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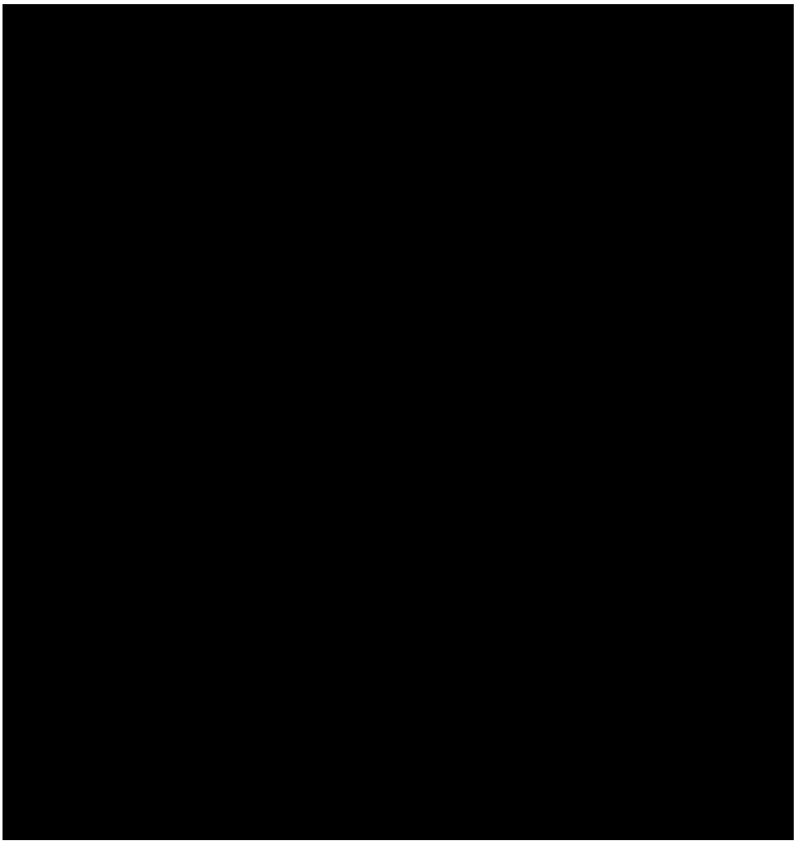

Dionne McClain SNOWDEN and Michelle Shack,
On Behalf of Christian Shack, *A Minor v.*
Glinder RIGGINS, Administratrix of the
Estate of Joelaun Snowden, *Deceased*

CA 99-1032 13 S.W.3d 598

Court of Appeals of Arkansas
Division IV
Opinion delivered April 5, 2000

[redacted]

Lundy & Davis, L.L.P., by: *Charles W. Peckham* and *Jackey W. South*, for appellants.

Crumpler, O'Connor & Wynne, by: *William J. Wynne*, for appellee.

JOHN B. ROBBINS, Chief Judge. This appeal comes from the probate court's refusal to set aside an order appointing appellee as administratrix of the estate of Joelaun Snowden, deceased. We hold that the order should have been set aside and, therefore, reverse and remand the case.

On May 11, 1996, Joelaun Snowden died in the crash of Valuejet Flight 592 in Dade County, Florida. He was survived by his mother, appellee Glinder Riggins, his father Grady Snowden, and two children, Jasmine Barnes and Marquela Ferguson. There is also the possibility that his survivors included a wife, appellant Dionne McClain, and another child, Christian Shack, whose mother is appellant Michelle Shack. After Joelaun's death, his mother and father, who had been divorced since 1980, filed competing petitions to be appointed personal representative of his estate. An objection to their petitions was filed by appellants, and the objection was joined in by Alicia Barnes and Markela Ferguson, the mothers of the deceased's two daughters. All four women were represented in the probate matter by attorney Floyd Thomas. Thomas had been retained as local counsel for these women by two out-of-state attorneys who were handling the McClain-Shack-Barnes-Ferguson wrongful-death claims resulting from the crash. In their pleading, appellants and their co-filers requested that they be appointed as administratrixes of the estate. They further alleged that the decedent was not a resident of Arkansas at the time of his death. A hearing on the matter was scheduled for December 13, 1996.

On December 6, 1996, one week before the hearing, attorney Thomas filed a motion to withdraw as appellants' counsel. He stated in his motion that a conflict had developed between appellants' claims and the Barnes-Ferguson claims. The court allowed the withdrawal, and an order was entered that same day.

At the December 13 hearing, Glinder Riggins and Grady Snowden appeared in person and were represented by counsel. Attorney Thomas appeared on behalf of Barnes and Ferguson. Appellants did not appear either in person or by counsel. Thomas explained to the judge that "Ms. McClain claimed to be the spouse of the deceased" and that "Michelle Shack claims to be the mother of a minor child, Christian Shack, who ... was a child of the deceased," but that there was no proof of such claims. He therefore withdrew as attorney for appellants to avoid a conflict with Barnes and Ferguson, the mothers of the decedent's two acknowledged children. He stated that appellant McClain, who lived in Tennessee, and appellant Shack, who lived in Michigan, were aware of the hearing and had been sent notice of his withdrawal by certified mail.

The judge allowed the hearing to proceed and told the parties that he would make no determination of heirship that day. Instead, his decision would be confined to the appointment of a personal representative. Testimony was taken, with most of it being directed to the question of whether the decedent's mother or father would be the more suitable administrator. During the course of the testimony, some evidence concerning the decedent's residence was adduced as a consequence. It appeared that the decedent was living and working in Nashville, Tennessee, at the time of his death. However, he had also rented a trailer in Union County from 1985 until his death and regularly spent time there (almost every weekend, according to his landlord). At the close of the evidence, the judge appointed appellee the administratrix of the estate, and her attorney was asked to prepare the order for the court's signature. The order, as entered on December 19, 1996, not only reflected appellee's appointment but recited that the decedent was a resident of Union County at the time of his death and that he was unmarried at the time of his death. Further, the order listed the decedent's survivors but did not include Dionne McClain or Christian Shack.

On December 30, 1998, two years after the above order was entered, appellants moved to set it aside. They asserted that the court did not have jurisdiction over the decedent's estate because the decedent was a resident of Tennessee at the time of his death, and they asserted that they had not received proper notice of attorney Thomas's withdrawal of his representation of them. Contemporaneously therewith, they asked that appellee be removed as administratrix because she had excluded them from a listing of heirs, had misrepresented the decedent's residence, and had shown animosity toward them. A hearing on these motions was held, and the judge refused to set the previous order aside. In an order entered August 3, 1999, he found that appellants had received notice of the 1996 hearing and of Thomas's withdrawal and that any questions regarding the decedent's residence were *res judicata*, having been decided at the prior hearing. Further, he affirmed his original appointment of appellee as personal representative. The order noted that no ruling was being made on appellants' claims of heirship and that such matters would be addressed if and when the court was called upon to distribute proceeds from the plane-crash litigation.

Appellants raise three issues on appeal: 1) whether the court's ruling that any questions concerning the decedent's residence are *res*

judicata; 2) whether the court should have removed appellee as administratrix; and 3) whether the court should have set aside the 1996 order because appellants did not receive proper notice of their attorney's withdrawal. We need not address the first two issues because we hold that reversal is merited on the third.

We begin by addressing three threshold issues raised by appellee. The first is whether we have a final, appealable order in this case. Even though this appeal is brought from an interlocutory order, almost all probate court orders are appealable. Other than an order removing a fiduciary for failure to give a new bond or render an account or an order appointing a special administrator, a person aggrieved by an order of the probate court may obtain appellate review of the order. *See* Ark. Code Ann. § 28-1-116(a) and (b) (1987); *In re Guardianship of Vesa*, 319 Ark. 574, 892 S.W.2d 491 (1995). In particular, an order denying a petition to remove a personal representative is appealable. *Guess v. Going*, 62 Ark. App. 19, 966 S.W.2d 930 (1998). However, when an interlocutory appeal such as this one is taken, either this court or the probate court may stay the appeal until final distribution is made, unless the order admits or denies probate of a will or appoints or refuses to appoint a personal representative. Ark. Code Ann. § 28-1-116(c) (1987). Appellee contends that, by declining to determine appellants' heirship claims, the probate court impliedly stayed any appeal of its order until final distribution. We disagree. The court's order gives no indication of any intent to curtail appellants' right to appeal but only to clarify and restrict the scope of the order. Additionally, the order appealed from is largely concerned with the appointment of a personal representative and thus is not encompassed by subsection (c). Thus, we have an appealable order in this case.

The next threshold issue is whether the probate court had jurisdiction to consider appellants' request to set aside a two-year-old order, given the requirements of Ark. R. Civ. P. 60(b). That rule imposes a ninety-day time limit on a trial court's modification or setting aside of its orders (with certain exceptions contained in Rule 60(c)). However, a probate court may vacate or modify an order from which no appeal has been taken so long as the action is taken within the time period allowed for appeal after final termination of the administration of an estate. Ark. Code Ann. § 28-1-115(a) (1987). This statute has been interpreted to mean that a probate order may be vacated or modified at any time before a final

order is entered. *See Brooks v. Baker*, 242 Ark. 128, 412 S.W.2d 271 (1967). This rule applies notwithstanding the dictates of Rule 60(b). *White v. Toney*, 37 Ark. App. 36, 823 S.W.2d 921 (1992). Therefore, the court had the authority to set aside its 1996 order.

Finally, appellee contends that appellants were not entitled to seek her removal as personal representative because they were not "interested persons." A probate court may remove a personal representative for various reasons either on its own motion or upon the petition of interested persons. Ark. Code Ann. § 28-45-105(a)(2) (1987). An "interested person" is defined by the probate code as any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered, and a fiduciary. Ark. Code Ann. § 28-1-102(a)(11) (1987). In *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994), the decedent died testate, leaving nothing to his children. Later, his children attempted to remove the estate's executor. However, our supreme court held that the children were not interested persons because they were not heirs or creditors nor did they have a claim against the estate. *See also White v. Welsh*, 323 Ark. 479, 915 S.W.2d 274 (1996), in which it was held that the petitioners were not interested persons because they did not assert a claim against the estate or declare any interest in the decedent's property or indicate any entitlement to proceeds that might be distributed. By contrast, the appellants in this case are at least potential heirs. *See Sanders v. Ryles*, 318 Ark. 418, 885 S.W.2d 888 (1994), where, in an analogous context, the supreme court held that an interested party includes a potential heir to land that is part of an estate. Further, unlike the petitioners in *Pickens v. Black, supra*, appellants' decedent died intestate, meaning that, if their claims are proven, they could be legally classified as heirs. *See* Ark. Code Ann. § 28-1-102(a)(10) (1987), defining an heir as a person entitled to the property of an intestate decedent. Additionally, unlike the petitioners in *Pickens v. Black, supra*, and *White v. Welsh, supra*, appellants have asserted a claim against the decedent's estate, declared an interest in his property, and indicated an entitlement to proceeds of the estate. Based upon these factors, we hold that appellants were interested persons entitled to seek removal of the estate's personal representative.

Having disposed of the threshold issues, we turn to the merits of the case. Probate cases are reviewed *de novo* on appeal. *In re Guardianship of Vesa, supra*. However, we will not reverse the pro-

bate judge's findings of fact unless they are clearly erroneous. *See id.* A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998).

We are firmly convinced that a mistake was made in this case when the probate judge found that appellants received adequate notice of their counsel's withdrawal from representation. A lawyer may not withdraw from representing any party without permission of the court. Ark. R. Civ. P. 64(b). Permission may be granted for good cause shown if counsel seeking permission shows, *inter alia*, that he has taken reasonable steps to avoid foreseeable prejudice to his client, including giving due notice to his client, allowing for the appointment of other counsel. *Id.* In this case, Thomas testified that, at the request of lead counsel, he withdrew from representation of appellants because of a potential conflict. That withdrawal was accomplished only seven calendar days before the 1996 hearing. According to Thomas, he mailed certified letters to appellants notifying them of his withdrawal. However, he never received any green cards back acknowledging the letters' receipt, and appellants testified that they never received notice. Nevertheless, even if appellants had received notice, they would have had only three business days at most to either arrange for their attendance at the hearing or to arrange for new local counsel to represent them. This was simply not the type of "due notice" contemplated by Rule 64(b). Further, the prejudice that they suffered as a result of their lack of representation is apparent. Thomas was able to state, on the record and without contradiction, that neither appellant could prove her heirship claim. Additionally, the 1996 order that resulted from the hearing contains certain extraneous matters which, while they were not crucial to the court's appointment of a personal representative, stated matters or omitted matters contrary to appellants' interests.

The probate judge ruled that appellants knew or should have known of Thomas's withdrawal as their primary counsel and that "if someone wants to blame someone" the blame could be placed upon the primary attorneys. Our supreme court has addressed the unfortunate practice of viewing the propriety of counsel's withdrawal from the standpoint of whether counsel engaged in wrongdoing rather than from the standpoint of how the

client was affected. In *Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996), it was emphasized that Rule 64(b) is aimed at protecting the client. The trial court should focus on whether the client's interest is protected and should play an active role in determining whether the requirements of Rule 64(b) have been met. That was not done in this case. Thomas's notice of withdrawal, when viewed from the client's perspective, violated Rule 64(b). He did not allow appellants sufficient time to protect their interests in the hearing by either appearing themselves or by hiring new counsel. We therefore hold that the 1996 order should have been set aside.

Based upon the foregoing, the 1996 order is set aside in its entirety, the 1999 order appealed from is reversed in its entirety, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

BIRD and CRABTREE, JJ., agree.

Randy ANHALT *v.* STATE of Arkansas

CA CR 99-1264 13 S.W.3d 603

Court of Appeals of Arkansas
Division IV
Opinion delivered April 5, 2000

Gordon, Caruth & Virden, P.L.C., by: *Ben Caruth*, for appellant.

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

JOSEPHINE LINKER HART, Judge. After he entered his conditional pleas of guilty to the crimes of manufacture of a controlled substance, possession of a controlled substance, and possession of drug paraphernalia, appellant, Randy Anhalt, appealed

the circuit court's denial of his motion to suppress evidence seized during a nighttime search. He does not argue that the search warrant affidavit failed to state grounds justifying a nighttime search. Rather, he argues that the search warrant authorizing a nighttime search was defective because, in issuing the search warrant, the issuing judicial officer failed to specifically state in the search warrant that he found that a nighttime search was justified. We affirm the court's denial of the motion to suppress.

The search warrant in this case provided that the warrant could be served and the search made at any time in the day or night. While a paragraph in the affidavit listed what it described as "[e]xigent circumstances" for a nighttime search, as noted by appellant, there was no provision in the warrant stating why a nighttime search was necessary. Appellant notes that Ark. R. Crim. P. 13.2(c) provides 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 issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

Appellant also cites *Carpenter v. State*, 36 Ark. App. 211, 214, 821 S.W.2d 51, 53 (1991), which provides that "[t]he wording of Rule 13.2(c) is clear and need only be applied as written, *i.e.*, the warrant must contain not only a finding of justification for a nighttime search, but also an appropriate order authorizing the same." *See also Hale v. State*, 61 Ark. App. 105, 110, 968 S.W.2d 627, 629 (1998).

In view of the following analysis, however, we cannot conclude that the court erred in denying appellant's motion to suppress. First, unlike the search warrant in *Carpenter*, the search warrant here specifically authorized a nighttime search. Second, despite our *gratis dicta* to the contrary in *Carpenter* and *Hale*, Rule

13.2(c) does not provide that the search warrant must state, with particularity, the judicial officer's finding of reasonable cause to believe that circumstances provided in Rule 13.2 (i), (ii), or (iii) are present, justifying a nighttime search. Third, we are guided by *Harris v. State*, 262 Ark. 506, 509-10, 558 S.W.2d 143, 145 (1977), in which the supreme court concluded that there was not a substantial violation of the appellant's rights requiring suppression of evidence[1] even though the search warrant did not recite (as specifically required by the Ark. R. Crim. P. 13.2(b)(ii)) that the judicial officer found reasonable cause for the issuance of the search warrant. In *Harris*, the court concluded that "the magistrate's actual issuance of the search warrant established his finding of reasonable cause even more positively than the insertion of a conclusory finding to that effect would have."

Thus, because Rule 13.2 does not require in the warrant a written recitation of the judicial officer's finding that a nighttime search is justified, and because the *Harris* court concluded that the judicial officer's failure to insert a finding of reasonable cause for issuance of the warrant was not a substantial violation of the appellant's rights, we must conclude that the judicial officer's failure to specifically state in the warrant that a nighttime search was justified did not substantially violate appellant's rights. As in *Harris*, the judicial officer's issuance of a search warrant specifically authorizing a nighttime search established his finding that a nighttime search was justified "even more positively than the insertion of a conclusory finding to that effect would have."

While certainly the better practice would be for the judicial officer to insert in the warrant a specific finding justifying a nighttime search, the judicial officer's failure to do so does not require suppression of evidence seized pursuant to the search warrant. We conclude that the circuit court properly denied appellant's motion to suppress.

Affirmed.

PITTMAN and STROUD, JJ., agree.

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[1] "A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state." Ark. R. Crim. P. 16.2(e)(1999).

Sharon DENNIS *v.* James DENNIS, II

CA 99-626 13 S.W.3d 909

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered April 5, 2000

Mark S. Carter, P.A., by: *Mark S. Carter*, for appellant.

R. Ted Vandagriff, for appellee.

ANDREE LAYTON ROAF, Judge. The sole issue in this divorce case involves the unequal division of proceeds from the sale of the parties' jointly owned marital homestead. Sharon Dennis appeals from the chancellor's decision, which was based upon appellee James Dennis's claim of an oral agreement, to award James the nonmarital funds he contributed toward the purchase of the home. She contends on appeal that the chancellor erred by 1) awarding James a greater interest in homestead property held in tenancy by the entirety, or, in the alternative 2) awarding James a greater interest in marital property without stating the reasons for the unequal division, as required by statute. We affirm the chancellor.

Sharon and James were married in 1986. At the time of the marriage, they both owned homes in Little Rock. After the marriage, Sharon moved into the home owned by James; her home was subsequently sold. Sharon testified that she netted approximately $4,000 from the sale, and that those proceeds were used to pay marital expenses.

In 1990, the parties purchased a home in Cabot, Arkansas. Prior to this purchase, James also sold his home in Little Rock and netted approximately $31,000 as his share of the proceeds. James testified that this money was used for the down payment, closing costs, and moving expenses associated with the purchase of the home in Cabot. According to the testimony, the home in Cabot was titled in the names of "James A. Dennis and Sharon D. Dennis." After the purchase of the home in Cabot, James and Sharon, pursuant to agreement, each paid one-half of the monthly mortgage payments until they separated in June 1996. After the separation, Sharon remained in the home and made the entire payment during the pendency of the divorce.

At the final divorce hearing on November 25, 1998, Sharon testified first. Her testimony was that the parties had agreed to each pay one-half of the monthly mortgage payments, that she lived up to that agreement, and that they owned the house jointly, in "equal names." The only testimony offered by Sharon with regard to the agreement between the parties is as follows:

> Q. Would you explain to the Court the arrangements which your husband had *in regard to the payments that were made, the monthly mortgage payments*?
>
> A. The agreement that we had when we purchased the home in 1990 was that my contribution to the house would be half the house payment, and from that point in time, I began making half the house payment.
>
> Q. You owned the house jointly?
>
> A. Owned it jointly.
>
> Q. Equal names?
>
> A. Equal names.
>
> Q. And you each made equal payments?
>
> A. Yes, sir.

James testified after Sharon and concurred that the parties had agreed to divide the mortgage payments, however he testified that they also agreed that if they divorced he would get the $31,000 back out of the sale of the house, and the rest would be divided between the parties, stating, "That was our agreement as well as she would pay half of the house payment because she was the one that was insistent on buying a new house. I was perfectly happy where I was. But that was our agreement." When James was cross-examined by Sharon's lawyer about whether the agreement was put in writing, he stated, "No, we have put nothing in writing as a matter of fact. Any of the things you've talked about so far haven't been in writing. But that was our agreement also because she pressured so much to be there, and was so fanatic about it being her house." Sharon did not offer any rebuttal to James's testimony.

The trial court granted James's request to trace the $31,000 back to him, holding that the $31,000 would be offset by the

$4,000 Sharon received from the sale of her nonmarital home, and gave Sharon credit for the reduction of the principal owed on the home from the date of the final hearing until the house was sold. The remainder of any equity in the home was to be divided equally. Sharon appeals from this order.

The issue presented in this appeal deals with the division of property. In reviewing such cases, we affirm the findings of the chancery court unless they are clearly erroneous. *Dunavant v. Dunavant*, 66 Ark. App. 1, 986 S.W.2d 880 (1999), citing *Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993). Where matters of credibility are concerned, findings of those in a position to observe the witnesses (in this case, the chancellor), are given great weight. *Box v. Dudeck*, 265 Ark. 165, 578 S.W.2d 567 (1979). On appeal, we only reverse such a judgment if it is clearly against the preponderance of the evidence. *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978).

When property is placed in the names of a husband and wife, by an instrument running to them conjunctively, and without specification of the manner in which they take, a presumption arises that they own the property as tenants by the entirety. *Dunavant v. Dunavant, supra* (citing *Boggs v. Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988)). In *Lyle v. Lyle*, 15 Ark. App. 202, 691 S.W.2d 188 (1985), this court stated that when a husband and wife hold property as tenants by the entirety, there arises a presumption of a gift from the party furnishing the consideration. *Lyle* involved a husband and wife who made a down payment on forty acres and a house that was held as tenants by the entirety. In dividing the proceeds, the chancellor credited each party with the amount contributed toward the down payment on the forty acres. This court reversed and remanded, holding that although the contributions toward the down payment came from separate funds, the forty acres were held as tenants by the entirety, and, in such a situation, a presumption arises of a gift from the party furnishing the consideration.

Although this presumption is rebuttable, it is a strong one. In *Ramsey v. Ramsey*, 259 Ark. 16, 20, 531 S.W.2d 28, 31 (1975), the supreme court stated the following:

> The presumption is strong, and it can be overcome only by clear, positive, unequivocal, unmistakable, strong and convincing evidence, partially because the alternative is a resulting trust the estab-

> lishment of which, under such circumstances, requires that degree of proof. (Citations omitted.)

In *McLain v. McLain*, 36 Ark. App. 197, 820 S.W.2d 295 (1991), this court held that the wife failed to overcome the presumption of a gift with regard to stocks, bonds, and securities purchased primarily with funds derived from her separate property, but held jointly, with her husband. The only evidence that the wife offered to rebut the presumption that she intended to make a gift was her testimony that she always thought of the stocks, bonds, and securities as being her property and that her husband was entitled to the income or what it could buy only as long as he was married to her.

