seize items subject to seizure if he has reasonable cause to believe that the vehicle contains such items. Reasonable cause, or probable cause, as required by Rule 14.1, exists when officers have trustworthy information which rises to more than mere suspicion that the vehicle contains evidence subject to seizure and a person of reasonable caution would be justified in believing an offense has been committed or is being committed. *Reyes v. State*, 329 Ark. 539, 954 S.W.2d 199 (1997); *Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994). The same standards govern probable cause whether the question is validity of a search and seizure or validity of an arrest. *Perez v. State*, 260 Ark. 438, 541 S.W.2d 915 (1976). A mere suspicion is not enough to establish probable cause, and even a "strong reason to suspect" will not suffice. *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986).

Here, Constable Shelton had no suspicion, reasonable or otherwise, that appellant's vehicle contained contraband until after he "stuck [his] head" into appellant's truck and smelled marijuana. The record is devoid of any articulable facts to support a reasonable suspicion to search prior to Shelton entering the truck. Therefore, appellant's motion to suppress the marijuana found in his truck should have been granted.

Reversed and remanded.

GRIFFEN and ROAF, JJ., agree.

Christopher CLARK (Deceased) *v.* SBARRO, INC.

CA 99-383 8 S.W. 3d 36

Court of Appeals of Arkansas
Divisions II and III
Petition for rehearing denied December 22, 1999
Dissenting opinion delivered December 22, 1999

JOHN MAUZY PITTMAN, Judge, dissenting. I would grant rehearing in this case. The deceased had a blood-alcohol content of .21 percent at the time of his death, i.e., more than double the percentage required for him to be found guilty of driving while intoxicated. Arkansas Code Annotated § 11-9-102(5)(B)(iv) (Supp. 1997) provides that the use of alcohol creates a rebuttable presumption that the accident was caused by the use of alcohol. Nevertheless, our opinion in this case held that the Commission was required to find that the presumption was rebutted because the other driver crossed the center line, and "[t]here was no evidence from which the Commission could have concluded ... that [Clark] could have avoided the accident." This reasoning is faulty. First, it ignores the statutory presumption that the *accident was caused by* the use of alcohol. Second, it erroneously places the burden on the appellee to present evidence in addition to the statutory presumption of causation. *See Ester v. National Home Centers, Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998); *Garcia v. State*, 333 Ark. 26, 969 S.W.2d 591 (1998); *Kilpatrick v. State*, 322 S.W.2d 728, 912 S.W.2d 917 (1995). Third, it ignores the possibility, suggested by reason and common sense, that the decedent might have avoided the accident by driving defensively had he not been intoxicated. *See Garcia v. State*, 333 Ark. at 33.

I respectfully dissent from the denial of rehearing.

[redacted]