■ We find the present case to be distinguishable from *Lyle, supra*, and *McLain, supra*. First, the assertion of an oral agreement is not analogous to the claim made by appellee in *McLain* that she did not "intend" to make a gift. Second, although the issue here is likewise whether the testimony presented by James is sufficient to rebut the presumption, Sharon testified only that the parties orally agreed to divide the mortgage payments, and that they owned the home jointly, in "equal names." To rebut the presumption, James testified that there was an additional aspect of the oral agreement providing for return of his nonmarital contributions when the home was sold. His testimony was also clear that the agreement was made to overcome his resistance to buying the new house. Sharon did not deny the existence of this aspect of the agreement; her statement that the home was in "equal names" is ambiguous at best and falls far short of a denial of the clear and specific testimony offered by James. Under these circumstances, we cannot say that the trial court was clearly erroneous in finding the testimony presented by James sufficient to overcome the presumption.

Affirmed.

PITTMAN, JENNINGS, and NEAL, JJ., agree.

BIRD and CRABTREE, JJ., dissent.

SAM BIRD, Judge, dissenting. The majority has affirmed the chancellor's divorce decree by which he enforced an alleged oral agreement for the unequal division of the proceeds from the sale of the parties' marital residence that they owned as

tenants by the entirety. Because I believe that the chancellor's decision is clearly erroneous, not supported by a preponderance of the evidence, and is a deviation from well-established case law, I respectfully dissent.

The majority acknowledges and cites cases that support the rule of property law, well established in Arkansas, that when a husband and wife acquire real property and title it in both of their names, a rebuttable presumption exists that the property is held by them as tenants by the entirety. *Dunavant v. Dunavant*, 66 Ark. App. 1, 986 S.W.2d 880 (1999), citing *Boggs v. Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988). Further, the majority cites several cases that are in accord with an equally well-established Arkansas rule of property law that when husband and wife hold real property as tenants by the entirety, a rebuttable presumption arises that the spouse furnishing the consideration has made a gift in favor of the other spouse, and that this presumption can only be overcome by clear and convincing evidence. *Ramsey v. Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1975); *McClain v. McClain*, 36 Ark. App. 197, 820 S.W.2d 295 (1991); *Lyle v. Lyle*, 15 Ark. App. 202, 691 S.W.2d 188 (1985). Both of these rules of law are involved in the case at bar because, from the record, it is undisputed that appellant and appellee were husband and wife who, during their marriage, acquired title to their marital residence in both of their names, and the husband furnished a greater portion of the consideration.

It is not disputed by the parties that they own their marital home as tenants by the entirety. Thus, the question in this case is whether the chancellor was clearly erroneous in his conclusion that clear and convincing evidence was produced that overcame the presumption of a gift. I believe that legal precedent compels the conclusion that the chancellor was clearly erroneous because, in my opinion, the evidence offered by appellee falls far short of being sufficiently clear and convincing to overcome the strong presumption of a gift that is applicable to this case.

At the trial, appellant testified that, "At the time Jim took the proceeds from the sale of his first house and put it in this house, there was no question that it was to be our house," that she and appellee "owned the house jointly in equal names and equal payments," and that "my contribution to the house would be half the

house payment, and from that point in time, I began making half the house payment."

Following appellant's testimony, appellee testified that when the marital residence was purchased, it was their agreement that "If the home was sold due to reasons or things like we're doing today, divorce, that the original equity would come back to me and we would split the difference," and that "[appellant] would pay half the house payment because she was the one that was insistent on buying a new house. That was our agreement. I want my original investment back."

The preceding two paragraphs constitute the sum and substance of the evidence that the majority judges apparently believe supports the chancellor's apparent conclusion[1] that *clear and convincing* evidence had been presented to rebut the *strong* presumption of a gift. Of course, appellant's testimony provides no evidence whatsoever that supports the chancellor's decision, so we are left only with appellee's statement that he would get his equity back "[i]f the home was sold due to reasons or things like we're doing today, divorce,...." If this testimony by appellee fulfills his obligation to produce *clear and convincing* evidence sufficient to overcome the *strong* presumption that a gift arises from the creation of a tenancy by the entirety, then the majority has given a new meaning to that phrase.

In explaining why their agreement was not in writing, appellee testified, "We have not put nothing in writing as a matter of fact. But that was our agreement also because she pressured so much to be there, and was so fanatic [sic] about it being her house." If, by this statement, appellee meant that they agreed that their agreement (that he would get his equity back in the event of "reasons or things" like divorce) would *not* be put in writing because appellant was fanatical about the house being hers, then the statement simply makes no sense. Why would appellant agree *not* to reduce their agreement to writing as a way of ensuring that she owned an equal interest in the house? This testimony by appellee is anything but clear and convincing.

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[1] It does not appear expressly in the record on appeal that the chancellor acknowledged or applied the "clear-and-convincing-evidence" standard.

It seems to me that if, as appellee alleges, the parties had an agreement that was intended by them to rebut the law's strong presumption of a gift from the provider of the purchase price that arises from the creation of a tenancy by the entirety, appellee would have been the one insisting that it be put in writing, especially where one of the "reasons or things" that was to trigger the recoupment of his contribution included a divorce, not ordinarily a harmonious occasion. There was no evidence that corroborated the existence of an oral agreement between the parties that appellee would recoup his contribution to the purchase price upon the occurrence of "reasons or things" like divorce. To the contrary, all the evidence supports appellant's version of the agreement. It is undisputed that from the time they purchased the house until they separated, they each contributed half of each monthly house payment. This is what appellant said they agreed to do.

The most puzzling aspect of the majority opinion is that it bases its decision to affirm the chancellor on the fact that appellant did not offer rebuttal testimony to what the majority refers to as an "additional aspect of the oral agreement" that appellee would get his money back if "reasons or things like we're doing today" happened. I can not help but wonder what evidence she would offer in rebuttal that she had not already presented. She had already testified to the content of their agreement. Was not appellant's testimony that she and appellee owned the house "jointly, in equal names" clear enough to establish that she understood they each had an equal interest in the house? Was that testimony not sufficient to establish appellant's position that appellee had no greater interest in the house than she? Was appellee's ambiguous statement that "If the home was sold due to reasons or things like we're doing today ..." made clear and convincing because appellant did not take the stand and say, "Judge, we didn't agree to what he said"? Appellant's testimony had already made it abundantly clear that they agreed that they each owned an equal interest in the house. I do not see how appellant's failure to, again, take the stand and state the obvious can serve as a basis for the majority to conclude that appellee's different version of the agreement is clear and convincing.

I see no distinction between the case at bar and the *Lyle, supra,* and *McClain, supra,* cases cited by the majority. In *Lyle,* we reversed a chancellor who had ordered in a divorce decree that the proceeds from the sale of tenancy-by-the-entirety real property be first allo-

cated to the parties in the amounts that each had contributed toward the down payment, and that the balance be divided equally between them, exactly like the court ordered in the case at bar. In *McClain*, a chancellor found that certain personal property was not held by the parties as tenants by the entirety, and refused to distribute it between the parties. We reversed, holding that the property was tenancy-by-the-entirety property, and, as such, was required to be divided equally between the parties, absent clear and convincing evidence to the contrary. We said:

> 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. (Citation omitted.)

McClain, 36 Ark. App. at 199, 820 S.W.2d at 296-97.

The majority attempts to distinguish *Lyle* and *McClain* by noting that those cases involved only proof that there was no intent to make a gift, whereas, in the case at bar, there is evidence of an agreement. This is simply not a valid distinction. In order to distinguish *Lyle* and *McClain* on that basis the majority has, first, concluded that appellee's version of the agreement was, in fact, the agreement of the parties, and, then, bootstrapped this conclusion to the level of clear and convincing evidence by the inconsequential fact that appellant did not offer rebuttal testimony.

I do not understand how the majority can acknowledge and quote from *Ramsey*, *supra*, that the strong presumption in the case at bar "can be overcome only by clear, positive, unequivocal, unmistakable, strong, and convincing evidence," and hold that appellee's testimony rises to the level necessary to rebut the presumption. To so hold renders the presumption meaningless and makes a mockery of the phrase "clear and convincing."

I also do not understand how the majority can conclude that appellant's testimony that she and appellee owned their marital residence "jointly" and "in equal names" is ambiguous, while holding that appellee's testimony that he would get his money back "if reasons or things like we're doing today" happened is clear and

convincing. Even if appellant's testimony is ambiguous, that fact lends neither clarity nor weight to appellee's testimony.

The majority opinion stands for the proposition that to overcome the presumption of a gift by the tenant providing the consideration for the purchase of tenancy-by-the-entirety property, the would-be benefactor need only testify, without any corroboration, that the tenants agreed otherwise. I suggest that this case marks the beginning of the end of that *strong* presumption.

I would reverse and remand this case for the chancellor to order that the proceeds from the sale of the marital residence be distributed equally between the parties. I am authorized to state that Judge CRABTREE joins in this dissent.

Tim SMITH and Shelby Arrington *v.*
Shawn J. RUSS

CA 99-801 13 S.W.3d 920

Court of Appeals of Arkansas
Division IV
Opinion delivered April 12, 2000

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

No response.

JOSEPHINE LINKER HART, Judge. The circuit court determined that appellants, Tim Smith and Shelby Arrington,

breached a contract for the sale of an automobile to appellee, Shawn J. Russ. The court awarded appellee $12,078.16, of which $10,395.00 served as compensation for lost tips and wages resulting from appellee's lack of transportation with which to deliver pizzas and his consequent demotion from pizza delivery driver to cook. On appeal, appellants argue that to establish a breach of the contract, appellee had to prove, as he alleged, that the car was stolen, and the court erred in finding that there was a breach of contract because appellee did not prove that the vehicle was stolen. They further argue that the court erred in awarding consequential damages in the form of lost earnings. While we conclude that the court's finding that appellants breached the contract was not clearly erroneous, we further conclude that the court erred in awarding damages stemming from appellee's lost tips and wages. Therefore, we affirm in part, and we reverse in part and remand for an award of damages consistent with this opinion.

Appellee, appearing *pro se*, provided the only testimony at trial. According to him, on December 22, 1997, appellant Arrington, at Auto 1 USA, sold him a 1987 Black Nissan Maxima. Appellee paid $500 in cash, $400 in trade, and executed a promissory note in the amount of $100. Appellee, however, was unable to obtain a title on the car, and appellants never provided him with one. On January 17, 1999, appellee was stopped by police "for being in a stolen car." After providing the police with proof that he had purchased the car, he was released. When appellee complied with a request by the police to return the vehicle to the dealer, the owners of the vehicle were present at appellants' business. Appellee was then given a loan vehicle that was not roadworthy. Appellee was given another loan vehicle by appellant Smith to use until appellant Arrington was released from jail. On February 7, 1999, after appellant Arrington was released from jail, he went to appellee's residence and demanded return of the vehicle. Appellee refused and explained that he could not return the car until he was given another car because "I had paid him for a car." After appellee refused to return the car, appellant Arrington unsuccessfully attempted to have the car towed and then called the police, who arrested both appellee and appellant Arrington. The police ordered appellee to return the car. Afterwards, appellants neither provided appellee with a replacement vehicle nor returned the purchase money.

We disagree with appellants' conclusion that appellee had to prove that the car was stolen in order to establish a breach of contract. "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." Ark. Code Ann. § 4-2-301 (Repl. 1991). "[T]here is in a contract for sale a warranty by the seller that ... [t]he title conveyed shall be good and its transfer rightful...." Ark. Code Ann. § 4-2-312(1)(a) (Repl. 1991). Here, appellants never provided to appellee title to the vehicle. Further, after appellee returned the vehicle to appellants, appellee never received a replacement vehicle or return of his consideration. In bench trials, the standard of review on appeal is whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *See Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997). Here, the court did not clearly err in finding that appellants breached the parties' contract for the sale of an automobile.

We conclude, however, that the court erred in awarding appellee lost tips and wages. "Consequential damages resulting from the seller's breach include ... [a]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." Ark. Code Ann. § 4-2-715(2)(a) (Repl. 1991). Appellee never presented evidence that, at the time of contracting, appellants had reason to know the particular needs of appellee. Thus, we reverse and remand on this point for an award of damages consistent with this opinion.

Affirmed in part; reversed in part and remanded.

PITTMAN and STROUD, JJ., agree.

Patricia BUNN *v.* Dorothy LUTHULTZ

CA 99-1120 13 S.W.3d 915

Court of Appeals of Arkansas
Division I
Opinion delivered April 12, 2000

Legal Services of Northeast Arkansas, by: *Louis J. Nisenbaum*, for appellant.

Tom Allen, for appellee.

TERRY CRABTREE, Judge. Appellant, Patricia Bunn, purchased a home through owner financing provided by appellee, Dorothy Luthultz, on April 2, 1996. On March 8, 1997, the property was damaged by fire. The appellant had to find other housing and in doing so was unable to make her monthly payments to appellee. On April 14, 1997, appellee offered to take the property back to relieve the appellant of her burden and produced a quitclaim deed for the appellee to sign. The appellee conferred with a friend and agreed to "get out from under the mess," and signed the quitclaim deed.

The original contract of sale provided that appellant would procure and maintain a policy of casualty insurance in a face amount of not less than $70,000 on the improvements situated on the real property. Appellant procured casualty insurance from Terra Nova Insurance Company and was listed as the insured, and appellee was listed as the lienholder. The policy specifically stated, "[L]oss or damage, if any, under this policy, shall be payable to the mortgagee named on the first page of this policy as interest may appear."

Appellant argues that the trial court erred in its finding that the appellee had any interest in the insurance proceeds or the penalties enumerated in Ark. Code Ann. § 23-79-208 (Repl. 1994), when after the loss, she received and accepted a quitclaim deed to the property from the appellant in full satisfaction of the appellant's underlying debt contained in the parties' real estate contract, and, therefore, the proceeds of the insurance policy and penalties should have been awarded to the appellant pursuant to the "foreclosure after loss rule."

■■ We will not reverse the findings of the trial court unless such findings are clearly erroneous or clearly against the preponderance of the evidence. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998); ARCP Rule 52(a). Disputed facts and determination of the credibility of witthin the province of the factfinder. *McQuillan, supra.*

■ *Arkansas Teacher Retirement v. Coronado*, 33 Ark. App. 17, 801 S.W.2d 50 (1990), dealt with this issue of foreclosure after loss. The prevailing rule in other jurisdictions is that a mortgagee forfeits its right to proceeds from an insurance policy when the loss occurs

prior to the foreclosure and the amount bid at the foreclosure sale is sufficient to satisfy the mortgagee's debt. In the case at bar there was not a foreclosure, but a quitclaim deed. A quitclaim deed is different from foreclosure in that it conveys all rights and entitlements to the grantee, and under the circumstances of this case, it includes interest in insurance proceeds. The property is not subject to sale in a manner that would exceed or satisfy the indebtedness.

We have said that a mortgagee can retain only so much of the insurance proceeds as will cover his interest in the property. *See Wilbanks & Wilbanks, Inc. v. Cobb,* 269 Ark. 936, 939, 601 S.W.2d 601, 603 (Ark. App. 1980). "[W]hen a mortgagee is named as loss payee in its mortgagor's insurance policy, and a loss occurs, the mortgagee is entitled to enough of the proceeds to satisfy the mortgage indebtedness." *Echo, Inc. v. Stafford,* 21 Ark. App. 201, 205, 730 S.W.2d 913, 915 (1987).

When appellee accepted the conveyance of the property from appellant by quitclaim deed, the trial court found it was a release of the appellant by the appellee from all obligations under the real estate contract entered into by and between the parties on April 2, 1996. Therefore, the appellant conveyed all of her interest in the insurance proceeds and lost her status as an assignee as she had no insurable interest.

Affirmed.

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

Felicia WOOD and Ruth Carolyn Wood *v.*
WEST TREE SERVICE

CA 99-708 14 S.W.3d 883

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered April 12, 2000

Ben E. Rice, for appellant Felicia Wood.

Roland E. Darrow II, for appellant Ruth Carolyn Wood.

Barber, McCaskill, Jones & Hale, P.A., by: *Robert L. Henry, III* and *Richard A. Smith*, for appellee.

TERRY CRABTREE, Judge. On March 4, 1997, George Wood was electrocuted by a downed power line. Mr. Wood was an employee of West Tree Service and was cleaning up debris that was left by a recent tornado. The coroner's report stated that the decedent was struck in the face as an energized wire fell off the tree branch he had picked up.

Mr. Wood's body was taken to Southwest Regional Medical Center where the Coroner's office inspected the body and took blood and urine samples. A bag of marijuana and a package of ZigZag cigarette rolling papers were found in the pockets of Mr. Wood's pants. Tests performed on the samples by the State Crime Lab revealed that marijuana metabolites were present in the samples taken from Mr. Wood's body. These findings were confirmed by the UAMS Toxicology Department.

Appellee, West Tree Service, disputed compensability of the claim of appellant Felicia Wood for dependency benefits, but stipulated that should Mr. Wood's death be ruled compensable, appellant Felicia Wood, Mr. Wood's daughter by a previous marriage, should qualify as a dependent child.

The Workers' Compensation Commission found that the presence of marijuana metabolites in Mr. Wood's system constituted the presence of an illegal drug and therefore invoked the rebuttable presumption found in Ark. Code Ann. § 11-9-102(5)(B)(iv)(b)(Repl. 1996) that Mr. Wood's death was substan-

tially occasioned by the use of marijuana. The full Commission denied benefits on that basis. Appellant asserts three points on appeal: (1) whether the Commission properly performed its function of determining the credibility of the witnesses and the proper weight to be given their testimony; (2) whether the Commission correctly interpreted the testimony of Jimmie Valentine, Ph.D.; and (3) whether substantial evidence exists to support the findings and decision of the Commission. We affirm.

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

It is now clear that testing positive for marijuana metabolites is sufficient to establish a rebuttable presumption that Mr. Wood's injury was substantially occasioned by the use of marijuana. *Brown v. Alabama Electric Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998); *Weaver v. Whitaker Furniture Co., Inc.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996). This court has addressed Ark. Code Ann. § 11-9-102(5)(B)(iv) a number of times. It has found that when the urine sample is tested for delta-9-tetrahydrocannabinol, if the result is positive, this evidence establishes the rebuttable presumption.

In both *Brown, supra,* and *Graham v. Turnage Employment Group*, 60 Ark. App. 150, 960 S.W.2d 453 (1998), this court affirmed the Commission's decision denying compensability because metabolites were found in the appellants' urine samples.

The appellants argue on appeal that the Commission erred by finding that the testimony of two witnesses, both related to the decedent, did not sufficiently rebut the presumption of intoxication. This argument is without merit. The question of whether the testimony of an interested party is sufficient to rebut the presump-

tion remains a question for the trier of fact. *Lambert v. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985). We cannot find that the Commission erred in its decision.

For her second point on appeal, the appellants argue that the Commission misinterpreted the testimony of Jimmie Valentine, Ph.D. It is the function of the Commission to determine the credibility and weight due a witness and his testimony, and its findings as to the inferences to be drawn from the testimony, once made, have the force and effect of a jury verdict. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998). Dr. Valentine was the only expert who testified, and his opinion was that the decedent was impaired at the time of his accident. The appellants did not carry their burden of proving by a preponderance of the evidence that the decedent's death was not substantially occasioned by the use of marijuana.

For their third point on appeal, the appellants argue that the Commission's decision was not supported by substantial evidence. Substantial evidence was presented through the toxicology reports and the doctor's testimony. A decision by the Workers' Compensation Commission is not reversed unless it is clear that fair-minded persons could not have reached the conclusion if presented with the same facts. *Golden v. Westark Comm. College*, 333 Ark. 41, 969 S.W.2d 154 (1998). We cannot find that the Commission erred.

Affirmed.

PITTMAN, JENNINGS, BIRD, and NEAL, JJ., agree.

ROAF, J., dissents.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse and remand this case for an award of benefits in line with the ALJ's opinion in this case. As in *Clark v. Sbarro*, 68 Ark. App. 350, 8 S.W.3d 36 (1999), the circumstances surrounding Mr. Wood's unfortunate accident and death are sufficient to rebut the presumption that his death was substantially occasioned by the use of marijuana.

Once again, the Commission has played fast and loose with the evidence before it in reaching its decision to deny benefits to

Mr. Wood's family. The record reflects that Mr. Wood and his crew were engaged in removing debris and tree limbs from a downed power line that was dead the day before and, while they were working on it again the next morning, the line suddenly became energized. According to Jason Sullivan, the *only witness to testify about the circumstances of this event*:

> I don't know if I was walking under the wire or if I was crossing over it but when it left my hand and hit the ground, it started shooting sparks all over the place. I was like, whoa, and everybody said the line is hot, the line is hot run. ... When I looked up, everybody was scattering. I took off running. I probably ran a quarter or fifty feet and stood up on a big tree that was out of the water so I could find out what was going on. About that time I heard them holler for the decedent and everybody said he was hurt.

According to the coroner, his investigative report stated that Mr. Wood "tried to pick up a tree limb and tried to remove the wire from the limb and ... was struck in the face as the wire fell off the tree branch and the wire was said to have fallen on him."

In his opinion awarding benefits, the ALJ stated:

> Witnesses testified that the power line in question was dead the evening before when they worked on the same right-of-way; however, the next morning when they returned to clear debris at the same site and began working, sparks were noted coming from the line, and everyone shouted that the line was hot and tried to get out of the way, but Decedent Claimant was either struck by the line or was holding the line to move it, about at the time he was fatally injured.

However, the Commission seemed to read a great deal more into the evidence than did the ALJ:

> In the process of clearing the debris an electrical line became energized. Someone shouted that the line was "hot" and everyone managed to get out of the way except the decedent.... Furthermore, the evidence reflects that both Mr. Hall and Mr. Sullivan heeded the warning of the "hot" line, something which claimant did not do.... Mr. Sullivan and Mr. Hall both testified that after being warned of the "hot wire," they were able to avoid it. However, claimant's actions did not prove him to be as nimble.

The first problem with these findings is that William Hall *gave no testimony whatsoever* about the downed power line, but testified only that he saw Mr. Wood changing a tire that morning before commencing work and that he did not appear to be impaired. This inexcusable misstatement of the facts suggests an attempt by the Commission to bolster its entirely speculative and illogical conclusion that, because Mr. Wood was the only person killed by the hot wire, "everyone" else must have "heeded" the warnings and managed to get out of the way of the wire, but that Mr. Wood was not "nimble" enough to do so because of his drug usage.

Of course, the warning shouts came after the line had suddenly become energized and had fallen, not before. According to Mr. Sullivan, the shouts came only after the line left his hand, fell to the ground, and began shooting sparks; he did not have to "avoid" it because it had already fallen onto the ground. Unfortunately, the line fell onto Mr. Wood's face rather than the ground, and he did not survive. I must, however, agree with the Commission's analysis in one respect—Mr. Wood was not "nimble" enough to outrun electricity.

I would reverse and remand for an award of benefits.

Ronald A. CAMPBELL (*Deceased*) *v.*
RANDAL TYLER FORD MERCURY, INC.

CA 99-1212 13 S.W.3d 916

Court of Appeals of Arkansas
Division II
Opinion delivered April 12, 2000

Sexton & Fields, P.L.L.C., by: *Don Langston*, for appellant.

Frye & Boyce, P.A., by: *William C. Frye*, for appellee.

MARGARET MEADS, Judge. Lorena Campbell, widow of appellant, Ronald Campbell, brought a claim for death benefits by a dependent spouse alleging that appellant died in an automobile accident which occurred while he was within the scope of his employment while performing employment services. An administrative law judge awarded benefits. The full Commission reversed the law judge and denied benefits on the finding that appellant was not performing employment services when he was traveling to work on the morning of the accident. We affirm.

Ronald Campbell, whose duties included drawing up contracts, handling financing, and doing the paperwork associated with buying a car, was appellee's financial manager. Campbell used a company car for company business, took home paperwork that needed to be done, and went to places other than the company for business after-hours. On May 18, 1998, Campbell died in a fire which occurred as a result of a one-vehicle accident on his way to work.

The evidence at the hearing before the law judge was that Campbell often brought contracts home and made telephone calls from home to arrange to show a vehicle, to get a contract signed, or to discuss "deals." He had a cellular telephone under appellee's contract, but he paid for it. The weekend prior to his death,

Campbell brought home paperwork relating to a sale to Jeremy Roberts. He worked on it over the weekend and discovered something wrong with it. On Sunday, Campbell called Roberts to let him know that the contract could not be signed that weekend, and arrangements were made to sign the contract on Monday. On the morning of the accident, Campbell left for work in his uniform, driving his company car, and taking his cellular phone and paperwork. He had the contract with him and was taking it back to appellee, but was not on any type of errand for appellee; the accident occurred on his normal route to work. Prior to the accident, Campbell telephoned appellee from the cellular phone to inform it that he would be late. The contract burned as a result of the automobile accident; a new contract was printed and was signed later in the week.

An administrative law judge found that Campbell was performing employment services when he was involved in the fatal car accident. The full Commission reversed. The Commission found that the employment-services exception to the definition of compensable injury "clearly excludes" this claim from being compensable, stating:

> In our opinion, claimant's traveling to work does not elevate claimant's activities to the level of activities which carry out the employer's purpose or advances [sic] the employer's interests. Claimant was not employed as a courier to transport documents. Claimant was a finance manager. As a finance manager, he was required to work on sales contracts. Whether he worked on these contracts at home or at the office is immaterial to this claim, as claimant was clearly not working on a sales contract at the time of his injury.
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> . . . .
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> Claimant was traveling to work on Monday morning when he was involved in a fatal automobile accident. He just merely happened to have a contract with him when the accident occurred. ... [W]e are not persuaded by any argument advanced that transporting the contract at this particular time to the dealership for corrections was required by his employer. ... [T]he relevant fact is that claimant was traveling to work when the accident occurred. Whether claimant had the contract in his possession at that time is irrelevant. As explained at the hearing, a duplicate contract could be created and, in fact, later was duplicated by the computer system at the dealer-

> ship. Thus, it was not necessary or even required of claimant's employment to have the contract in his possession at the time the accident occurred. Claimant's primary activity as a finance manager on the particular morning did not involve driving to work as that is an activity required of all employees. Consequently, we do not find that it was a risk attributable to his employment as a finance manager. Nor do we find that claimant's employment imposed greater risks or demands on him in traveling to or from work. This case is a classic going and coming case and an accident which occurred when claimant was going to work is not compensable.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission, and we affirm that decision if it is supported by substantial evidence. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). The Commission's decision will be affirmed unless fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Gansky, supra.*

Arkansas Code Annotated section 11-9-102(4)(A)(i) (Repl. 1999), defines compensable injury as an accidental injury causing internal or external physical harm arising out of and in the course of employment. The test for determining whether an employee was acting in the course of employment at the time of his injury requires that the injury occur within the time and space boundaries of his employment while he is carrying out the employer's purpose or advancing the employer's interests directly or indirectly. *Pettey, supra.* An employee is generally said not to be acting within the course of employment when he is traveling to and from the workplace, the rationale being that an employee is not within the course of his employment while traveling to or from his job. *Id.* Some exceptions to this rule are where the journey itself is "part of the service," such as traveling men on a business trip and employees who must travel from job site to job site. *Id.* Whether an employer requires an employee to do something has been dispositive of whether that activity constituted employment services. *See Ray v. Univ. of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999);

Coble v. Modern Business Systems, 62 Ark. App. 26, 966 S.W.2d 938 (1998).

Appellant argues that the Commission erred when it found that Campbell was not performing employment services at the time of his death. Appellant contends he was advancing his employer's purposes by bringing paperwork back to work and by making the cellular telephone call, and that bringing an incomplete contract back to the premises for correction and signature constitutes employment services. Appellant relies on *Pettey, supra*; *Ray, supra*; *Shults v. Pulaski County Special School Dist.*, 63 Ark. App. 171, 976 S.W.2d 399 (1998); and *Fisher v. Poole Truck Line*, 57 Ark. App. 268, 944 S.W.2d 853 (1997); in support of this argument. However, these cases are distinguishable on their facts and provide no support for the instant appeal.

In *Pettey*, appellee was employed as a nursing assistant and was required to travel to patients' homes to provide nursing services. She was injured in a one-vehicle accident while she was traveling to the home of a patient. Our supreme court held that appellee was required by the very nature of her job description to submit herself to the hazards of day-to-day travel back and forth to the homes of her patients, and as such was acting within the course of her employment at the time she was injured.

In *Ray*, a food-service worker slipped and fell in the cafeteria during one of her paid fifteen-minute breaks. Appellee required her to be available to work during her break and paid her for the time she was on break because she was required to help students. She was required to assist student diners by leaving her break to help if the need arose. This court held that appellee clearly benefitted by appellant's being in the cafeteria and available for students during her paid break, and the benefit was directly related to the job she performed and for which she was paid.

In *Shults*, appellant was employed as a building custodian. One of his duties upon arriving at work was to disarm the alarm system when he entered the building. He was injured when he tripped after entering the building and seeing that the alarm had been disarmed. Because appellant's first duty as building custodian was to check the alarm system, this court held that appellant sustained his injury at a time when employment services were being performed.

Finally, in *Fisher*, appellant was a newly hired truck driver and as such was required by his employer to take a physical, which he did. When he reported to work to receive a driving assignment on the day of the accident, he learned that his urine test was unacceptable, and he would not be allowed to drive until he retook and passed the test. He left and immediately drove to the doctor's office, retook, and passed the test. He was injured when his automobile was stuck by a tractor-trailer truck as he was returning to his place of employment with the results of the test. Although he was not ordered to bring back the results of the test, he knew that by hand-delivering the results he would receive his driving assignment. This court held Fisher was performing employment services while traveling from the employer's premises to retake the test and was injured on the return trip.

To the contrary, in the instant case, Campbell was not doing something required by his employer, as in *Ray, Shults*, or *Fisher*; nor was he required by the very nature of his job description to carry contracts back and forth in his vehicle as in *Pettey*. Rather, appellant was injured while driving his company car on the way to work. Although he had some contracts in the car which he had worked on during the weekend, neither working on these contracts over the weekend nor transporting them in his car was something he was required to do as part of his job or even something that appellee had asked him to do. Appellant's journey itself was not part of the service, and appellant was not required, as part of his job, to bring with him his own vehicle for use during his work day. In regard to the cellular telephone call Campbell made to his employer to inform it that he would be late, we view this as a common courtesy to inform someone that you are running late, and it is not enough to bring appellant's actions within the purview of "performing employment services" at the time of his death. We cannot hold that the Commission erred in finding that Campbell was not performing employment services at the time of his untimely death.

Affirmed.

ROAF, J., and HAYS, S.J., agree.

Gene McWHORTER *v.* Bernice McWHORTER

CA 99-455 14 S.W.3d 528

Court of Appeals of Arkansas
Division II
Opinion delivered April 19, 2000

Charles B. Roscopf, for appellant.

Appellee, pro se.

JOHN B. ROBBINS, Chief Judge. Appellant Gene McWhorter and appellee Bernice McWhorter were divorced on August 20, 1993. Custody of the parties' children, Warren and Kimberly, was placed with Ms. McWhorter, and Mr. McWhorter was ordered to pay child support. On May 16, 1995, the chancery court entered an order modifying appellant's child-support obligation, and set support for both children at $465.00 per month pursuant to a finding that Mr. McWhorter's average annual net income was $23,325.00. No appeal was taken from this order.

On February 15, 1996, Ms. McWhorter filed a petition for an increase in child support. A trial in the matter was held in April 1998 at which four witnesses testified, including the parties. Shirley Miles, a CPA who examined Mr. McWhorter's tax returns, testified on behalf of Ms. McWhorter. Deborah Norwood, who prepares Mr. McWhorter's tax returns under the direction of CPAs, testified

on his behalf. After the hearing, the chancery court found that Mr. McWhorter's average annual net income over the past three years was $58,344.00, and on this basis increased his monthly child-support obligation to $1,017.00. In arriving at his average annual income from 1995 to 1997, the chancery court found that, during this period, he earned $34,306.76, $82,737.00, and $58,000.00, respectively. The chancery court ordered that the increased rate of child support would be effective retroactive to February 1997, and after allowing credits for support payments made, entered a judgment for $8,832.00 for retroactive child support.

After the chancery court issued its letter opinion, but before judgment was entered, Mr. McWhorter filed a motion for findings of fact pursuant to Ark. R. Civ. P. 52. In his motion, he asked the chancery court to revisit and enumerate her calculations that were used in arriving at his annual incomes for the past three years. However, the chancellor declined to rule on this motion.

On appeal, Mr. McWhorter raises five arguments for reversal. First, he contends that the chancery court erred in refusing to make findings of fact as requested. Next, he takes issue with the order increasing child support, specifically arguing that the chancery court erred in considering gambling profits, erred in its method of averaging his three-year income, and was clearly erroneous in arriving at his income for child-support purposes. Finally, Mr. McWhorter asserts that the chancery court clearly erred in ordering the child support to be awarded retroactively to February 1997.

We agree with Mr. McWhorter's first point on appeal. Rule 52(a) provides that, "If requested by a party, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon[.]" If findings under Rule 52(a) are timely requested, the trial court is required to make specific findings of fact and conclusions of law and to file the same with the clerk of the trial court so that such findings may be made part of the record. *See McClain v. Giles*, 271 Ark. 176, 607 S.W.2d 416 (1980). Mr. McWhorter made a timely request and we, therefore, must reverse and remand for compliance with the provisions of Rule 52(a).

In the instant case, the evidence showed that Mr. McWhorter is an independent trucker with a lengthy list of business expenses.

Both parties' financial analysts testified as to the propriety of the business expenses, and other factors, in arriving at their opinions as to the net profits realized by Mr. McWhorter over the past few years. As Mr. McWhorter's Rule 52(a) motion recites, the letter opinion issued by the chancery court (and ultimately the final order) fails to set forth findings of fact upon which the chancery court relied in calculating Mr. McWhorter's income for child-support purposes. Among other things, the chancery court failed to indicate whether or not, in arriving at its conclusions, it considered depreciation or mileage expense with respect to Mr. McWhorter's work vehicle, and whether it took into account income derived from gambling. From the record, it is unclear as to how the chancery court arrived at its figures.

STROUD and NEAL, JJ., agree.

Royce L. HOLT *v.* George W. HOLT

CA 99-656 14 S.W.3d 887

Court of Appeals of Arkansas
Division IV
Opinion delivered April 19, 2000

Helen Rice Grinder and *David R. Hogue*, for appellant.

Brazil, Adlong, & Osment, PLC, by: *Caroline L. Winningham*, for appellee.

JOHN MAUZY PITTMAN, Judge. This case arose out of a dispute concerning the division of the parties' retirement annuities. During their marriage, both of the parties were participants in federal retirement programs administered by the Office of Personnel Management. Their 1988 divorce decree included findings that the retirement plans were marital property, and that each of the parties was entitled to one-half of the other's retirement benefits accrued during the marriage.

Appellee continued to work for the federal government until 1998, and his salary increased. When he retired, the Office of Personnel Management, interpreting the decree in light of federal regulations, included post-divorce salary increases in calculating appellant's half of the benefits. Appellee was notified that he had the right to appeal that decision within thirty days. He did not do so. Instead, appellee filed a petition in chancery court to modify the 1988 divorce decree. The chancellor granted the petition and modified the decree to provide that post-divorce salary increases were to be disregarded in computing retirement benefits. From that decision, comes this appeal.

For reversal, appellant contends that the chancellor erred in denying her motion to dismiss for lack of jurisdiction, in admitting hearsay evidence, and in interpreting the 1988 decree. We reverse.

Appellant argues that the chancery court lacked jurisdiction under Rule 60 to modify the divorce decree ten years after it was entered. We agree. The divorce decree did not specify whether post-decree salary increases would be included in the calculation of appellant's share of the retirement benefits. There were no changed circumstances since the decree was initially entered because even the federal regulations in force in 1988 provided that, unless the court directly and unequivocally ordered otherwise, a decree dividing an annuity on a percentage basis would be interpreted to entitle the former spouse to salary adjustments occurring after the date of the decree. *See* 5 C.F.R. § 831, Subpt. Q, App. A (1988). The 1992 amendments to the regulations added nothing contrary to this. *Compare* 5 C.F.R. § 838, Subpt. J., App. A (1999). There was no ambiguity regarding the legal effect of the language employed in the divorce decree at issue in the present case, which is thereby distinguished from *Ford v. Ford,* 30 Ark. App. 147, 783 S.W.2d 879 (1990). In the absence of either changed circumstances or ambiguity, the changes made to the decree were not clarifications of what the court originally intended, but instead modifications that changed the effect that the decree would have had pursuant to its express terms and the law extant at the time it was pronounced. *See Reves v. Reves*, 21 Ark. App. 177, 730 S.W.2d 904 (1987) *(overruled on other grounds*, 26 Ark. App. 37, 759 S.W.2d 570 (1988)) (Rule 60(a) allows a court only to correct the record to make it conform to action actually taken at the time, and does not permit a decree to be modified to provide for action that the court, in retrospect, should have taken, but which it in fact did not take); *see also Tyer v. Tyer*, 56 Ark. App. 1, 937 S.W.2d 667 (1997) (omission of a provision dividing husband's retirement plan from a divorce decree was not a "clerical error" within the meaning of Rule 60(a)). No grounds for modifying the decree after ninety days appear of record, and we hold that the chancellor therefore lacked jurisdiction to do so. Ark. R. Civ. P. 60(c).

Even had jurisdiction been proper, we would still be required to reverse. The doctrine of exhaustion of administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative

remedy has been exhausted. *Delta School of Commerce, Inc. v. Harris*, 310 Ark. 611, 839 S.W.2d 203 (1992). In the present case, appellee admittedly did not pursue the administrative appeal that was available to him, and the review board could have provided complete relief by interpreting the decree in favor of appellee's position. *See generally* 5 C.F.R. §§ 1201.3, 1201.113(e) (1999); *see also Barr v. Arkansas Blue Cross*, 297 Ark. 262, 761 S.W.2d 174 (1988). Therefore, appellee was not entitled to relief in chancery court. *See Delta School of Commerce, Inc. v. Harris, supra.*

Reversed.

STROUD and NEAL, JJ., agree.

Randy Wayne MANGRUM *v.* STATE of Arkansas

CA CR 99-1076 14 S.W.3d 889

Court of Appeals of Arkansas
Division I
Opinion delivered April 19, 2000
[Petition for rehearing denied June 21, 2000.]

Joe Holifield, for appellant.

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

SAM BIRD, Judge. On March 9, 1999, following the trial court's denial of a motion to suppress evidence, Randy Wayne Mangrum entered an unconditional plea of guilty to manufacturing a controlled substance, methamphetamine, and was sentenced to 144 months in the Arkansas Department of Correction. After entry of the plea but before sentencing, Mangrum obtained a

new attorney and filed a motion to withdraw the guilty plea. Following a hearing on April 20, 1999, the trial court refused to set aside the guilty plea. However, the judge did agree to treat Mangrum's unconditional guilty plea as a conditional plea of guilty, thereby permitting Mangrum to appeal the denial of his motion to suppress, pursuant to Ark. R. Crim. P. 24.3(b).

Mangrum argues two points on appeal: (1) that the trial court erred in failing to suppress the evidence obtained in a nighttime search, and (2) that the trial court erred in denying his motion to withdraw his guilty plea. We affirm.

Arkansas Rule of Criminal Procedure 24.3(b) provides:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

Rule 24.3(b) provides the only procedure for an appeal from a guilty plea. *Eckl v. State*, 312 Ark. 544, 851 S.W.2d 428 (1993). But if the express terms of Rule 24.3(b) are not complied with, the appellate court acquires no jurisdiction to hear an appeal from a conditional plea of guilty. *Bilderback v. State*, 319 Ark. 643, 893 S.W.2d 780 (1995); *Scalco v. City of Russellville*, 318 Ark. 65, 883 S.W.2d 813 (1994). Accordingly, the Arkansas Supreme Court has required strict compliance with Rule 24.3(b) to convey appellate jurisdiction. *Burress v. State*, 321 Ark. 329, 902 S.W.2d 255 (1995).

In *Tabor v. State*, 326 Ark. 51, 930 S.W.2d 319 (1996), the defendant appealed from a plea of guilty to three charges, arguing that the trial court erred in denying his motion to suppress statements he had given to police. The State moved to dismiss for failure to comply with Rule 24.3(b), and the court of appeals granted that motion. Thereafter, Tabor moved to reinstate the appeal, and it was stipulated that Tabor had, in fact, entered a conditional plea, and the court reporter had recorded it. The court of appeals remanded the case to the trial court to settle the record. The Arkansas Supreme Court granted the State's petition for review. In its decision reversing the court of appeals, the supreme court stated:

> In the case now before us, there was no contemporaneous writing by Tabor reserving his right to appeal. Hence, Rule 24.3(b) was not strictly followed, and the Court of Appeals obtained no jurisdiction of the matter. Without jurisdiction, the Court of Appeals had no authority to remand the case to the trial court to settle the record. Moreover, the subsequent order by the trial court with the attached signed plea statement by Tabor entered after remand cannot breathe life into a moribund appeal where no jurisdiction originally vested.

326 Ark. at 55, 930 S.W.2d at 322.

We must affirm as to Mangrum's first argument because there has been no compliance with Rule 24.3(b). Mangrum entered an unconditional guilty plea on March 9, 1999, that the trial court refused to set aside. After hearing the testimony presented at the hearing on Mangrum's motion to set aside his plea, the court made the following ruling:

> Motion to withdraw plea is denied. The Court's of the opinion and belief from the record and the testimony that Mr. Mangrum fully understood the — the — act of entering a plea of guilty. That he fully comprehended what he was doing and that from his testimony here today that — that he — he obtained other counsel during that thirty day interval because he thought he could reverse what he had done. And I'm not gonna allow it. It's clear that in his questions to the Court and — his responses to the Court, rather — he knew and understood what he was doing at the time and believed it to be in his best interest and that it was voluntarily made.
>
> I don't care, Mr. Holifield. In fact, I've had lawyers reserve a right after an adverse ruling on a suppression motion to appeal on that issue. That's — that's perfectly permissible whether you realize it or not. And in view of the assertion you make that there's new law, I will go back and allow you permission to appeal, if you choose to do so, the adverse ruling that this Court made [at] the suppression hearing. So I'm gonna permit that. But I'm not going to allow what I find to be and believe to be a perfectly knowing and voluntary entry of a guilty plea. There's no doubt in this Court's mind that this is just an effort to play for more time. That it — it's a — a — lawyer swapping tricks and I'm not gonna bite.

After refusing to set aside Mangrum's March 9 unconditional plea of guilty, the trial court had no authority to approve a condi-

tional plea arrangement under Rule 24.3(b). There is no language in Rule 24.3(b) that could be construed to mean that a trial court can accept an unconditional plea of guilty that it refuses to set aside, and then approve an appeal from that plea as if it was conditional.

Furthermore, the attempt to preserve an appeal under Rule 24.3(b) was also ineffective because, although the trial court's order provides that "the guilty plea entered herein, shall be deemed conditional pursuant to Arkansas Rules of Criminal Procedure 24.3," the record contains no writing by which Mangrum reserved the right to appeal under that rule.

That brings us to Mangrum's second argument, that the trial court abused its discretion in refusing to allow him to withdraw his guilty plea. Arkansas Rule of Criminal Procedure 26.1(a) provides:

> A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right before it has been accepted by the court. A defendant may not withdraw his or her plea of guilty or nolo contendere as a matter of right after it has been accepted by the court; however, before entry of judgment, the court in its discretion may allow the defendant to withdraw his or her plea to correct a manifest injustice if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of his or her motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea. A plea of guilty or nolo contendere may not be withdrawn under this rule after entry of judgment.

Subsection (b)(i) states that, if the defendant proves to the satisfaction of the court that he was denied effective assistance of counsel, withdrawal of a plea of guilty shall be deemed to be necessary to correct a manifest injustice. In his motion to withdraw his plea Mangrum alleged that:

> At the time of the entry of the unconditional plea of guilty, the Defendant and Defendant's attorney were in substantial conflict as to the procedures to be followed in this case. Such conflict led to a breakdown in the attorney/client relationship between the Defendant and Defendant's attorney to the point that the Attorney and Defendant both requested that the Attorney be relieved as attorney of record in this matter.
>
> ...

> The Defendant believes that because of the conflict between the Defendant and Defendant's then attorney, ... a manifest injustice would result in Defendant's not being allowed to withdraw his guilty plea.

Both Mangrum and his previous attorney testified at the withdrawal hearing that there was a conflict between them: Mangrum wanted a jury trial, but defense counsel thought he should plead guilty. Mangrum admitted that he had told the court when he entered the plea that he had no complaints about his attorney. However, at the hearing, he testified that he did not really understand what was going on, it was all happening too fast for him, he felt he was being railroaded, and he did not remember being told that by entering the guilty plea he waived any right to challenge the validity of the search warrant on appeal.

At the withdrawal hearing, counsel acknowledged the conflict between them and admitted that he was not prepared to try the case on March 9, 1999, the date set for trial. However, he testified that he discussed Mangrum's options, and their consequences, with him many times. He thought Mangrum understood the words, but that Mangrum was under a lot of stress because, in addition to the criminal charges, he had also recently lost a brother, and counsel thought Mangrum was incapable of really appreciating the seriousness of the charges and the consequences of his options. However, counsel admitted that he did not voice his concerns to either the prosecution or the court.

On appeal, Mangrum contends that there has been a manifest injustice, that he had ineffective assistance of counsel in entering his plea, and that he entered his plea without knowledge of the charges and sentence ranges.

Where a factual basis exists for the plea and the defendant initially admits that the plea is voluntary, the defendant faces an "uphill climb" to overcome the consequences of the plea. *Stone v. State*, 254 Ark. 566, 494 S.W.2d 715 (1973); *Hall v. State*, 51 Ark. App. 1, 906 S.W.2d 692 (1995). Pleas of guilty are designed to avoid the necessity of trial, with advantages both to the State and to the defendant. A plea of guilty is not to be lightly disclaimed days later, and the trial judge was not required to accept appellant's repudiation of his earlier statements regarding the voluntariness of

his pleas. *Hall*, and *Stone*, *supra*. *See also Pettigrew v. State*, 262 Ark. 359, 556 S.W.2d 880 (1977).

When Mangrum and his counsel returned from a brief recess, during the trial on March 9, the following exchange occurred:

> THE COURT: All right, Mr. Mangrum, your attorney informs me that you wish to change your plea at this time. Is that correct, sir.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Now, do you understand what you're charged with? You're charged with manufacturing a controlled — Schedule Two controlled substance. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: How do you plead to that charge?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: Are you pleading guilty because in truth and fact you are guilty?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Has anyone made any threat or promise to you to cause you to plead guilty to this charge?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: And are you pleading guilty to the Court without recommendation of the state?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Unconditionally?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you discussed your case, your defenses and your constitutional rights with ... your attorney?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you satisfied with his service and advice?
>
> THE DEFENDANT: Yes, sir.

THE COURT: Do you have any complaint or criticism or anything at all that you want to make known to the Court?

THE DEFENDANT: No, sir.

THE COURT: And are you pleading guilty totally and completely of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: All right, the Court finds that you know and understand what you're doing, [and] that your plea is voluntarily and knowingly made and will be accepted.

From our review, we find no abuse of discretion in the trial judge's decision that the withdrawal of Mangrum's plea was not necessary to correct a manifest injustice.

Affirmed.

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

Eugene RYAN *v.* Debra REYNOLDS

CA 99-305 16 S.W.3d 556

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered April 19, 2000

[redacted]

Harrill & Sutter, PLLC, by: *Raymond Harrill*, for appellant.

One brief only.

SAM BIRD, Judge. Eugene Ryan appeals a decision of the Pulaski County Circuit Court awarding Debra Reynolds judgment for $1,334.50. We reverse the court's decision and remand with instructions to enter judgment in favor of Ryan.

Ryan filed a complaint in the small claims division of Sherwood Municipal Court against Reynolds for unpaid rent of $641. Reynolds did not file an answer. However, she appeared at the hearing, and at the close of the hearing, the municipal judge awarded Reynolds a judgment against Ryan for $125 plus eight percent interest. Ryan appealed to circuit court.

At the trial in circuit court, Reynolds again appeared pro se, and Ryan moved to exclude any evidence Reynolds might seek to present as an affirmative defense or a counterclaim, and any effort she might make to amend the pleadings to conform to the proof, because Reynolds still had not filed an answer or any other pleading. Nevertheless, the trial judge denied all of Ryan's motions.

After Ryan rested, the judge, over Ryan's objection, questioned Reynolds about her claims that Ryan owed her money. At the close of the case, the judge granted a judgment in favor of Reynolds against Ryan in the amount of $1,334.50. Ryan filed a motion to amend the judgment or, alternatively, for new trial under Ark. R. Civ. P. 59(a)(5),(6) & (8). The motion was deemed denied after thirty days, and Ryan appealed to this court.

Arkansas Code Annotated section 16-17-610 (Repl. 1999), relating to municipal courts, provides, "The defendant shall file his answer with the clerk of the court within twenty (20) days after the service of the claim form upon him.... The defendant shall mail a copy of his answer to the plaintiff." Arkansas Code Annotated section 16-17-611 (Repl. 1999) adds, "The defendant shall file with

the clerk of the court his answer and assert any affirmative relief he may claim in substantially the following form:...."

Furthermore, the procedure to be followed is also provided in the Inferior Court Rules, which govern small claims court. Rule 6 states:

> (a) *Contents of Answer.* An answer shall be in writing and signed by the defendant or his or her attorney, if any. It shall also state: (1) the reasons for denial of the relief sought by the plaintiff, including any affirmative defenses and the factual bases therefor; (2) any affirmative relief sought by the defendant, whether by way of counterclaim, set-off, cross-claim, or third-party claim, the factual bases for such relief, and the names and addresses of other persons needed for determination of the claim for affirmative relief; and (3) the address of the defendant or his or her attorney, if any.
>
> (b) *Time for Filing Answer or Reply.* An answer to a complaint, cross-claim, or third-party claim, a reply to a counterclaim, shall be filed with the clerk of the court within 20 days of the date that the complaint or other pleading asserting the claim is served. A copy of an answer or reply shall also be served on the opposing party or parties in accordance with Rule 5(b) of the Rules of Civil Procedure.

The reporter's note to Rule 6, after the 1997 amendment explains:

> Former subdivisions (a) and (b) have been collapsed into a single provision that requires a defendant to file a written answer. Under a previous version of the rule, a defendant could simply appear on the trial date without filing a formal answer, unless he intended to assert an affirmative defense or seek affirmative relief, in which case a written answer was necessary. In addition, subdivision (a) now specifies that the answer include information set out in the form accompanying the rule, which has also been revised slightly. Consistent with Rule 4, [Ark. R. Civ. P.] new subdivision (b) provides that an answer to a complaint, cross-claim or third-party claim, as well as a reply to a counterclaim, must be filed within 20 days after service.

And Inferior Court Rule 8, "Judgments — How entered," states:

> (a) *By Default.* When a defendant has failed to file an answer or reply within the time specified by Rule 6(b), a default judgment may be rendered against him.

The addition, the reporter's note to the 1997 amendment states:

> Subdivision (a) has been amended to take into account the requirement, imposed by amended Rule 6(a), that a formal answer be filed. The previous version provided for a default judgment if the defendant did not appear in court on the trial date. .

There is no procedure by which a municipal court or a circuit court of this state can render a judgment in favor of a defendant who has failed to answer a complaint. Consequently, the decision of the circuit court must be reversed.

Although in his complaint in municipal court, Ryan sought to recover only $75 as partial rent due for December 1996, and $286 representing Reynolds's share of a full month's rent for October 1997, he testified at the de novo trial in circuit court that, in addition to those sums, Reynolds owed $286 for her share of the rent for November 1997. He explained that Reynolds had moved into the rent house in December 1996. The monthly rental was $500, and HUD subsidized Reynolds $214 of that, leaving Reynolds's share at $286 a month, but that $75 of Reynolds's share for the first month was unpaid. Ryan said that although Reynolds's payments were not always timely thereafter, it was not until October 1997 that Reynolds completely failed to pay her share of the rent. She moved out November 3, 1997, without paying the November rent, and left behind a "garage full of stuff." When she moved she also dug up a lot of plants from the yard, leaving unfilled holes, and, after being told to make no changes to the house, she had painted cloud effects on one bedroom ceiling, put a wallpaper border in one room, and wallpapered another. Ryan also sought to recover $25 for a shower head and $12.50 for electric-switch wall plates and outlet covers that he said had been removed from the house when Reynolds left.

Arkansas Rule of Civil Procedure 15(b) permits amending pleadings to conform to the proof adduced at trial and such amendments may be made at any time, even after judgment. *National Sec. Fire & Casualty Co. v. Shaver*, 14 Ark. App. 217, 686 S.W.2d 808 (1985). Consequently, we consider Ryan's pleadings to have been amended to conform to the proof as to Reynolds's liability for her share of the November 1997 rent, the shower head, and the wall plates.

At the circuit court trial, Reynolds was permitted to testify, over Ryan's objection, that Ryan had breached their lease contract by giving her notice to move out of the house before the lease expired. Reynolds was also permitted to testify, over objection, that she sustained $250 in moving expenses, that she paid teenage girls $65 to help with the house and yard, that it cost $267 in materials and $440 labor to bring the house up to HUD guidelines to qualify for subsidized housing, and that she spent $106 for two rose bushes she lost. Such evidence could not have been offered in mitigation of Ryan's damages, but was, rather, the assertion of a counterclaim, which Reynolds, being a defendant in default, should not have been permitted to present. In *Polselli v. Aulgur*, 328 Ark. 111, 942 S.W.2d 832 (1997), the Arkansas Supreme Court stated the following about the rights of a defendant in default:

> When disputing the amount of damages, the defendant has the right to cross-examine the plaintiff's witnesses, to introduce evidence in mitigation of damages, and to question on appeal the sufficiency of the evidence to support the amount of damages awarded. *Clark v. Michael Motor Co.*, 322 Ark. 570, 910 S.W.2d 697 (1995). The defaulting defendant may not, however, introduce evidence to defeat the plaintiff's cause of action.

328 Ark. at 114, 942 S.W.2d at 833. *See also Sphere Drake Ins. Co. v. Bank of Wilson*, 312 Ark. 540, 851 S.W.2d 430 (1993); and *B & F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992).

Ryan's evidence established that appellee owed him $572 for her share of two months' rent, $75 for a partial month's rent, $25 for a missing shower head, and $12.50 for missing wall plates, for total damages of $684.50. He also testified that he held $250 of Reynolds's money as her renter's deposit that should be credited to the amount she owed him. That leaves a balance of $434.50 for which Ryan is entitled to judgment against Reynolds, because Reynolds failed to present any evidence in mitigation other than that she asserted as a counterclaim.

The judgment of the circuit court is reversed, and we remand the case to the circuit court for entry of a judgment for Ryan in the amount of $434.50, plus costs.

Reversed and remanded.

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

PITTMAN and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. While joining the majority opinion in other regards, I dissent from the decision to remand the case to the trial court with instructions to enter judgment in Ryan's favor for $434.50. Plainly, the trial court was not persuaded by his proof regarding the claim for breach of contract. Findings of fact by a trial judge sitting as the fact finder will not be disturbed on appeal unless those findings are clearly erroneous or clearly against the preponderance of the evidence. *Arkansas Poultry Fed'n Ins. Trust v. Lawrence*, 34 Ark. App. 45, 805 S.W.2d 653 (1991). I am unable to agree that the trial court's decision to deny Ryan's claim for breach of contract was clearly erroneous. Thus, I would reverse and dismiss rather than reverse and remand.

PITTMAN, J., joins in this opinion.

J-M MANUFACTURING COMPANY, Inc. *v.*
FIRST NATIONAL BANK of DEWITT

CA 99-1047 14 S.W.3d 534

Court of Appeals of Arkansas
Division IV
Opinion delivered April 19, 2000
[Petition for rehearing denied May 24, 2000.]

Crumpler, O'Connor & Wynne, by: *William J. Wynne*, for appellant.

Russell D. Berry, for appellee.

JOHN F. STROUD, JR., Judge. This case involves conflicting lien claims with respect to objects of personal property. The chancellor found that the lien of appellee, First National Bank of DeWitt, had priority over the lien of appellant, J-M Manufacturing Company, Inc. We affirm.

The case was decided on a motion for summary judgment, and the following sequence of events is helpful in understanding the issue on appeal:

1. Appellee, First National Bank of DeWitt, perfected its security interest in items of personal property owned by Thomas M. and Betty J. Howe by filing U.C.C. financing statements on December 6, 1989, and December 8, 1989, with the circuit clerk and the Secretary of State, respectively.

2. On February 10, 1993, appellant, J-M Manufacturing Company, Inc., obtained a judgment against Thomas Howe d/b/a Howe Company. The judgment was filed on March 5, 1993.

3. On December 6, 1994, the period of perfected filing of appellee's security interest expired (after five years), and no continuation statement was filed.

4. On April 27, 1995, the Howes filed for bankruptcy.

5. On December 30, 1995, a foreclosure decree was entered in favor of appellee and a public sale was subsequently held.

Appellant's sole point of appeal contends that the chancery court erred in finding that appellee's lien had priority over appellant's judgment lien so as to entitle appellee to receive the proceeds from the judicial sale of the personalty. In making its argument, appellant primarily relies upon Arkansas Code Annotated section 4-9-403(2) (Supp. 1999), which provides:

> (2) Except as provided in subsection (6) a filed financing statement is effective for a period of five (5) years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of sixty (60) days or until expiration of the five-year period, whichever occurs later. Upon lapse the security interest becomes unperfected, unless it is perfected without filing. *If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before the lapse.*

(Emphasis added.)

For purposes of this case, the key sentence of this code section is the last one. There is no dispute that appellee's perfected security interest lapsed on December 6, 1994, when no continuation statement was filed. Moreover, there is no dispute that appellant became a "judgment creditor" before the lapse. With respect to the protections afforded by this code section, however, the question is not whether appellant was a "judgment creditor," but whether appellant was a "purchaser" or "lien creditor" before the lapse, so as to take priority under the terms of this code section. Appellant has not established that it was either.

A "lien creditor" is defined as a "creditor who has acquired a lien on the property involved by attachment, levy, or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment." Ark. Code Ann. § 4-9-301(3) (Supp. 1999). The problem with appellant's reliance upon its purported status as a "lien creditor," is that there is nothing in the abstract to establish that fact. Appellant contends in its brief that:

> [appellant] caused a Writ of Execution to be issued as filed on April 21, 1995, by the Clerk of the Circuit Court in which the Judgment in favor of Appellant was entered pursuant to the provisions of Ark. Code Ann. (1987) § 16-66-104 directed to the Sheriff of Arkansas County for service upon the Debtor, Thomas Howe, but that service thereof was not made as the result of the filing six (6) days later by Thomas M. Howe and Betty J. Howe on April 27, 1995, of their Petition seeking relief under Chapter 13 of the United States Bankruptcy Code and the prohibition thereunder against taking action against such Debtors to collect money owed or to take property of the Debtor. However, at the time such Petition in Bankruptcy was filed, the Writ of Execution had already been filed with the Clerk and delivered to the Sheriff of Arkansas County, to whom such Writ had been directed, for service upon said Debtor.

Arkansas Code Annotated section 16-66-112 (1987), provides that:

> An execution shall be a lien on the property in any goods or chattels, or the rights or shares in any stock, or on any real estate, to which the lien of the judgment, order, or decree extends or has

> been determined, from the time the writ shall be delivered to the officer in the proper county to be executed.

Our review of the abstract, however, does not reveal anything that establishes this critical fact that is relied upon by appellant. Consequently, appellant has not established its status as a "lien creditor."

Without the priority status of a lien creditor, Arkansas Code Annotated section 4-9-312(5)(b) (Supp. 1999) comes into play: "So long as conflicting security interests are unperfected, the first to attach has priority." Here, as far as we are able to determine from the abstract, both security interests were unperfected at the critical time, and therefore appellee's security interest has priority because it was the first to attach.

Affirmed.

PITTMAN and HART, JJ., agree.

Keith P. MILLER *v.* Mary Elieen MILLER

CA 99-346 14 S.W.3d 903

Court of Appeals of Arkansas
Division III
Opinion delivered April 19, 2000

[redacted]

Stephen Bennett, for appellant.

Lueken Law Firm, by: *Patty W. Lueken*, for appellee.

OLLY NEAL, Judge. Appellant and appellee were divorced pursuant to a decree entered September 11, 1998. In connection therewith, the chancellor divided the parties' property, awarded tort damages to appellee, and ordered appellant to pay a portion of appellee's attorney fees and expert witness fees. We affirm with modifications.

Appellant is an architect whose highly specialized practice involves the design of church buildings. His firm is incorporated under the name of Keith Miller Architects & Associates, Inc. The primary issue on appeal is whether the chancellor, in making a division of marital property, erred in her valuation of the corporation. She found that the corporation had a value of $600,000 and ordered appellant to pay appellee half that amount. Payments were to be made in the sum of $30,000 per year for ten years. To secure the payment schedule, appellee was given a lien "on any business entities currently or subsequently owned by [appellant] in the next ten (10) years, or until the debt obligations to [appellee] are fulfilled."

■ Appellant's first argument is that the evidence did not support a valuation of $600,000. Chancery cases are reviewed *de novo* on appeal. *See Bolan v. Bolan*, 32 Ark. App. 65, 796 S.W.2d 358 (1990). However, we do not reverse a chancellor's findings of fact unless they are clearly erroneous. *See id.* At the time a divorce decree is entered, all marital property shall be distributed one-half to each party unless the court finds such division to be inequitable. Ark. Code Ann. § 9-12-315 (Repl. 1998). In this case, appellant does not challenge the inclusion of the business as marital property or the chancellor's decision to award one-half of its value to appellee. His argument is confined to the propriety of the chancellor's valuation. A chancellor's finding regarding the valuation of a business will not be overturned unless it is clearly erroneous. *Nicholson v. Nicholson*, 11 Ark. App. 299, 669 S.W.2d 514 (1984).

To establish the value of Keith Miller Architects & Associates, Inc., appellee presented the testimony of CPA Rachel Kramer Fletcher, a certified valuation analyst. Fletcher placed a value of $974,000 on the adjusted net assets of the business and estimated a "rule-of-thumb" value of $1,040,000. She determined that the

company's primary assets were a $500,000 blueprint inventory and accounts receivable of $349,532. The remaining assets consisted of cash, loans to shareholders, unbilled contracts, physical property, and land. Fletcher began her analysis by referring to the corporation's 1996 income-tax return. The return, which was prepared on a cash basis, reflected approximately $108,000 in assets including the cash, the loans to shareholders, the land, and the physical property, less depreciation. However, to arrive at the value of the business, she inserted normalizing entries for items not included in cash-basis accounting. These included the accounts receivable in the amount of $349,532, the $500,000 blueprint inventory, and unbilled contracts in the amount of $66,000. Further, she altered the corporation's depreciation deduction to reflect the straight-line method rather than the accelerated method used for tax purposes. These calculations resulted in adjusted net assets of $974,000. Then, using an industry-approved rule-of-thumb method for valuation of architecture and engineering firms, she arrived at $1,040,000 as the ultimate value of the company.

Appellant presented no expert witness of his own, but he questioned Fletcher's valuation methods. His primary concern was the $500,000 she assigned as the value of the corporation's blueprints. There was evidence at trial that the company had between 50 and 200 blueprints on hand and had, in the past, resold the designs contained therein to new clients. Using appellant's contract prices, Fletcher calculated that 50 blueprints would have a value of $10,000 each, for a total of $500,000. Appellant denied his ability to resell the blueprints, but appellee, who had worked in the business, and Tim Dowty, appellant's intern, confirmed that it had been done. Appellant did admit that the blueprints in his office were insured for $250,000. The remainder of Fletcher's valuation, including the accounts receivable, the unbilled contracts (which were two works in progress), and the value of the company's physical assets, were gleaned from the corporation's own financial records.

In his argument on appeal, appellant relies on *Tortorich v. Tortorich*, 50 Ark. App. 114, 902 S.W.2d 247 (1995), which stands for the proposition that the goodwill of a business is not a divisible item of marital property if it has no value independent of the presence or reputation of a particular individual. However, no goodwill was included in Fletcher's valuation. Her valuation was

based upon the blueprints, the accounts receivable, and other tangible assets of the business. In any event, the chancellor did not blindly rely upon Fletcher's testimony to establish the value of the corporation. At the close of the evidence, she expressed doubt that the corporation was worth as much as Fletcher had testified. In particular, she was skeptical of the "arbitrary" value that Fletcher placed on the blueprints, although she conceded that they probably had some worth. In her final decree, she valued the business at $600,000, meaning that she deducted approximately $400,000 from Fletcher's valuation.

Given the chancellor's careful consideration of the evidence, especially with the testimony of only one expert to rely upon, we cannot say that the value she placed on the business was clearly erroneous. She obviously deducted a substantial amount from Fletcher's evaluation based upon her doubt regarding the value of the blueprints. The other items included in the valuation had a basis in the evidence and in recognized accounting methods. Additionally, she took into consideration evidence that appellant had been receiving a very good income from the business that enabled him to afford numerous cars and a yacht. In light of the foregoing, we find no error on this point.

Appellant argues next that the chancellor did not have the right to place a lien on his current and future businesses to secure payment of the $300,000. We disagree. First, the chancellor in a divorce case has the power to impose a lien to secure an amount owed pursuant to a property division. *See Speer v. Speer,* 298 Ark. 294, 766 S.W.2d 927 (1989). Secondly, the lien was justified in this case based upon testimony that appellant had once discussed either filing bankruptcy or scaling down his business in the event of a divorce and based upon evidence of appellant's rather extravagant spending habits. A chancellor may fashion any reasonable remedy justified by the proof. *See Jones v. Ray,* 54 Ark. App. 336, 925 S.W.2d 805 (1996).

The next set of arguments concerns the chancellor's award of tort damages to appellee. Appellee testified that, during an argument with appellant in February 1997, he hit her and injured her. As a result, she sought chiropractic treatment and underwent psychological counseling. The chancellor awarded her $15,000 for future medical expenses, to be reduced by $6,000 she owed appel-

lant on another matter. Appellant contends first that the tort claim should have been heard in circuit court. However, appellant did not move to transfer the case to circuit court until midway through trial, despite the fact that appellee's amended complaint had sought damages for physical abuse and appellee's counsel had mentioned the tort claim in opening statements. By the time the motion was made, several witnesses had already testified. Failure to make a timely motion to transfer a case from equity to law waives the right to make the motion unless the equity court is wholly incompetent to grant the relief sought. *See McCune v. Brown*, 8 Ark. App. 51, 648 S.W.2d 811 (1983). The chancery court in this case was not wholly incompetent to hear the tort claim. A court of equity, once it acquires jurisdiction of a case, may hear a tort claim under the clean-up doctrine. *See Roach v. Concord Boat Corp.*, 317 Ark. 474, 880 S.W.2d 305 (1994); *Liles v. Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986).

Appellant also argues that the tort claim was barred by the one-year statute of limitations on assault and battery cases contained in Arkansas Code Annotated section 16-56-104(2) (1987). However, the incident that gave rise to the claim happened in February 1997, and appellee's amended complaint seeking damages for physical injury was filed in October 1997, less than one year later.

Finally on this point, appellant argues that the award of $15,000 in damages was excessive. We disagree. First, we note that appellee, her sister Janet Friday, and appellant's intern Tim Dowty all testified as to the severity of appellee's injuries that resulted from the beating. Secondly, the award was apparently based upon the testimony of appellee's therapist Linda Davis. Davis testified that appellee would need counseling in varying degrees of frequency for a five-year period to cope with the post-traumatic stress that resulted from the beating. Based upon Davis's hourly rate of $137, the award of $15,000 was reasonable in light of her recommendations.

Next, we turn to the chancellor's order to appellant to pay $4,000 of appellee's attorney fees and $4,000 of appellee's expert witness fee. Regarding the attorney fees, courts have the inherent power to award attorney fees in a domestic relations proceeding. *See Tortorich v. Tortorich, supra.* A trial court has considerable discretion in the allowance of attorney fees in a divorce case,

and, absent an abuse of that discretion, the fixing of the amount of fees will not be disturbed on appeal. *See Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987). We find no abuse of discretion here. The chancellor considered the written arguments of the parties concerning an award of attorney fees. Appellee contended that she had been forced to expend fees to seek arrearages from appellant on alimony and medical bills, to seek a contempt citation, and to seek a motion to compel in connection with appellant's failure to respond to discovery requests. Based upon these contentions, and the apparent credence given to them by the chancellor, we cannot say that an abuse of discretion occurred.

Regarding the expert witness fees, appellant contends that they do not fall within the type of costs that a court is allowed to award in the absence of a statute. *See generally* Ark. R. Civ. P. 54(d)(2). We agree. Expert witness fees are not recoverable costs. *See Sunbelt Exploration Co. v. Stephens Prod. Co.*, 320 Ark. 298, 896 S.W.2d 867 (1995); *State Farm Mut. Ins. Co. v. Brown*, 48 Ark. App. 136, 892 S.W.2d 519 (1995). Because recovery of such fees is not authorized by statute or rule, the trial court erred in its award. *See Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994). We note that, in two domestic relations cases, we have implied that such costs are recoverable. *See Tortorich v. Tortorich, supra*; *Yockey v. Yockey*, 25 Ark. App. 321, 758 S.W.2d 421 (1988). However, those cases did not directly address the issue, as the *Sunbelt* and *Brown* cases did.

Based upon the foregoing, we modify the court's decree by deducting the $4,000 awarded as payment of appellee's expert witness fee. In all other respects, the decree is affirmed.

Affirmed as modified.

JENNINGS and GRIFFEN, JJ., agree.

Toby Patrick CRAIG *v.* STATE of Arkansas

CA CR 98-187 14 S.W.3d 893

Court of Appeals of Arkansas
Divisions II, III, and IV
Opinion delivered April 19, 2000

Honey & Honey, P.A., by: *Charles L. "Chuck" Honey* and *Marsha Basinger*, for appellant.

Mark Pryor, Att'y Gen., by: *Mac Golden*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. A Nevada County Circuit Court jury convicted Toby Patrick Craig of murder in the first degree concerning the beating death of Jake McKinnon, and Craig was sentenced to forty years' imprisonment in the Arkansas Department of Correction. Craig has appealed that conviction and asserts: (1) that the conviction is not supported by

substantial evidence that he purposely caused McKinnon's death; (2) that the trial judge erred by not granting his motion to dismiss; (3) that the trial court erred by not allowing him to present evidence of self-defense; (4) that the trial court erred by allowing cumulative and prejudicial pictures of the homicide victim and booking photographs of Craig into evidence; and (5) that the prosecution made an improper "Golden Rule" closing argument, otherwise made improper closing arguments, and failed to disclose exculpatory evidence that was only discovered after trial. We hold that the trial court committed reversible error when it denied appellant's motion to dismiss the felony-murder charge because the appellant did not cause McKinnon's death in the course of committing an independent felony. Therefore, we are compelled to reverse and remand for new trial. However, we hold that the trial court committed no error when it denied appellant's attempts to present evidence of self-defense. Finally, we hold that appellant's failure to abstract the photographs which he contends were cumulative and prejudicial precludes review of that alleged error, and that appellant's allegation that the prosecutor made prejudicial closing arguments is procedurally barred because appellant's counsel failed to obtain a ruling on his objection.

Jake McKinnon died on November 9, 1996, in Nevada County, Arkansas, after suffering multiple blunt-force injuries including four fractured ribs, a fracture of his skull, and a brain injury, according to the testimony of Dr. Charles Paul Kokes, an associate medical examiner with the Arkansas Crime Laboratory. Appellant and McKinnon had engaged in a protracted dispute about unpaid dues that appellant owed a hunting club. McKinnon had apparently been instrumental in appellant's dismissal from the club because of the unpaid dues, and appellant had reported McKinnon to a game warden for possession of game killed out of season. On November 9, 1996 (the first day of the gun deer season that year), appellant, Johnny Cason, and Keith Buchheit "went looking for" McKinnon so that appellant, according to his testimony, could "talk to him" and "get everything straight." They found McKinnon alone in his truck beside a deer stand in Nevada County with his hunting rifle across his lap. After McKinnon asked appellant what he was doing there, appellant reached into the truck and struck McKinnon in the face, causing him to bleed.

Appellant and his friends then drove to the end of the dead-end road, turned around, and headed back toward a highway. Before reaching the highway, they encountered McKinnon's truck blocking the road. McKinnon grabbed his gun and walked to the back of his truck. Appellant then exited his truck with Cason's shotgun and told McKinnon that he "just wanted to talk." Appellant, Cason, and Buchheit then disarmed McKinnon, and Cason chased McKinnon's hunting companion, Shane Henry, into the woods and disarmed him. Shane Henry testified that when he and Cason returned to McKinnnon's truck after Cason had overtaken and disarmed him (Henry), appellant and Buchheit had McKinnon on the ground and were beating him. According to Henry's trial testimony, McKinnon was not fighting back at all, and the only thing McKinnon said was, "Shane, they're killing me." Henry escaped the scene and ran from the woods to seek help.

Appellant testified at trial that he and his friends struck McKinnon in the head and torso, that Cason and Buchheit kicked McKinnon in the ribs and head, that McKinnon was sitting upright and talking when they left him after the incident, and that he (appellant) only meant to give McKinnon a "butt whipping." Henry managed to catch a ride to a hunting campsite and obtain help. When Henry and the help returned to the scene where appellant and his friends had attacked McKinnon, they found him dead. Autopsy photographs vividly portrayed the injuries that the medical examiner testified resulted from the beating that McKinnon suffered, especially on his face and head.

I.

First, appellant argues that there was no substantial evidence that he purposely committed the murder of Jake McKinnon. However, we decline to address that contention because the trial court committed prejudicial error by denying appellant's motion to dismiss the first-degree felony-murder charge.

Appellant, along with his associates, Cason and Buchheit, was charged with first-degree murder under alternative theories as follows:

> [T]he said defendant ... did wilfully, unlawfully, and feloniously ... commit or attempt to commit a felony, being 5-13-201 Battery in

> the First Degree, 5-13-202 Battery in the Second Degree and/or 5-13-204 Aggravated Assault, and in the course of and in the furtherance of the felony or in immediate flight therefrom, cause the death of Jake H. McKinnon under circumstances manifesting extreme indifference to value of human life; AND/OR, with the purpose of causing the death of Jake H. McKinnon, cause the death of Jake H. McKinnon, against the peace and dignity of the State of Arkansas.

Appellant's attorney filed a written motion to dismiss charges in conjunction with a motion for a directed verdict during the course of the trial. Both motions asserted that there was no underlying felony upon which the felony-murder charge could rest. The motions were renewed at the close of the evidence, but were denied as the following excerpted exchange between the trial court and appellant's counsel indicates:

> THE COURT: On your motion to dismiss charge of First Degree Murder, the Court finds that the motion will be denied and State may proceed on the First Degree Murder charge. There have been lengthy arguments in this case. I understand the contentions on both sides, but it is clear to the Court that the intent of the law is a person to be charged as is charged in this case and proceed to the jury on the issue of Murder in the First Degree. For your motion —
>
> MR. HONEY (*appellant's counsel*): Judge, before you leave that may I inquire of the Court? Could I get the Court to make two separate rulings on that? Will you tell me whether or not they [the State] can proceed under Paragraph 1 or Paragraph 2 [Ark. Code Ann. § 5-10-102]?
>
> THE COURT: Well, they can proceed because of the fact that actually there is an either/or here. There is a proper question in this case as to whether or not the battery that was committed and whether or not the individuals intended only to commit a battery and in fact committed a battery to such an extent that it resulted in death, or there is a question of whether or not that during the commission of this battery their intent changed.
>
> MR. HONEY: Judge, that of course is all under Paragraph 2.
>
> THE COURT: Well, the intent in change and they intended at that point in time to kill the victim.

> MR. HONEY: Well, Paragraph 1, which is during the commission of a felony. How would the Court rule on that?
>
> THE COURT: I would rule that these are separate instances. That a battery can be separate from the murder in this situation and the set of facts we have before the Court. That is your point, that you can't separate it. I say that you can separate it.

Throughout the trial and consistent with the alternative theories under which appellant was charged, the State contended that aggravated assault and battery constituted the underlying felonies which warranted the felony-murder prosecution. During opening statement, counsel for the State addressed the jury as follows:

> Now under the First Degree Murder statute there are several different provisions listed A,B,C, and D, where if you do either one of those acts then you have committed the offense of First Degree Murder. In this case Mr. Craig and his accomplices are charged in the alternative as to two of those manners. What the State must prove — the first offense or the first method of proving First Degree Murder is we would have to prove that Mr. Craig acting in complicity with and accomplice to the other two [Cason and Buchheit], committed or attempted to commit a felony. It is alleged that there are three possible felonies there, any of which would suffice, Battery in the First Degree, Battery in the Second Degree, and Aggravated Assault. And at an appropriate time that's why it is so important that you listen to all the facts and details of this case, because at an appropriate time the Court will give you instructions that tell you what constitutes the offense of Battery in the First Degree, what constitutes the offense of Battery in the Second Degree, and what constitutes the offense of Aggravated Assault. There again we have charged this in the alternative that they with the purpose of committing either one of those three felonies. . . They were attempting to commit any one of those three. In the course of and in the furtherance of the felony or in immediate flight therefrom they caused the death of Jake McKinnon under circumstances manifesting extreme indifference to the value of human life. As to this first method of charging, what our burden is, we've got to come in and prove to you that they were committing a felony. Either First Degree Battery, as the Court will instruct you, Second Degree Battery, as the Court will instruct you, or Third Degree Battery. They could have been committing two of them or more than one. We've got to prove to you that Mr. Craig and his accomplices were committing at least one of these felonies on Jake McKinnon and in the course of that they killed

> him under circumstances manifesting extreme indifference to the value of human life.
>
> If you find all of that has been proven under the instructions the Court will give you, then we have proved that he has committed First Degree Murder, but in the alternative say that for one reason or the other you had a doubt about some element of First Degree Murder as so charged, there is a second charge, not a second charge, but a second method of charging and proving First Degree Murder that we have alleged in the alternative, which is the with the purpose of causing the death of Jake H. McKinnon, they caused his death.
>
> What you are going to be looking for, the second thing, if you sit there looking at the evidence. If they had purpose of killing Jake McKinnon and they killed him, then they are guilty or Mr. Craig is guilty of First Degree Murder. But there is another thing, they can have a purpose less than a purpose to kill him. If they had a purpose of if they were actually committing one of these other three felonies I told you about. Maybe if you find that they really didn't intend to kill him, but they were committing one of these other felonies and they were doing it in a manner that manifested extreme indifference to the value of human life and they killed him or he died as a result of it, even though that might not have been their conscious purpose to kill him, under that provision he would be guilty of First Degree Murder. So it's very important that you pay real close attention to the evidence and the witnesses and keep in mind that certainly if their purpose was to find Jake McKinnon and kill him, then they have committed First Degree Murder. But if they had a purpose something less than that, just to commit one of these other felonies and they done it under the circumstances explained and he died as a result of it, even with a purpose less than killing him, Mr. Craig can be found guilty of First Degree Murder.

The State repeated this argument in its written and oral responses to appellant's motion to dismiss the charges that was raised at the close of the State's case in chief and after the defense rested its case. The State presented no rebuttal evidence. Appellant's counsel then objected to the jury being instructed as to Arkansas Model Criminal Jury Instruction 301 (lesser included offenses) consistent with the motion to dismiss the charges and for directed verdict. That objection was overruled. Appellant's counsel then requested that two interrogatories be submitted to the jury specifically focused on the elements of the felony murder aspect of the charge; that

request was denied. After the trial court instructed the jury, counsel for the State argued as follows, in pertinent part:

> Under the law in the State of Arkansas if you go out and beat the hell out of somebody or commit an assault and battery on them, even if you don't mean to kill them, the law is if you do you are guilty of First Degree Murder. He [referring to appellant] admitted it. He said when he was being questioned by the police he thought he was being questioned about an assault and battery on Jake McKinnon. Jake was dead at the time.

We agree with counsel for appellant that our supreme court's reasoning in *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987), and subsequent cases contradicts the State's contention and the trial court's decision to deny the motion to dismiss the felony-murder charge. In *Parker v. State* the supreme court reversed and remanded two capital-felony murder convictions against William Frank Parker based on prosecutions under what was Ark. Stat. Ann. § 41-1501(1)(a), which required that a murder be committed "in the course of and in furtherance of" any of several enumerated felonies, including burglary. Parker was divorced from Pam Warren, the daughter of James Warren. On the date of the homicides, James Warren and Cindy Warren, another of his daughters, were getting into Mr. Warren's truck in front of their house when they saw Parker approaching the truck with a gun. Parker fired shots at Cindy Warren but missed her. Then he chased Mr. Warren into the house where Mr. Warren and his wife, Sandra Warren, were later found shot to death. The supreme court concluded that the killings, although obviously a form of criminal homicide, were not "in the course of and in furtherance of" a burglary as required to be capital-felony murder. Chief Justice Jack Holt, Jr., wrote the majority opinion and addressed the issue as follows:

> For the phrase "in the course of and in furtherance of the felony" to have any meaning, the burglary must have an independent objective which the murder facilitates. In this instance, the burglary and murder have the same objective. That objective, the intent to kill, is what makes the underlying act of entry into the home a burglary. The burglary was actually no more than one step toward the commission of the murder and was not to facilitate the murder.

Id. at 427, 731 S.W.2d at 759.

In *Sellers v. State*, 295 Ark. 489, 749 S.W.2d 669 (1988), the supreme court reversed and remanded John Sellers's conviction for capital-felony murder in connection with the death of William Byrd, an elderly man who lived alone and who was known to carry large sums of money on his person. Sellers and an associate had been drinking and decided to rob Byrd. The associate obtained an axe handle, and the two men went to Byrd's house late at night. Although Sellers professed that their plan was for him to hit Byrd with his fist, he knew his associate had procured the axe handle. The evidence showed that Byrd had been killed in a brutal beating with a blunt instrument. Writing for the court in *Sellers*, Justice Newbern quoted from the court's opinion in *Parker*, *supra*, and rejected the State's argument that *Sellers* was distinguishable from *Parker* because Sellers's intent on entering Byrd's house was to assault and batter him rather than to murder him.

> While we can appreciate the state's argument that intent to commit assault and battery differs from intent to commit murder, we cannot find a way to say that the murder facilitated the burglary if the assault and battery were the underlying offenses. We cannot say that the murder facilitated the assault and battery as it was the very culmination of them. It was, therefore, error to have permitted the jury to find Sellers guilty of capital murder on the basis that it was committed in the course of burglary because the jury was not allowed to consider the robbery or any purpose for the entry of Mr. Byrd's home independent of the acts which resulted in his death.

Id. at 493, 749 S.W.2d at 671.

In *Allen v. State*, 310 Ark. 384, 838 S.W.2d 346 (1992), the supreme court reversed and remanded James Lee Allen's conviction for first-degree murder regarding the death of Robert Harris. Allen had been charged with premeditated and deliberate capital murder, which includes the lesser charge of purposeful first-degree murder. He had not been charged with capital-felony murder, but the trial court gave a first-degree felony murder instruction over his objection. The jury verdict did not reflect whether it had found Allen guilty of first-degree premeditated murder or first-degree felony murder. The supreme court reversed the conviction because it concluded that Allen may have been convicted of first-degree felony murder although he had never been charged with that crime. Because the felony murder charge was never filed, the court con-

cluded that it could neither remand nor dismiss it. But in view of its decision to remand the premeditated murder charge that was filed and in anticipation that the State might seek to amend the information to include a felony-murder count, the court referred to its decision in *Parker v. State, supra*, and addressed the State's contention that Allen's action in firing a pistol at the homicide victim constituted the underlying felony of aggravated assault so as to warrant the trial court's decision to issue the felony-murder jury instruction:

> The proof showed that appellant fired a pistol when he killed the victim. At trial, the State contended that firing the pistol constituted the underlying felony of aggravated assault, and on that basis the trial court gave the felony-murder instruction. That was a misconstruction of the felony-murder statute. Under the first degree felony-murder statute, "a person commits murder in the first degree if . . . he commits . . . a felony, and in the course of and in the furtherance of the felony . . . causes the death of any person . . . ." Ark. Code Ann. 5-10-102 (Supp. 1991). The assault in this case was only in the furtherance of the murder, not of some other felony. . . . In sum, under the proof, the appellant would not be guilty of felony-murder even if he were so charged.

310 Ark. at 388, 838 S.W.2d at 348.

The foregoing authorities lead us to conclude that the trial court committed reversible error when it denied appellant's motion to dismiss the first-degree felony-murder charge in the case before us. The proof at trial showed that appellant assaulted, beat, and kicked Jake McKinnon in furtherance of the homicide, not in furtherance of committing an independent felony. As the supreme court concluded in *Sellers*, we cannot say that appellant killed McKinnon in order to facilitate an assault or a battery. And by the same reasoning the supreme court employed to conclude that the appellant in *Allen* would not have been guilty of first-degree felony murder even had he been so charged, we must conclude that the trial court erred when it allowed the State to prosecute and the jury to convict this appellant of first-degree felony murder. Any other result would be inconsistent with our supreme court's decisions in *Parker*, *Sellers*, and *Allen*.

The State argues appellant is procedurally barred from attacking the trial court's denial of his motion to dismiss the first-degree felony-murder charge because he failed to proffer the interrogato-

ries he wanted to submit to the jury in place of the general verdict form that the trial court issued and because he failed to proffer a first-degree murder instruction to replace the model instruction given by the trial court. But this argument misses or ignores the crux of appellant's valid claim that the trial court erred when it denied his motion to dismiss the first-degree felony-murder charge. Appellant preserved his challenge to that error at all relevant points in the trial. He would not have bolstered his challenge by proffering a first-degree purposeful murder instruction consistent with the general verdict because the trial court had erroneously allowed the case to be tried on the alternative theories of first-degree felony murder and purposeful murder. Appellant should not have been prosecuted for felony murder; no jury instruction would cure that error, nor would it have been cured by proffering interrogatories, particularly when the trial court had denied appellant's request that the jury be given interrogatories for completing its verdict.

We recognize how painful and difficult a second trial will be for the family of Jake McKinnon. Yet we cannot dismiss the trial court's error as harmless. As previously indicated, appellant should not have been charged with first-degree felony murder because he did not kill Jake McKinnon in the course of and in furtherance of committing or attempting to avoid apprehension for an independent felony. We cannot determine whether the jury convicted on the permissible theory of purposeful murder alone or also on the impermissible theory of first-degree felony murder. Thus, we must reverse and remand for new trial.

II.

Appellant also contends that the trial court erred by denying his request to present evidence of self-defense. The State argues that appellant failed to preserve the issue for appellate review by his failure to make an objection to the trial court's decision, by failing to request the trial court to instruct the jury as to self-defense, and by failing to proffer a written jury instruction on self defense. Alternatively, the State argues that the evidence did not support instructing the jury as to self-defense.

We agree with the State that the evidence did not support a self-defense instruction. All the evidence, including appellant's testi-

mony at trial, showed that appellant punched McKinnon in the face without provocation or aggressive action by McKinnon. Appellant testified, "I just felt like hitting him in the mouth. He had angered me by threatening me and telling me that I had no right to be down there." The evidence shows that McKinnon did not pursue appellant following that incident. Instead, appellant and his cohorts returned to McKinnon's truck. At that point McKinnon pointed a gun at their vehicle. Appellant, Cason, and Buchheit exited the vehicle and disarmed McKinnon. McKinnon tried to punch appellant, but the appellant testified that the swing missed. Appellant, a six-feet-tall man who estimated his weight at between 205 and 210 pounds, then knocked the five-feet, nine-inches-tall McKinnon (who weighed 165 pounds) to the ground, straddled him, and began punching him about the head and body. Cason and Buchheit then began kicking McKinnon about the head and body. Shane Henry testified that when Cason brought him back to the area where appellant had begun beating McKinnon, McKinnon was on the ground, offered no resistance to the beating he was receiving from appellant and Buchheit, and said, "Shane, they're killing me." Appellant estimated that the beating lasted as long as ten minutes.

One who asserts the defense of justification of a homicide must show not only that the person killed was using deadly physical force, but that he responded with only that force which was necessary and that he could not have avoided the killing. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996). A person is justified in using deadly physical force upon another person only if he reasonably believes that the other person was about to commit a felony involving force of violence or about to use unlawful deadly physical force and he was not the initial aggressor. *See* Ark. Code Ann. §§ 5-2-606(b)(2) and 5-2-607(a)(1)(2) (Repl. 1997). No error exists in refusing a self-defense instruction when there is no supporting evidence for the instruction. *Humphrey v. State*, 332 Ark. 398, 966 S.W.2d 213 (1998). The trial court properly denied appellant's effort to present evidence to show self-defense.

III.

Appellant contends that the trial court erred by permitting the State to introduce autopsy photographs into evidence that depicted McKinnon's injuries and erred by admitting mug photo-

graphs of him and his co-defendants into evidence over his objection. Appellant cited no legal authority and offered no convincing argument to support his contention that the trial court erred by admitting the mug photographs of him and his co-defendants. *See Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998). Further, appellant failed to abstract the autopsy photographs that he contends were cumulative.

Rule 4-2(a)(6) of the Rules of the Supreme Court and Court of Appeals provides that:

> [w]henever a map, plat, photograph, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by photography or other process and attach it to the copies of the abstract filed in the Court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the Court upon motion.

Appellant did not move to have this requirement waived, and the photographs in question have not been reproduced and attached as prescribed by the rule. Thus, we do not consider appellant's arguments. *See Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996).

■ Appellant also argues that the prosecution withheld exculpatory information consisting of a tape-recorded message that McKinnon, the homicide victim, apparently left at the home of Nevada County criminal investigator Jim Westmoreland. McKinnon inquired in the message about the possibility of criminal charges being filed against Larry Overton for being a felon in possession of a firearm. According to appellant, this information was exculpatory in that it implicated Overton for having a motive to harm McKinnon. Because of our decision to reverse and remand for retrial, appellant has not been adversely affected by the withheld information.

■ Appellant finally argues that the prosecutor made an improper "Golden Rule" argument and otherwise engaged in improper closing argument couched at arousing the passion of jurors by referring to appellant and his cohorts as a "truckload of criminals." The record shows that appellant's counsel interrupted the prosecutor's closing argument but failed to obtain a ruling. There is no proper objection to the "truckload of criminals" state-

ment, merely an interruption. Thus, we do not reach the merits of appellant's contention.

Appellant's conviction is reversed and the case is hereby remanded for retrial.

PITTMAN, JENNINGS, NEAL, and MEADS, JJ., agree.

STROUD, J., and HAYS, S.J., concur.

ROAF and HART, JJ., concur in part and dissent in part.

JOHN F. STROUD, JR., Judge, concurring. I concur with the majority in reversing and remanding this case solely because we are bound to follow precedent of the Arkansas Supreme Court. Under our first-degree murder statute, a person commits murder in the first degree if, acting alone or with one or more other persons, he commits or attempts to commit a felony, and *in the course of and in the furtherance of the felony* or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-10-102 (Repl. 1997) (emphasis added). The emphasized language, which likewise appears in our capital-murder statute,[1] has been the subject of discussion in cases before the supreme court:

> [In] *Sellers v. State*, 295 Ark. 489, 749 S.W.2d 669 (1988), ... we cited *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987), which held that one could not be convicted of capital murder where the underlying felony was burglary if the intent of the perpetrator, upon entering the dwelling, was to commit the murder. Quoting from *Parker*, we said:
>
> For the phrase "in the course of and in furtherance of the felony" to have any meaning, the burglary must have an independent objective which the murder facilitates. In this instance, the burglary and murder have the same objective. That objective, the intent to kill, is what makes the underlying act of entry into the home a burglary. The burglary was actually no more than one

[1] In Arkansas, the capital-murder statute enumerates the included felonies (rape, kidnapping, vehicular piracy, robbery, burglary, and certain felony violations of the Uniform Controlled Substances Act, or escape in the first degree), Ark. Code Ann. § 5-10-101 (Repl. 1997), and not the first-degree murder statute, just quoted, which refers only to "a felony."

> step toward the commission of the murder and was not to facilitate the murder.
>
> In keeping with the *Parker* rule, we reversed in *Sellers* where Sellers was charged with capital murder and burglary with an underlying charge of assault and battery. We held that we could not say the murder facilitated the burglary if the underlying offense for the burglary was assault and battery.[2]

Allen v. State, 296 Ark. 33, 39-40, 751 S.W.2d 347, 350 (1988). In *Allen*, the murder victim received several blows to the head, cracking his skull. The State presented evidence that Allen had burglarized the victim's home, had beaten him, and had stolen his money, watch, credit cards, guns, and vehicle. Allen confessed that he had entered the home in order to get keys and steal the car. He said that he did not intend to kill, but he confessed that he took a piece of angle iron with him in case the victim caught him or tried to shoot him. The supreme court held that the evidence supported theft as the underlying offense and object of the burglary, and that the murder resulted "in facilitating" the theft.

The problem I have with the instant case is that common sense seems to get lost in the shuffle of applying the felony-murder doctrine. For example, in the facts presented by the instant case, there seems to be more culpability, deserving a higher degree of murder charge, where the perpetrators intend to give the victim a "butt-whipping," and the victim dies as a result, than in a situation where a victim surprises the perpetrator in the middle of a theft that takes place in the victim's house, a scuffle ensues, a gun discharges, and the victim dies as a result. Yet in the first situation, according to precedent from our supreme court, the perpetrators cannot be guilty of first-degree murder, while in the second situation the perpetrator can. Perhaps an even more graphic example is presented in *Hall v. State*, 299 Ark. 209, 772 S.W.2d 317 (1989), where the supreme court affirmed a first-degree murder conviction that was based upon the underlying felony of theft by receiving. In *Hall*, the appellant killed a pedestrian while fleeing from police in a stolen vehicle.

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[2] The *Sellers* court stated, "We cannot say that the murder facilitated the assault and battery as it was the very culmination of them." 295 Ark. at 493, 749 S.W.2d at 671.

The common-law rule was that if a person killed another in doing or attempting to do an act amounting to a felony, the killing was murder. 40 AM. JUR. 2d *Homicide* § 64 (1999). Now practically all jurisdictions have enacted felony-murder statutes, the effect of which is to impute malice or deliberation to a felon so as to make the incidental homicide murder in the first degree. *Id.* The defendant need only intend to commit the underlying felony, and no other *mens rea* is required. To me, an aggravated assault so extreme that it leads to death is the type of underlying felony for which murder in the first degree should apply. A logical reading of the first-degree felony murder statute should encompass the facts of the instant case because "[a] person commits murder in the first degree if . . . acting . . . with one (1) or more other persons, he commits a felony [in this case aggravated assault], and in the course of and in furtherance of the felony..., he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life [.]" I disagree with the supreme court's interpretation of the phrase "in furtherance of" to exclude aggravated assault as an underlying felony. Consequently, I urge the supreme court to reexamine this issue. In the absence of such action by the supreme court, I invite the legislature to examine this area of our criminal code.

I am authorized to state that Special Judge STEELE HAYS joins in this concurrence.

ANDREE LAYTON ROAF, Judge, concurring in part; dissenting in part. I agree that this case should be reversed and remanded based on the erroneous felony-murder charge, but I also believe that the trial court erred in not allowing Craig to put on evidence of self-defense.

I agree with Craig that the trial court erred in refusing to admit testimony concerning McKinnon's threats to Craig and his family the morning of the beating, which were motivated by McKinnon's belief that Craig had reported him for "poaching," and concerning McKinnon's violent nature, particularly when he was intoxicated as the autopsy report showed him to be. This evidence was clearly relevant to Craig's self-defense theory. While the majority asserts that Craig initiated the altercation by punching McKinnon in the mouth without provocation, they ignore the undisputed evidence that Craig, while attempting to exit from a dead-end road,

encountered McKinnon's truck blocking the roadway, and that McKinnon got out of his truck and pointed a rifle at Craig's truck. Further, by this time, McKinnon had picked up a companion, Shane Henry, who was also armed. Because it was McKinnon, not Craig, who was the first to threaten to use deadly physical force, I cannot agree with the majority that Craig failed to provide any evidence showing that McKinnon was the aggressor. At any rate, whether or not Craig was the aggressor was a fact question that belonged to the jury. *See Humphrey v. State*, 332 Ark. 398, 966 S.W.2d 213 (1998). Moreover, neither the medical examiner's testimony, nor that of Shane Henry, contradicts Craig's claim that McKinnon was alive when he and his companions left. Accordingly, it was a question of fact as to whether the physical force that Craig and his companions employed was necessary to effect their safety.

Finally, on review, the test is not whether Craig would have prevailed with this defense, but rather whether he presented *any evidence* tending to support its existence. *See Doles v. State*, 275 Ark. 448, 631 S.W.2d 281 (1982). Once again, neither the trial court nor this court should have usurped the role of the jury and decided this question, and I would also reverse and remand for a new trial on this point.

HART, J., joins.

Gordon Andrew STELLPFLUG *v.*
Vickie Verleen Doss STELLPFLUG

CA 99-1481 14 S.W.3d 536

Court of Appeals of Arkansas
Division I
Opinion delivered April 19, 2000

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

Appellee, pro se.

WENDELL L. GRIFFEN, Judge. Gordon Stellpflug appeals from the order of the Benton County Chancery Court in which the chancellor reduced his summer visitation with his children. His sole argument on appeal is that the chancellor erred in modifying visitation even though he expressly found there was no change in circumstances to warrant a modification. We agree that appellee did not demonstrate a change of circumstances warranting a modification of visitation. Therefore, we reverse the chancellor's order reducing appellant's visitation.

Appellant and his ex-wife, appellee Vickie Stellpflug, were divorced on September 30, 1996. They had three daughters during their marriage: Megan Stellpflug, born November 10, 1987, Morgan Stellpflug, born September 19, 1990, and Caitlen Stellpflug, born June 24, 1992. The parties' visitation arrangements were modified twice, on May 22, 1997, and on October 10, 1997, before the modification petition was filed in this case. On May 26, 1998, the Benton County Chancery Court approved another order that modified visitation between the parties. Under the terms of this order, the parties agreed that appellant's visitation with his three

daughters would begin one week after the school year ended and would end one week prior to the commencement of the next official school year, for a total of thirteen weeks during the summer. Appellee was to have alternate weekend visitation.

On April 23, 1999, appellee filed a petition to reduce appellant's visitation. She alleged in her petition that 1) the children desired to see their mother more frequently during the summer; and 2) the visitation arrangement created undue hardship for her and the children because she is unable to exercise her alternate weekend visitation during the summer.[1] The chancellor conducted a hearing on the petition for modification on August 26, 1999, and entered an order reducing appellant's visitation.

Appellee admits that when she signed the visitation agreement, she knew that it meant her husband would have the children for the entire summer, but she did not realize "how it was going to affect my children." She maintains that a change of circumstances was shown by her testimony that the summer visitation was difficult on her children, especially Caitlen, the youngest, because appellee was unable to make the lengthy trip from Pea Ridge, Arkansas, to Morris, Illinois, to exercise her weekend visitation during the summer. She also testified that, because her child support was abated while the children were with their father, she had to work two jobs to support herself financially, which also made it difficult for her to exercise her weekend visitation during the summer. She maintains that Caitlen cries whenever appellee returns the girls to their father, and asks to come home when they talk on the phone during their summer visitation.

During the hearing, the following colloquy took place:

> COURT: If I [would] have been notified that they have agreed that she was giving visitation all summer, I would not have signed the order.
>
> APPELLANT'S COUNSEL: I do believe that when I brought the order to the Court I did point that out to you.

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[1] She also argued that the visitation arrangement should be changed because appellant made unreasonable demands as to the time and location regarding the exchange of the children. The chancellor did not change the transportation arrangements, but did admonish the parties to be reasonable regarding the pick-up and return times.

COURT: It should have been pointed out. I give six weeks in the summer in my routine stuff. The kids are going up there for some time longer than that and the kids have a little time off and it is hard to be involved in things.

APPELLANT'S COUNSEL: I will assert to the Court that I brought it to the Court's attention, I did it for the specific purposes that she was not represented when she entered into this agreement and I was protecting myself by bring it to the Court and saying, this contains all summer visitation.

COURT: Well, anyway.

***

COURT: When the children come back just the week before school starts, all that time certainly has to be spent getting ready for school. There's not a lot of time for vacation.

***

APPELLANT'S COUNSEL: *She agreed to this order last year. He agreed to this order last year. The fact that she is asking for this to be changed, yet there are no change of circumstances to warrant a change in this order — there are none. There is no testimony that the kids are being mistreated up there or that the kids are lacking in education or that they are lacking in anything to do up there. There is not testimony about that and there has not been any allegation of the change in circumstances.*

COURT: *I know, but it's contrary to the Court's ideas of what is right and wrong.*

APPELLANT'S COUNSEL: When this order was signed, before it was signed, I made sure the Court knew and talked to the Court about it.

COURT: Well, you may have. But as far as I'm concerned there has to be a statement that the court agrees with the factual basis. You may have mentioned it to me and I may have been thinking of something else, but that's not the right answer as far as I'm concerned.*I just don't agree with it, there's too much time.* She gets no time to visit with the children in her free time, or arrange a vacation or take a few days off or something. It just doesn't happen.

APPELLANT'S COUNSEL: The point is, and my argument is, since she agreed to this there has been no change in circumstances,

> none whatsoever, and she's coming in here asking the Court to just change it because she doesn't like it and that's not the standard for changing visitation.
>
> COURT: Well, I'm going to order it changed. He'll have six weeks in the summer....

(Emphasis added.)

Appellant maintains this exchange demonstrates that the chancellor specifically found that there had been no material change in circumstances, but nonetheless modified the visitation because the agreement was "contrary to the Court's ideas of what is right and wrong," and because the chancellor "do[es not] agree with it."

On appeal, although we review chancery cases *de novo* on the record, we do not reverse unless the chancellor's findings are clearly against the preponderance of the evidence or are clearly erroneous. *See Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996). This court has stated that we know of no case in which the superior position, ability, and opportunity of the chancellor to observe the parties carries as much weight as those cases involving minor children. *See Riddle v. Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989).

It is well settled that the chancery court maintains continuing jurisdiction over visitation and may modify or vacate such orders at any time on a change of circumstances or upon knowledge of facts not known at the time of the initial order. *See Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). It is also well settled under Arkansas law that reversal is warranted where a chancellor modifies visitation where no material change in circumstances warrant such a change. *See Tillery v. Evans*, 67 Ark. App. 43, 991 S.W.2d 644 (1999) (reversing where the court modified visitation but conceded the party had no basis upon which to modify custody by stating, "If you want to try again and have some factual basis for your claim, a change of circumstances, then you will be free to do that within ten days"); *see also Leonard v. Steadman*, 59 Ark. App. 5, 95 S.W.2d 189 (1997) (reversing where the chancellor candidly stated that no material change in circumstances had taken place but radically modified visitation on the ground that he was clarifying his earlier decree by defining the meaning of the clause "other reasonable time arranged by the parties").

We hold that the chancellor erred in modifying appellant's visitation because it is clear that the only change that occurred in this case was appellee's attitude regarding summer visitation. It appears that the chancellor either signed an order that he did not read, or did not ascertain that the arrangement that he was approving would grant substantial summer visitation to the appellant. The chancellor's concern that appellee did not get any "vacation time" with the children was a matter he should have addressed in his prior order.

Appellee, as the party seeking the modification, had the burden below to show a material change in circumstances warranting the change in visitation. *See Hepp v. Hepp,* 61 Ark. App. 240, 968 S.W.2d 62 (1998). She also had the burden to show that the modification is in the best interest of the children. *See Bennett v. Hollowell,* 31 Ark. App. 209, 792 S.W.2d 338 (1990). Although we are sympathetic to the difficulties alleged by appellee, *i.e.*, transportation difficulties, financial difficulties, and homesick children, we must find that appellee simply failed to meet her burden below. Appellee merely testified that her children expressed a desire to see her during the summer, that her youngest daughter gets homesick, and that she has financial difficulty exercising her summer visitation rights. However, she fails to cite any authority to show that these difficulties constitute a material change in circumstances to warrant modification of the visitation arrangements. Nor does she show why reducing appellant's visitation from thirteen weeks to six weeks, a substantial reduction, is in the best interest of the children.

By contrast, the testimony of all parties confirms that the children want to visit their father, and suggests the children are well-adjusted. The attorney ad litem for the children testified that the children stated they enjoyed staying with their father, but they wanted him to be more flexible in allowing them to enjoy summertime activities, such as basketball camp. He further stated that Caitlin likes to spend time with her father but gets homesick. He also indicated the children "do not seem to have any animosity toward anybody and ... seem to have a good relationship with their stepmother."

In sum, appellee requested a change in visitation without demonstrating that a material change in circumstances had occurred. This is tantamount to collaterally attacking the order to

which she had agreed. While visitation is always modifiable, our courts require a more rigid standard for modification than for initial determinations in order to promote stability and continuity for the children, and to discourage repeated litigation of the same issues. *See Jones v. Jones*, 328 Ark. 97, 940 S.W.2d 881 (1997). Because the chancellor modified visitation where there was no material change in circumstances, we reverse and dismiss his order reducing appellant's visitation.

Reversed and dismissed.

BIRD and KOONCE, JJ., agree.

Michael H. ROBERTS *v.* Jennifer Kay ROBERTS

CA 99-722 14 S.W.3d 529

Court of Appeals of Arkansas
Division I
Opinion delivered April 19, 2000

Henry Law Farm, P.A., by: *David P. Henry*, for appellant.

Meredith Wineland, for appellee.

TERRY CRABTREE, Judge. Appellant Michael Roberts appeals the March 16, 1999, Decree of Divorce from his wife, Jennifer Roberts. On appeal he argues the following points: (1) the trial court erred in entering a final decree of divorce without distributing all marital property as required by Ark. Code Ann § 9-12-315 (a)(1)(A) (Repl. 1998), and (2) the trial court erred in ruling that the property which is to be distributed should be divided as of the date of the hearing of statutory grounds for divorce, rather than when the decree is entered. We dismiss.

Rule 2(a)(1) of the Appellate Rules of Procedure—Civil provides that an appeal may be taken from a final judgment or decree entered by the trial court. When the order appealed from is not final, this court will not decide the merits of the appeal. *Arkansas Dep't of Human Servs. v. Lopez*, 302 Ark. 154, 787 S.W.2d 686 (1990). Whether a final judgment, decree, or order exists is a jurisdictional issue that we have the duty to raise, even if the parties do not, in order to avoid piecemeal litigation. *Id.* For a judgment to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Id.* Thus, the order must put the trial court's directive into execution, ending the litigation, or a separable branch of it. *K.W. v. State*, 327 Ark. 205, 937 S.W.2d 658 (1997). Where the order appealed from reflects that further proceedings are pending,

which do not involve merely collateral matters, the order is not final. *Id.*

■ The March 16, 1999, Decree of Divorce does not conclude the parties' property rights in respect to a number of issues including but not limited to the following: the appellant's entitlement to one-half of the amount of principal reduction from the date of marriage until the date of separation on the Foster Street home, division of the pension plans, division of the property on Johnson Road, and the disclosure of assets not included. This order does not dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. Furthermore, where the record reflects that both parties did agree that no property division was to be made at the time the decree was entered, not distributing the property at that time was not error. *Forest v. Forest*, 279 Ark. 115, 649 S.W.2d 173 (1983). In this case, the parties acknowledged that they would have to determine what property was to be divided in kind or sold. Therefore, this order is not a final appealable order, and we dismiss this appeal.

Dismissed.

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

Edward L. GARNETT *v.* Dennis CROW and Brenda Crow

CA 99-920 14 S.W.3d 531

Court of Appeals of Arkansas
Division II
Opinion delivered April 19, 2000

McMillan, Turner, McCorkle & Curry, by: *F. Thomas Curry*, for appellant.

Winonia Griffin Roberts, for appellees.

STEELE HAYS, Special Judge. Appellant, Edward Garnett, is appealing from an order by the Hempstead County Circuit Court setting aside the jury verdict and ordering a new trial. We affirm the circuit court's order.

While driving his automobile in Hope, Arkansas, on December 10, 1997, appellant ran a stop sign and collided with appellee Dennis Crow's automobile. In May 1998, Mr. Crow sued appellant for negligence, claiming damages for aggravation of a preexisting condition and for past and future medical expenses, mental anguish, pain, physical impairment, and loss of earnings in the amount of $585,000. Mr. Crow's wife, appellee Brenda Crow, sued appellant for $50,000 for loss of consortium. Appellant denied liability and alleged that Mr. Crow was negligent in driving too fast and failing to maintain a proper lookout.

Mr. Crow testified that, at the time of the accident, he had owned his own business, a classic car sales establishment, and that he had been forced to close it soon after the accident because of his injuries. He described in detail the severe back pain he has experienced since the accident and the adverse impact this pain has had on all areas of his life. He said he has not been able to work, perform household chores, or do yard work since the accident. He and his wife also testified about the toll that the accident has taken on their sexual relationship. Mr. Crow presented evidence of his injuries and the medical services he has received, as well as the substantial expenses he has incurred. He stated that, in addition to treatment at the emergency room, he has consulted a psychologist and a succession of physicians — his family physician, an internist, an orthopedic surgeon, and a neurologist — in search of relief for his pain. He also described the extensive medical tests and procedures, physical therapy, and medication his doctors have prescribed. Mr. Crow introduced into evidence his medical records and documents reflecting medical expenses, approximating $39,000.

Dr. Joseph Greenspan, who specializes in rehabilitation, testified that Mr. Crow's injuries were caused by the accident and that his expenses were reasonable and medically necessary. He testified Mr. Crow would continue to suffer pain; Dr. Greenspan doubted he would be able to return to work. Dr. Greenspan determined Mr. Crow's permanent whole-body impairment to be twenty-one percent and estimated his future medical expenses at approximately

$100,000. Appellees also presented the testimony of an economist, Larry Davis, who testified that Mr. Crow's future lost income had a present value of $224,229.

Appellant admitted at trial that he had run the stop sign and that the accident would probably not have occurred if he had stopped. He did not offer the testimony of any other witness; instead, he questioned the reliability and accuracy of Dr. Greenspan's opinion about Mr. Crow's injuries and their cause. In his attempt to discredit Mr. Crow's testimony, he elicited admissions from Mr. Crow that he has suffered from anxiety problems for years and that he has been treated with psychotropic drugs. Appellant introduced evidence that, since April 1997, Mr. Crow had refilled his prescription for Ativan, an anti-anxiety drug, almost once a month. Appellant also tried to discredit Mr. Crow's claim for lost wages by demonstrating that appellees had lost money on the business in 1997.

After the jury returned a unanimous $10,000 verdict for appellees, appellees moved for a new trial on the grounds of the purported misconduct of a juror, the questioning of Mr. Crow about his insurance by counsel for appellant, and the inadequate amount of damages. The circuit judge found appellees' motion to be meritorious but did not specify the precise ground on which he granted a new trial. On appeal, appellant argues that none of the grounds argued by appellees in their motion warranted a new trial. Because the amount of damages awarded is so small in comparison to appellees' proof, we cannot say that the circuit judge abused his discretion in granting a new trial. Therefore, we need not address appellant's other arguments on appeal.

■ ■ The law affecting the granting of a new trial is well settled. Arkansas Rule of Civil Procedure 59(a) provides that a new trial may be granted, among other reasons, for error in the assessment of the amount of recovery, whether too large or too small, and when the verdict is clearly contrary to the preponderance of the evidence. The test we apply on review of the granting of a new trial is whether there was a manifest abuse of discretion. *Carr v. Woods*, 294 Ark. 13, 740 S.W.2d 145 (1987); *Eisner v. Fields*, 67 Ark. App. 238, 998 S.W.2d 421 (1999). A manifest abuse of discretion in granting a new trial means discretion improvidently exercised, *i.e.*, exercised thoughtlessly and without due consideration. *Nazarenko v.*

CTI Trucking Co., 313 Ark. 570, 856 S.W.2d 869 (1993). A showing of an abuse of discretion is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996). Accordingly, he has less basis for a claim of prejudice than does one who has unsuccessfully moved for a new trial. *Carr v. Woods, supra.*

At trial, appellees presented detailed evidence that supported their claims. In our view, the words of the supreme court in *Carr v. Woods*, 294 Ark. at 16, 740 S.W.2d at 146, can be applied to the situation before us:

> [A] trial judge does not abuse his or her discretion when a new trial is granted if it could fairly be found that the jury failed to take into account all the elements of the total injury proven, even if it might be possible to explain the verdict on the basis of something like awarding the plaintiff only the proven pecuniary loss.

Given appellees' evidence of over $300,000 in damages and the relatively small amount awarded by the jury, we cannot say that the trial judge committed a manifest abuse of discretion in granting appellees a new trial.

Affirmed.

MEADS, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I concur in affirming the trial court's award of a new trial only because the supreme court has repeatedly said that a showing of abuse of discretion by the trial court is more difficult when a new trial has been granted because the opposing party will have another opportunity to prevail. *See Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996); *Bristow v. Flurry*, 320 Ark. 51, 894 S.W.2d 894; *Richardson v. Flanery*, 316 Ark. 310, 871 S.W.2d 589 (1994). However, it is equally well settled that the alleged inadequacy of a jury award will not support the reversal of a denial of a motion for new trial, where a fair-minded jury could have reasonably fixed the award at the challenged amount. *See, e.g., Depew v. Jackson*, 330 Ark. 733, 957 S.W.2d 177 (1997). The mere fact that a plaintiff has incurred medical expenses and the defendant has admitted liability

does not automatically translate into a damage award equivalent to those expenses. *Id.*

In the present case, Mr. Crow's evidence regarding both causation and the amount of his damages was thoroughly impeached during this trial, not to mention Mr. Crow's credibility as a witness. However, the supreme court has said that cases involving the grant of a motion for new trial have "little bearing" in the review of a denial of such a motion. *See id.* The converse of that proposition is equally true, especially where it has been declared to be "more difficult" to show that the trial court abused its discretion when a new trial has been granted.

SECOND INJURY FUND *v.* EXXON TIGER MART, INC.

CA 99-459 15 S.W.3d 345

Court of Appeals of Arkansas
Division IV
Opinion delivered April 26, 2000

Judy W. Rudd, for appellant.

Friday, Eldredge & Clark, by: *Betty J. Demory*, for appellee Exxon Tiger Mart, Inc.

Walmsley & Weaver, by: *Bill H. Walmsley*, for appellee Patricia A. Fuller.

JOHN MAUZY PITTMAN, Judge. The claimant, Patricia A. Fuller, sustained a compensable back injury while working at a restaurant in 1975. As a result of this injury, the claimant underwent a laminectomy and diskectomy at L4-5 on the right and center, and sustained permanent impairment of 17.5% to the body as a whole. Claimant returned to the workforce and began working for Exxon Tiger Mart, Inc., in August 1991. The claimant again injured her back when she fell while mopping a floor in the course of her employment with Exxon Tiger Mart on June 19, 1993. As a result of her 1993 injury, claimant underwent a lumbar laminectomy and diskectomy at L4-5 on the left and sustained an anatomical impairment of 13% to the body as a whole. After a hearing to determine the extent of claimant's wage-loss disability, and to determine whether such disability was the responsibility of her employer or of the Second Injury Fund, the Commission found that claimant sustained a 37% impairment to her wage-earning capacity attributable to her back condition, and that the Second Injury Fund was liable for those benefits. From that decision, comes this appeal.

For reversal, the Second Injury Fund contends that the Commission erred in finding that the claimant sustained a 37% impairment to her wage-earning capacity; in failing to make a specific finding regarding the claimant's credibility; and in finding that a preexisting disability or impairment combined with claimant's last injury to cause a greater degree of disability.[1] We affirm.

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[1] The Second Injury Fund made an additional argument concerning the sufficiency of the evidence to support a finding that claimant received a 17.5% permanent anatomical impairment rating for her 1975 injury. Because the Fund conceded in its reply brief that this additional argument is now moot, we do not address it.

We first address appellant's arguments concerning the sufficiency of the evidence. In determining the sufficiency of the evidence to support the findings of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we will affirm if those findings are supported by substantial evidence, *i.e.*, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Wal-Mart Stores, Inc. v. Vanwagner*, 63 Ark. App. 235, 977 S.W.2d 487 (1998). The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Min-Ark Pallet Co. v. Lindsey*, 58 Ark. App. 309, 950 S.W.2d 468 (1997).

The Commission found that the claimant was entitled to 37% wage-loss disability based on consideration of "all relevant factors," including "the claimant's relatively advanced age, her education and work experience, [and] the nature and extent of her back injury." Viewed in the light most favorable to the Commission's findings, the evidence showed that the claimant was fifty-seven years old at the time of the hearing; that she did not complete high school, but did obtain a G.E.D.; that she previously had been employed as cashier, factory worker, waitress, housekeeper, cook, and day-care aide; that she missed approximately two years of work as the result of her first back injury and had intermittent back and leg problems thereafter, but that after her second injury the claimant now experiences episodes where she is injured in falls caused by her legs giving way, that she has pain in her back and legs to such an extent that she feels unable to work, and that this pain manifests itself when she lifts, bends, stoops, stands, or sits.

Appellant asserts that, because there was evidence that claimant's functional-capacity evaluation indicated that she was capable of performing work classified as "medium" by the U.S. Department of Labor, the Commission could not reasonably have found her to have sustained a 37% wage-loss disability. We do not agree. The Commission is not bound to accept the testimony of any witness, even if uncontradicted. *Ester v. National Home Ctrs., Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998). Although expert opinion, such as that contained in the functional-capacity evaluation performed by the occupational therapist in the present case, is admissible and frequently helpful in workers' compensation cases, it is not

conclusive. *See Weldon v. Pierce Brothers Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). The Commission has the duty of weighing such evidence as it does any other evidence, and its resolution has the force and effect of a jury verdict. *See Jeter v. B.R. McGinty Mech.*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). In light of the evidence of claimant's physical condition and wage-loss factors, there is substantial evidence to support the Commission's finding of 37% wage-loss disability.

Appellant also asserts that the Commission erred in finding that a preexisting disability or impairment combined with claimant's last injury to cause a greater degree of disability, contending that claimant's testimony that she had a preexisting impairment as a result of her 1975 injury lacked credibility, and that, in any event, there was no substantial evidence to support the finding that claimant's current disability status resulted from a combination of disabilities or impairments from her 1975 and 1993 injuries. We do not agree.

First, although there was in fact a degree of inconsistency in the claimant's testimony regarding her recovery from her 1975 injury, the resolution of such inconsistencies is a matter within the sole province of the Commission, *see Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998), and we are bound by the Commission's findings upon such disputed questions of fact. *Tyson Foods v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). It is the Commission's duty to determine which portion of the testimony it deems worthy of belief and to translate that portion into findings of fact, *see University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997), and the Commission's finding of prior disability or impairment in the case at bar is amply supported by claimant's testimony that she experienced difficulties following her 1975 injury that kept her from applying for factory or restaurant work.

Second, we note that, in finding that claimant's current disability status resulted from a combination of disabilities or impairments from her 1975 and 1993 injuries, the Commission observed that the earlier injury and surgery were to the same level of the claimant's lumbar spine as the previous injury and surgery, and that claimant's physical limitations increased substantially following her second injury and surgery. As the Commission noted,

the relevant facts of this case are indistinguishable from those presented in *Second Injury Fund v. Furman*, 60 Ark. App. 237, 961 S.W.2d 787 (1998), and we hold that the Commission did not err in finding that claimant's preexisting disability or impairment combined with her last injury to cause a greater degree of disability.

Finally, appellant contends that the Commission was obligated under *Patterson v. Frito-Lay*, 66 Ark. App. 159, 992 S.W.2d 130 (1999), to make specific findings with respect to the claimant's credibility. We do not agree that such findings are required. The *Frito-Lay* case, *supra*, imposed no new requirement on the Commission, but instead merely applied the longstanding rules that the Commission may not arbitrarily disregard testimony, and that the Commission's opinion must include a statement of those facts the Commission finds to be established by the evidence in sufficient detail that the truth or falsity of each material allegation may be demonstrated from the findings. *See id.*; *see also Wright v. American Transp.*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). In the present case, there is no indication that the Commission arbitrarily disregarded any testimony, and its findings regarding the claimant's testimony are apparent from its recitation of those portions of that testimony that it deemed worthy of belief.

Affirmed.

STROUD and HART, JJ., agree.

Mashombe Shawn BROCK *v.* STATE of Arkansas

CA CR 99-714 14 S.W.3d 908

Court of Appeals of Arkansas
Division III
Opinion delivered April 26, 2000

John Joplin, for appellant.

Mark Pryor, Att'y Gen., by: *Valerie L. Kelly*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Mashombe Shawn Brock, appeals from the circuit court's revocation of his suspended sentences and its imposition of four years' imprisonment based on the State's allegation that, in violation of the conditions of his suspended sentences, he committed the crimes of possession of methamphetamine with the intent to deliver and second-degree battery. Citing *Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989)(relying on federal constitutional principles), and Ark. Code Ann. § 5-4-310(c)(1) (Repl. 1997)(according to *Goforth*, the codification of those principles), he argues on appeal that his right to confront witnesses against him was violated when a witness for the State was permitted to testify that he had received information from a confidential informant that appellant was selling methamphetamine. Because the testimony was not admitted to prove the truth of the matter asserted, we conclude there was no violation of his right to confront witnesses and affirm.

At the revocation hearing, Corporal Shannon Binyon, a narcotics detective with the Fort Smith Police Department, testified that he contacted appellant after he was told by a reliable confidential informant that appellant was selling methamphetamine "at the Total Store at 19th and Grand" and was in possession of "a green organizer" containing "several quarter papers of methamphetamine." Appellant objected to this testimony as hearsay and argued that its introduction denied him the right to confront witnesses. The trial court overruled the objection. Binyon further testified that he and other officers contacted appellant at the store and found him in possession of a green organizer containing methamphetamine. The methamphetamine was packaged in seven individually

sealed plastic bags. Binyon testified that the methamphetamine was packaged for resale as "quarter papers to sell for $25.00 each."

In addressing appellant's claim that he was denied his right to confront witnesses when Binyon testified regarding what he was told by the confidential informant, we note that the United States Supreme Court has held that "admission of non-hearsay 'raises no Confrontation Clause concerns.' " *United States v. Inadi*, 475 U.S. 387, 398 n.11 (1986)(citing *Tennessee v. Street,* 471 U.S. 409, 414 (1985)). "Cross-examination regarding such statements would contribute nothing to Confrontation Clause interests." *Id.* Given that the Confrontation Clause is not violated by the introduction of non-hearsay testimony, we must determine whether the challenged testimony was hearsay.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c) (1999). An out-of-court statement is not hearsay if it is offered, not for the truth of the matter asserted, but to show the basis for the witness's action. *See, e.g., Sanford v. State*, 331 Ark. 334, 349-50, 962 S.W.2d 335, 343 (1998). Here, the challenged testimony was not introduced for the truth of the matter asserted, that is, that appellant was selling methamphetamine at that particular location, but instead to show why Binyon contacted appellant. We note that rather than alleging appellant was delivering methamphetamine, the State alleged in its petition to revoke that appellant was in possession of methamphetamine with the intent to deliver. The challenged testimony, we conclude, was not hearsay.

Because the challenged testimony was not hearsay, cross-examination of the confidential informant would have contributed little to appellant's interest in confronting witnesses against him. Thus, we conclude that appellant's right, based either on state or federal grounds, to confront witnesses against him, was not violated by the introduction of non-hearsay testimony at the revocation hearing. Given this, the court did not commit error by allowing introduction of the challenged testimony.

Furthermore, denial of an accused's right to confront witnesses may be harmless error. *See Caswell v. State*, 63 Ark. App. 59, 64-65, 973 S.W.2d 832, 835 (1998). Because the State had to prove

only one violation to establish that appellant violated his suspended sentence, *see Ramsey v. State*, 60 Ark. App. 206, 209, 959 S.W.2d 765, 767 (1998), and because appellant did not challenge the sufficiency of the evidence to support the State's separate allegation that appellant committed the crime of second-degree battery — a violation unrelated to the information garnered from the confidential informant — we could also affirm the revocation of his suspended sentence on the basis that any error committed was harmless.

Affirmed.

JENNINGS and ROAF, JJ., agree.

George WILCOX *v.* STATE of Arkansas

CA CR 99-861 15 S.W.3d 353

Court of Appeals of Arkansas
Division III
Opinion delivered April 26, 2000
[Petition for rehearing denied May 31, 2000.]

Sam T. Heuer, for appellant.

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

JOHN E. JENNINGS, Judge. George Wilcox was found guilty of battery in the first degree following a bench trial. Appellant moved for a new trial on the basis of newly discovered evidence, and the trial court granted the motion. Before he could be tried again, appellant filed a motion to dismiss on the basis of double jeopardy or, alternatively, for a judgment of acquittal, and that motion was denied. Appellant argues that the trial court erred in failing to dismiss pursuant to the prohibition against double jeopardy. We find no error and affirm.

During the summer of 1997, four young boys rode their bicycles in a field owned by appellant. According to the boys, they had misplaced one of the bicycles, and, because it was getting dark, one of them climbed onto a tractor and turned on its lights to help them locate the bicycle. The boys got scared when they saw a white truck approaching without its headlights on, so they hid. A man got out of the truck holding a gun and ordered them to turn off the engine and to get down off of the tractor. When they failed to do so, the man shot once toward the ground and fired a second time in the air. At some point, the boys began running but then obeyed the man's orders to return to him. Seeing that it was only children involved, the man told the boys to go home. Unfortunately, pellets from the second shotgun blast had struck one of the boys in the neck and foot.

At trial, two of the boys positively identified appellant as the man who had fired the shotgun that night. Officers who had investigated the scene found golf tees laying on top of the dirt and found similar golf tees in appellant's white truck. Officer Robert Brock noted that appellant's truck had a flat tire but was warm to the touch as though it had recently been driven. Appellant consented to a search of his house, and, although a shotgun was found underneath the bed, the gun was dusty and had mold on the stock.

Appellant's neighbor, John Patton, had been walking his dog that night when he heard a tractor running and children's voices. He called appellant on the phone and then went over to the field himself. Although he spoke to the man in the field who had told the boys to go home, Mr. Patton's testimony was that appellant was not the man he had seen by the tractor. Although appellant testified that he does not go anywhere without his glasses, the boys indicated that the man in the field that night was not wearing glasses. Appellant explained that he and his wife own eleven white trucks used in connection with their sod farm operation. He went on to say that golf tees are found in virtually every one of those trucks because they serve to plug water sprinklers all over the farm. According to the testimony of both appellant and his wife, after going to dinner with friends in the wife's car, they went straight to bed and were awakened between 9:30 and 10:00 p.m. by the doorbell and the telephone.

The trial court found appellant guilty of battery in the first degree, but, before sentencing, appellant moved for a new trial based on newly discovered evidence. At the hearing on appellant's motion, John Patton again testified on appellant's behalf. This time Mr. Patton identified Boyce Cope as the man he had spoken to that night in the field. He testified that appellant would not have had time to get to the field before him following the phone call, as appellant lives two blocks away and the field is directly across the road from Mr. Patton's house. Patton also said that the man he had spoken to in the field was not wearing glasses. Dr. Roy Ashebraner, appellant's optometrist, prepared photographs showing appellant's level of visual acuity with and without glasses. In addition, the transcript of Mr. Cope's confession was introduced into evidence. Mr. Cope explained that, when he saw the tractor's lights on at a time when no one is usually in the field, his first thought was that someone was stealing the tractor because there had been recent problems with theft. He fired the gun twice just to scare off the person on the tractor. Realizing it was just some children playing, he instructed them to go home. Mr. Cope said that he was unaware that a boy had been shot until the next day when he heard about it on the news. He then got scared and threw his shotgun over a bridge. Mr. Cope indicated that he had been driving a white pick-up truck that night. He also stated that he had spoken to someone in the field as the boys were leaving to go home but that he did not

know the man. Based on this newly discovered evidence, the trial court granted appellant's motion for a new trial.

Appellant argues that the trial court's granting of a new trial was tantamount to directing a verdict of acquittal. Appellant relies on the language in *Misskelley* that to prevail on a motion for a new trial based on newly discovered evidence, appellant must demonstrate that the new evidence would have impacted the outcome of the case. *Misskelley v. State,* 323 Ark. 449, 915 S.W.2d 702 (1996). Appellant argues that, by granting the new trial, the trial court must have found that the evidence would have impacted the outcome of his case, and the only logical impact would have been a judgment of acquittal based upon insufficient evidence to convict him. Furthermore, the State conceded that there would be no additional evidence at the new trial with the exception of more cross-examination. Appellant contends that this court must look to the substance of the trial court's decision and not just its form. Appellant points out that a defendant does not waive his right to a judgment of acquittal based on insufficient evidence simply by moving for a new trial.

The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *Burks v. United States,* 437 U.S. 1 (1977). In addition, the Double Jeopardy Clause bars a second prosecution when a new trial has been granted due to insufficient evidence. *Hudson v. Louisiana,* 450 U.S. 40 (1981). However, in the case at bar, there was no suggestion by the trial court that the State had failed to prove its case. Significantly, the trial court did not grant appellant's request for an outright acquittal. Moreover, in its ruling, the trial court pointed out that a new trial based on newly discovered evidence is not a favored remedy and that confessions should be approached with some skepticism but that, "the law provides for [a new trial] under appropriate circumstances." Clearly, it was not implicit in the trial court's granting of a new trial that the State's evidence had been rendered insufficient due to appellant's newly discovered evidence. The new trial simply provided appellant another chance for acquittal in light of the newly discovered evidence. We find no error in the trial court's denial of appellant's motion to dismiss on double jeopardy grounds. *See Carter v. State,* 848 S.W.2d 792 (Tex. Ct. App. 1993) (where a defendant's motion for a new trial is granted on grounds

other than insufficient evidence, double jeopardy does not bar a new trial). Affirmed.

HART and ROAF, JJ., agree.

Margaret INGE *v.* Scott WALKER

CA 99-1128 15 S.W.3d 348

Court of Appeals of Arkansas
Division I
Opinion delivered April 26, 2000

[redacted]

Joey McCutchen, *Tanya B. Spavins*, and *Richard H. Strunks*, for appellant.

Warner, Smith & Harris, PLC, by: *Joel D. Johnson* and *Jason T. Browning*, for appellee.

SAM BIRD, Judge. Margaret Inge appeals the granting of summary judgment in favor of Scott Walker. She argues that there were questions of fact to be determined and, therefore, Walker should not have been awarded summary judgment. We agree with Inge that there were issues of fact to be determined and that the grant of summary judgment was error. Consequently, we reverse and remand.

The case arises out of an automobile accident that took place on June 15, 1998. Ms. Inge was stopped in the street waiting to make a left turn. Walker was behind her and bumped her rear bumper. They moved their cars and, while waiting for the officer, they talked. According to Walker, they assured each other that there were no personal injuries, only property damage to the bumper of Inge's vehicle, and Inge agreed to accept Walker's check for $200 for the damage. A police officer is said to have asked Ms. Inge if the $200 was satisfactory, and she is said to have replied that it was.

On February 22, 1999, Ms. Inge filed a complaint in the Sebastian County Circuit Court alleging that Walker was negligent and that, as a result of his negligence, she sustained serious physical injuries and permanent impairment, resulting in pain and suffering, medical treatment and expenses, and lost income. Ms. Inge asked for a jury trial. Accompanying her complaint were two requests for production, and thirty-two interrogatories. In an amended answer, Walker alleged that the $200 check was an accord and satisfaction, in full and final satisfaction of all claims arising from the accident.

On May 24, 1999, Walker filed a motion for summary judgment, relying on the pleadings, his response to the interrogatories, his affidavit, and the canceled $200 check. In his brief to the trial court in support of his motion for summary judgment, Walker claimed that Ms. Inge actually asked for the check to cover her damages. Walker contended in his motion that by cashing the check, Ms. Inge released him from liability for any further damages. Ms. Inge did not respond to the motion for summary judgment, no hearing was held, and on June 18, 1999, the appellee's motion for summary judgment was granted. The order stated:

> Rule 12(c) of the Arkansas Rules of Civil Procedure provides, in part: "If a party opposes a motion ... he shall file his response ... within ten (10) days after service..."
>
> As heretofore stated Plaintiff has failed to comply with said rule.
>
> The law is well settled that when a party makes a prima facie showing of entitlement to a summary judgment, the opposing party must meet proof with proof by showing there is a genuine issue as to a material fact. Plaintiff has failed to do so.
>
> Accordingly, Defendant's Motion for Summary Judgment is granted.

On June 25, 1999, Ms. Inge filed a motion for reconsideration and to vacate the summary judgment, alleging that no hearing was set or held on the motion for summary judgment, and that Walker's affidavit and answers to interrogatories filed as exhibits to his motion specifically raise the issue of the parties' intent in giving and receiving the check. In her brief, she pointed out that in exhibit one to the motion for summary judgment Walker stated: "Plaintiff asked Defendant to write her a check for $200 *for her bumper.*" Ms.

Inge contends this raised an issue of fact as to whether the $200 check was in satisfaction of *all damages* arising from the accident, or just payment for the damage *to her bumper*. She also raised in her motion for reconsideration the issue of whether summary judgment was proper simply because she failed to respond to the motion within ten days, citing Ark. R. Civ. P. 12(i).

Walker responded to Inge's motion to vacate and pointed out in his brief that Ark. R. Civ. P. 56 applies to summary judgments and allows a time for *affidavits* to be filed; Ark. R. Civ. P. 12(i) controls the time a party has to respond to a *motion*. He argued that granting the motion for summary judgment was appropriate since Inge failed to respond to his motion and "set forth specific facts showing there is a genuine issue for trial." On July 13, 1999, Inge's motion to vacate was denied.

Inge makes several arguments on appeal. First, she contends that summary judgment was not appropriate where genuine issues of material fact existed or where reasonable minds could differ as to the interpretation of the facts as shown by the pleadings, even if no formal response to the motion had been filed. We agree.

Arkansas Rule of Civil Procedure 56(e) provides:

> When a motion is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate*, shall be entered against him. (Emphasis added.)

■ ■ The Arkansas Supreme Court recently reviewed the law in regard to summary judgment in *New Maumelle Harbor v. Rochelle*, 338 Ark. 43, 991 S.W.2d 552 (1999):

> In these cases, we need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. All proof submitted must be viewed in a light most favorable to the party *resisting* the motion, and any doubts and inferences must be resolved *against the moving party*. Our rule states,

> and we have acknowledged, that summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to summary judgment as a matter of law.

338 Ark. at 45-46, 991 S.W.2d at 553 (quoting *Sublett v. Hipps*, 330 Ark. 58, 62, 952 S.W.2d 140, 142 (1997), quoting *Milam v. Bank of Cabot*, 327 Ark. 256, 261-62, 937 S.W.2d 653, 656 (1997))(emphasis added). Once a moving party establishes prima facie entitlement to summary judgment by affidavits, depositions, or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a genuine issue of material fact. *New Maumelle Harbor, supra.* Prima facie evidence is "[e]vidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which *if not rebutted or contradicted*, will remain sufficient." *Black's Law Dictionary*, 1190 (6th. ed 1990) (emphasis added).

In *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999)(quoting *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998)), the supreme court explained further:

> 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. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998), *supp. opinion on denial of reh'g*, 332 Ark. 189 (1998). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate 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.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

339 Ark. at 153-54, 3 S.W.3d at 686-87.

Summary judgment is not granted simply because the opposing party fails to respond to the motion for summary judg-

ment. *See Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994), which held:

> Summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be litigated. *Hickson v. Saig*, 309 Ark. 231, 828 S.W.2d 840 (1992). A summary judgment should not be granted where reasonable minds could differ as to the conclusions they could draw from the facts presented. *Lee v. Doe et al*, 274 Ark. 467, 626 S.W.2d 353 (1981). The burden of proving there is no genuine issue of material fact is upon the movant, and all proof submitted must be viewed favorably to the party *resisting the motion. Wyatt v. St. Paul Fire & Marine Ins.*, 315 Ark. 547, 868 S.W.2d 505 (1994). *Any doubts and inferences must be resolved against the moving party. Wyatt, supra; Pinkston v. Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988); *Cross v. Coffman*, 304 Ark. 666, 805 S.W.2d 44 (1991). The burden in a summary judgment proceeding is on the moving party and cannot be shifted when there is no offer of proof on a controverted issue. *Wyatt, supra; Collyard v. American Home Assurance Co.*, 271 Ark. 228, 607 S.W.2d 666 (1980). When the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing genuine issue as to a material fact. *Wyatt, supra; Harrell v. International Paper Co.*, 305 Ark. 490, 808 S.W.2d 779 (1991).

318 Ark. at 429-30, 885 S.W.2d at 895-96 (emphasis added). When the proof supporting a motion for summary judgment is insufficient, there is no duty on the part of the opposing party to meet proof with proof. *Cash v. Lim*, 322 Ark. 359, 908 S.W.2d 655 (1995); *Wolner v. Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986); *Collyard v. American Home Assurance Co.*, 271 Ark. 228, 607 S.W.2d 666 (1980). The failure to file counteraffidavits does not in itself entitle the moving party to a summary judgment. However, the effect is to leave the facts asserted in the uncontroverted affidavit supporting the motion for summary judgment accepted as true for purposes of the motion. *Cameo Jewelry v. Sweetser*, 247 Ark. 477, 446 S.W.2d 228 (1969); *Ashley v. Eisele*, 247 Ark. 281, 445 S.W.2d 76 (1969).

■ Inge stated in her complaint that she sustained physical injuries in the rear-end collision. Walker's answer did not offer proof that her claim was not true. In his answer to Inge's complaint, Walker stated that, at the time of the accident, he and Inge had entered into an agreement whereby he paid her $200 in "full and final settlement" of her claim. However, in his answers to the

interrogatories attached as an exhibit to Walker's motion for summary judgment, he stated that he gave Ms. Inge a check "for her bumper." These statements are contradictory. They leave open to speculation whether the $200 payment was for the damage to Ms. Inge's bumper or all damages sustained, including physical injuries. Since different conclusions can be drawn from these statements contained *in the motion for summary judgment*, the motion itself presented a material question of fact, and summary judgment should not have been granted.

Walker also claims the check represented an accord and satisfaction. An "accord and satisfaction" contemplates an agreement between parties to give and accept something different from that claimed by virtue of the original obligation, and both the giving and acceptance are essential elements. *Helms v. University of Missouri-Kansas City*, 65 Ark. App. 155, 986 S.W.2d 419 (1999); *Bohle v. Sternfels*, 261 S.W.2d 936, 941 (Mo. 1953). It generally involves a settlement in which one party agrees to pay and the other to receive a different consideration or a sum less than the amount to which the latter is or considers himself entitled. *Hardison v. Jackson*, 45 Ark. App. 49, 871 S.W.2d 410 (1994); *Dyke Indus., Inc. v. Waldrop*, 16 Ark. App. 125, 697 S.W.2d 936 (1985). There must be a disputed amount involved and a consent to accept less than the amount in settlement of the whole before acceptance of the lesser amount can be an accord and satisfaction. *Mademoiselle Fashions, Inc. v. Buccaneer Sportswear, Inc.*, 11 Ark. App. 158, 668 S.W.2d 45 (1984). The validity of an accord and satisfaction is dependent upon the same basic factors and principles that govern contracts generally, *Helms*, *supra*; *Bestor v. American Nat'l Stores, Inc.*, 691 S.W.2d 384 (Mo. Ct. App. 1985), and the burden of proving the agreement is simply the burden of proving a contract: offer, acceptance, and consideration. *Id.* The defense of accord and satisfaction presents an issue of fact, and Walker had the burden of proving accord and satisfaction. *Boone v. Armistead*, 48 Ark. App. 187, 892 S.W.2d 531 (1995); *Holland v. Farmers & Merchants Bank*, 18 Ark. App. 119, 711 S.W.2d 481 (1986). Since Inge claimed that the $200 was for damage to her bumper and Walker claimed it was in settlement of all liability for the accident, including personal injuries, a fact question was raised that was not capable of being decided by summary judgment.

Because of the foregoing conclusions, we find it unnecessary to consider appellant's other arguments.

Reversed and remanded.

KOONCE and GRIFFEN, JJ., agree.

Brian EMBRY *v.* STATE of Arkansas

CA CR 99-1011 15 S.W.3d 367

Court of Appeals of Arkansas
Division I
Opinion delivered April 26, 2000
[Petition for rehearing denied May 31, 2000.]

[redacted]

Dale W. Finley, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

K. MAX KOONCE, II, Judge. Appellant entered a conditional plea of guilty to manufacturing a controlled substance pursuant to Arkansas Rule of Criminal Procedure 24.3. He was sentenced to fifteen years in the Arkansas Department of Correction. On appeal, appellant argues the trial court erred in denying his motion to suppress. We affirm.

When reviewing the trial court's denial of a motion to suppress, the appellate courts make an independent determination based on the totality of the circumstances and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Welch v. State*, 330 Ark. 158, 955 S.W.2d 181 (1997).

Officer Phillip Hubbard of the Atkins Police Department testified that on November 13, 1998, he responded to a call of a possible fire at around 10:00 p.m., and subsequently observed smoke coming from a small storage building or tool shed at the Atkins Housing Authority, a state-owned facility. Officer Hubbard witnessed appellant exit the storage building and close the door. Appellant told the officer he was fumigating the building. Officer Hubbard testified that he heard a voice inside and asked appellant if he could search the building. Officer Hubbard further testified that appellant agreed and started to open the door with a key when another individual exited the building. Officer Hubbard then entered the building. He testified that he smelled a strong odor of ether and observed a fog or vapor inside. The building contained tools and cleaning supplies, as well as numerous items used in the manufacture of methamphetamine.

Tracy Spencer, a narcotics investigator with the Arkansas State Police, testified that inside the shed he found two HCL generators that consisted of two twenty-ounce plastic bottles sealed with plastic tubing. These items were found underneath a work bench along a wall. He testified that the HCL generators were emitting a heavy white vapor. He further stated that prolonged exposure to the

fumes can cause health problems and that there was a danger of explosion. Officers also found two-gallon water jugs, empty ephedrine tablet bottles, coffee filters, heating elements, syringes, muriatic acid, sulfuric acid, denatured alcohol, and funnels, all in plain view inside the building.

At the hearing on his motion to suppress, appellant testified that he did not give Officer Hubbard consent to search the shed. Appellant admitted he was aware that methamphetamine was being manufactured inside the building.

Appellant's mother testified that she was the executive director of the Atkins Housing Authority where appellant was employed as a part-time maintenance person. She testified that the storage building was used by the housing authority to store tools and complete repair work. She testified she and appellant had keys to the building.

The trial court found that appellant lacked standing to challenge the search. Appellant contends that he had standing to challenge the search because he controlled the building as his workplace.

Fourth Amendment rights against unreasonable searches and seizures are personal in nature. *Rakas v. Illinois*, 439 U.S. 128 (1978). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998). It is well settled that the defendant, as the proponent of a motion to suppress, bears the burden of establishing that his Fourth Amendment rights have been violated. *Id.* A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by a search of a third person's premises or property. *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997). One is not entitled to automatic standing simply because he is present in the area or on the premises searched or because an element of the offense with which he is charged is possession of the thing discovered in the search. *Ramage, supra.* The pertinent inquiry regarding standing to challenge a search is whether a defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *Id.*

We have found no cases from our court or our supreme court addressing the specific issue raised in the case at bar. However,

it has been recognized that employees may have a reasonable expectation of privacy in their offices against intrusions by police. *See Mancusi v. DeForte,* 392 U.S. 364 (1968). The United States Supreme Court has stated that the expectation of privacy in commercial premises is different from, and indeed less than, a similar expectation in an individual's home. *New York v. Burger,* 482 U.S. 691, 700 (1987). Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis. *O'Connor v. Ortega,* 480 U.S. 709, 718 (1987).

Courts that have addressed similar issues have considered whether the employee had a property or possessory interest in the thing seized or the place searched, had a right to exclude others from that place, exhibited a subjective expectation of privacy that it would remain free from governmental intrusion, took precautions to maintain privacy, and was legitimately on the premises. *See United States v. Cardoza-Hinojosa,* 140 F.3d 610 (5th Cir.), *cert. denied,* 525 U.S. 973 (1998) (holding that the defendant lacked a reasonable expectation of privacy in shed where he operated a part-time welding business because he kept shed unlocked, arranged for participants in drug transaction to meet there, did not object when the transaction was conducted inside the shed, and was not on the premises at the time of the search); *United States v. Anderson,* 154 F.3d 1225 (10th Cir. 1998), *cert. denied,* 526 U.S. 1159 (1999) (holding that the defendant had standing to seek suppression of evidence obtained as a result of the search of a vacant room in the office building of a corporation in which defendant was a corporate officer).

In the case at bar, appellant did not own the shed, nor did he have the right to exclude others from the government-owned storage shed; he was only a part-time employee and the director of the housing authority also had a key to the building. Anyone else entering the shed could observe, in plain view, the various items of paraphernalia; thus the items were not stored in a manner indicating anything of a private or personal nature. The building did not house an office environment; there was no desk or phone. It was used mainly for storage, and appellant was provided access to the shed for the purpose of facilitating work on behalf of the Atkins Housing Authority. Appellant has also not shown that he was legitimately on the premises at the time of the search. While

appellant no doubt intended the planned activities within the shed to remain private, the United States Supreme Court has explicitly stated that the "subjective expectation of not being discovered" while conducting criminal activities is insufficient to create a legitimate expectation of privacy. *Rakas,* 439 U.S. at 143-44 n. 12. We conclude that appellant did not have a reasonable expectation of privacy in the storage building, and thus did not have standing under the Fourth Amendment to challenge the warrantless search.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

Brian Antonio EDWARDS v. STATE of Arkansas

CA CR 99-1229 15 S.W.3d 358

Court of Appeals of Arkansas
Division II
Opinion delivered April 26, 2000

Willard Proctor, Jr., for appellant.

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

OLLY NEAL, Judge. On November 8, 1995, appellant pleaded guilty to the felony offense of aggravated assault and was placed on probation for a period of three years. Under paragraph 32 of his conditions of probation, appellant was eligible for expungement of his conviction "upon successful completion of his probationary period." Appellant completed his sentence on November 8, 1998, without violating any condition of his probation. There is no evidence of whether appellant's conviction was expunged.

On March 25, 1999, appellant was charged by information with possession of a firearm by a convicted felon pursuant to Ark. Code Ann. § 5-73-103 (Repl. 1997). On April 12, 1999, he filed a motion in limine asserting that the State could not use his previous felony conviction as a basis in a later prosecution for felon in possession of a firearm because the underlying felony was subject to expungement.

Following a pretrial hearing held June 2, 1999, the trial court denied the motion based on its finding that, at the time appellant was placed on probation in November of 1995, Ark. Code Ann. § 16-93-1207 (Supp. 1999), "provided that upon successful completion of probation the Court *may* direct the record of the offender be expunged of the offense for which the offender was convicted" (emphasis added), and that Ark. Code Ann. § 16-90-904 (Supp. 1999), "sets forth the procedure for a defendant to seek expungement pursuant to A.C.A. § 16-93-1207." The trial court found that

there was nothing in the record to show that appellant had taken steps to have his record expunged or sealed. It noted that even though the date of the current offense was outside the probationary period for appellant's prior aggravated assault conviction, the prior felony conviction remained in effect and was available for use by the State as an element of the current offense because appellant's prior record had not been expunged. The trial court noted that appellant's reliance on *Irving v. State*, 301 Ark. 416, 784 S.W.2d 763 (1990), was distinguishable from the present case because the basis of the *Irving* decision was decided under the Youthful Offender Alternative Services Act, which provided that upon completion of probation, the trial court "shall" direct that the record of the eligible offender be expunged of the offense for which the eligible offender was convicted. It further noted that appellant's prior offense occurred in 1995 after the repeal of the Youthful Offender Alternative Services Act. After a bench trial held August 3, 1999, appellant was convicted of being a felon in possession of a firearm and fined $1,000 along with court costs.

Appellant's sole point on appeal is that the trial court erred in denying his motion in limine to exclude the introduction of his prior conviction of aggravated assault, for which he was sentenced under the expunging provisions of Ark. Code Ann. § 16-93-1207.

■ On appeal, the appellate court will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion nor will the appellate court reverse absent a showing of prejudice. *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999).

Arkansas Code Annotated section 16-93-1207(b)(1) provides that "upon successful completion of probation ... the court may direct that the record of the offender be expunged of the offense of which the offender was convicted...." Arkansas Code Annotated section 16-93-1207(b)(3) further provides that the "procedure, effect, and definition of 'expungement' for the purposes of this subsection shall be in accordance with that established in § 16-90-901 et seq." Under Arkansas Code Annotated section 16-90-904 (a), "an individual who is eligible to have an offense expunged may file a uniform petition to seal records ... with the court in the county where the crime was committed."

Appellant now argues that the trial court abused its discretion when it used his prior felony conviction as the underlying felony in the subsequent prosecution against him for felon in possession of a firearm. He argues that when the trial court sentenced him to probation, the trial court's order and the conditions of probation provided that his conviction "shall" be eligible for expungement upon successful completion of the probationary period. He argues that under the dictate of *Irving, supra,* an underlying felony cannot be used in a subsequent prosecution for felon in possession of a firearm if it is subject to expungement and the expungement is merely a ministerial function to be performed by an official of the trial court.

In this case, however, a sentence must be in accordance with the statutes in effect on the date of the crime. *Nelson v. State,* 284 Ark. 156, 680 S.W.2d 91 (1984). At the time appellant was convicted of his prior felony in November of 1995, he was sentenced under Ark. Code Ann. § 16-93-1207, which provides that the trial court "may" direct that the record of the offender be expunged. Section 16-90-904(a), which sets out the procedures for expungement, further provides that it is the duty of the "individual who is eligible to have an offense expunged," and not the trial court, to file a petition to seal a criminal record. The Youthful Offender Alternative Service Act of 1975, under which the facts in *Irving* were decided, provides that upon completion of the sentence, the Commissioner of the Department of Correction *shall* direct that the record of the eligible offender be expunged. (Emphasis added.) *See* Ark. Stat. 43-2344 et seq. [Ark. Code Ann. § 16-93-501 et seq. (Repealed 1993)]. In *Irving,* the supreme court held that under the language of the Act, young offenders did not have to petition for expungement, and that expungement was a ministerial duty to be completed by the Commissioner of the Department of Correction.

We distinguish *Irving* from the facts in this case because appellant was sentenced and placed on probation under the provisions of Ark. Code Ann. § 16-93-1207 and not the Youthful Offender Alternative Services Act. Although the trial judge had some discretion under Section 16-93-1207 to expunge appellant's record upon the successful completion of appellant's probationary period, this court cannot say that the expungement of appellant's record was merely a ministerial duty of the trial court or a mandated function of the trial court. Therefore, since there is no evidence that appel-

lant petitioned to have his record sealed at the end of his probationary period, this court finds that the trial court did not abuse its discretion in denying appellant's motion in limine.

Affirmed.

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

Dorothea KOPRIVA and Stanley Kopriva *v.*
BURNETT-CROOM-LINCOLN-PADEN, LLC

CA 99-1207 15 S.W.3d 361

Court of Appeals of Arkansas
Division II
Opinion delivered April 26, 2000

Jewell, Moser, Fletcher & Holleman, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Glenn W. Jones* and *Morris W. Williams, III*, for appellee.

OLLY NEAL, Judge. This is a slip-and-fall case. The jury entered a verdict in the amount of $30, 296.78 in appellant Dorothea Kopriva's favor, but declined to make an award for Stanley Kopriva's loss of consortium claim. Appellee subsequently moved for judgment notwithstanding the verdict (JNOV). This appeal is taken from the trial court's order granting appellee's motion for JNOV. Appellants' sole point for reversal is that the trial court erred in granting appellee's motion for JNOV. We find no error and affirm.

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*, 63 Ark. App. 241, 977 S.W.2d 490 (1998). 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*, 63 Ark. App. 221, 977 S.W.2d 12 (1998).

Appellants argue that substantial evidence supports the jury's verdict and that the trial court's grant of JNOV should be reversed.

On May 12, 1997, Dorothea Kopriva arrived at appellee Burnett-Croom-Lincoln-Paden Clinic for a scheduled doctor's appointment. Mrs. Kopriva entered the clinic's restroom to collect a urine sample for her physician and fell on the restroom's floor, fracturing her hip. She filed suit, alleging that she was injured as a result of the clinic's negligence in failing to use ordinary care to maintain its premises in a reasonably safe condition. At trial and on appeal, Mrs. Kopriva's theory of the causation of her accident was that the floors were shiny and slick, and that the condition of the clinic's floor caused her fall.

■ 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). In order to prevail in a typical slip-and-fall case involving an invitee, the plaintiff must show either (1) that the presence of a substance upon the premises was the result of the defendant's negligence, or (2) that the substance had been on the premises for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Fred's Stores v. Brooks*, 66 Ark. App. 38, 987 S.W.2d 287 (1999).

■ This case is unlike the typical slip-and-fall case, in that appellants do not claim that Mrs. Kopriva's fall was caused by the presence of a substance on the floor. Rather, appellants suggest that the floor's condition resulting from the application of wax rendered the floor slick and shiny, causing Mrs. Kopriva's fall. In *National Credit Corp. v. Ritchey*, 252 Ark. 106, 477 S.W.2d 488 (1972), the supreme court adopted the following view expressed in *Nicola v. Pacific Gas and Electric Co.*, 50 Cal. App. 2d 612, 123 P.2d 529:

> If wax is applied to a floor it must be in such a manner as to afford reasonably safe conditions for the proprietor's invitees, and if such compounds cannot be used on a particular type of floor material without the violation of the duty to exercise ordinary care for the safety of invitees, they should not be used at all. Of course slipperiness is an elastic term. From the fact that a floor is slippery does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. This is a question of fact.

Mrs. Kopriva testified that one of the clinic's nurses named "Dawn" informed her after the accident that clinic employees had removed excess wax from the floors with alcohol and cotton swabs on prior occasions.

Dawn Pratt testified that she had removed substances from the clinic's laboratory floor, but could not recall cleaning up excess wax from any of the clinic's floors. She also testified that she never heard of anyone cleaning excess wax from the bathroom where Mrs. Kopriva fell.

Donna Burnett, the clinic's administrator, testified that she had been informed of prior occasions where clinic employees had removed excess wax from the floors. She also testified that the last time the floors were waxed before appellant's fall was May 28, 1996, and that the next time the floors were waxed was one week after appellant fell. She could not recall a patient ever having slipped on any of the clinic's floors.

Lillie Harper, a clinic employee, testified that she had on occasion removed excess wax from the clinic floor. She did not recall the floor being very slick and shiny at the time of appellant's fall. She also testified that she had never heard of anyone removing excess wax from the bathroom where appellant fell.

In granting appellee's motion for JNOV the trial court reasoned:

> In the trial of this matter, the plaintiff didn't contend that there was any foreign substance on the floor, but that the floor was "shiny and slick." She seemed aware of this before the fall. The court should have granted the Motion for Directed Verdict, but submitted the matter to the jury with the feeling that the jury would reach a defendant's verdict as there was really no proof of defect or

> showing of notice that the floor was slippery. From the amount of the verdict one could surmise that the jury disregarded the instructions of law, felt sympathy for Mrs. Kopriva and awarded her the amount of the medical bills.

Appellants argue that there was substantial evidence, both direct and circumstantial, to support the jury's verdict. They point out the fact that there was testimony to the effect that the clinic's floors were shiny and slick. However, testimony to this effect was insufficient to show that the bathroom floor's condition caused Mrs. Kopriva's fall. *See, e.g., Black v. Wal-Mart Stores, Inc.*, 316 Ark. 418, 872 S.W.2d 56 (1994). In fact, the evidence showed that the floors were buffed weekly, which, in our view, is the exercise of ordinary care in maintenance of the premises. Possible causes of a fall, as opposed to probable causes, do not constitute substantial evidence of negligence. *Safeway Stores, Inc. v. Willmon*, 289 Ark. 14, 708 S.W.2d 623 (1986).

Upon completing our review of the abstracted record and appellant's argument thereon, we cannot say that the trial court erred in granting appellee's JNOV motion.

Affirmed.

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

NORTHWEST ARKANSAS AREA AGENCY ON AGING
and Risk Management Resources *v.*
Norma GOLMON and Harry Golmon, *et al.*

CA 99-1030 15 S.W.3d 363

Court of Appeals of Arkansas
Division III
Opinion delivered April 26, 2000

Walter A. Murray, for appellant.

Blair & Stroud, by: *H. David Blair* and *Kincade Law Office*, by: *Ronald P. Kincade*, for appellees.

WENDELL L. GRIFFEN, Judge. Northwest Arkansas Area Agency on Aging ("the agency") and Risk Management Resources appeal from the order of the Baxter County Circuit Court that set aside an order allowing appellants to intervene in a negligence suit because the court determined that their petition to intervene was not timely. For reversal, appellants argue that the trial court abused its discretion in holding that their petition to intervene was not timely. We agree and reverse and remand to allow appellants to intervene.

Norma Golmon, an appellee in this case, was working for the agency when she was injured in a car accident on October 6, 1995. As Golmon approached the intersection of Highway 210 and Old Military Road, appellee Charles McCarney entered the intersection and struck Golmon's car, injuring her. In a letter dated October 20, 1995, the agency's insurance carrier notified McCarney's insurance carrier of its intent to claim its subrogation rights against them. Risk Management, the agency's workers' compensation carrier, eventually paid medical benefits, temporary total disability benefits, and permanent partial disability benefits to Golmon.

On September 17, 1998, Golmon filed a negligence suit against McCarney and his employer, Town and Country Discount Foods, and the rental company that owned the truck McCarney was driving. In a letter dated December 8, 1998, (received by appellants on December 21, 1998), appellants were given notice of the lawsuit. On December 16, 1998, appellee Golmon filed a motion to extend time for an additional sixty days, until March 16, 1999, to complete service upon McCarney. The court granted the motion on February 25, 1999.

Golmon died on January 19, 1999, and her husband, Harry Golmon, was appointed administrator of her estate. On January 20, 1999, appellee Town and Country Discount Foods filed a motion for summary judgment alleging that McCarney was not its employee. On January 26, 1999, Golmon and McCarney reached a tentative settlement agreement. On March 3, 1999, the parties in the negligence case filed a petition for approval of a settlement and sent notice of the petition to appellants. On March 10, 1999, appellants served notice to appellees of their motion to intervene. Judge Robert McCorkindale granted the motion to intervene on March 11, 1999, although the parties in this case were apparently

unaware the order had been entered, and although Golmon's extension for completing service on McCarney had not expired.

On March 19, 1999, Golmon filed an opposition to intervention. Each appellee filed an answer to the petition to intervene, and requested that the trial court dismiss appellants' petition. Golmon's answer was filed on April 13, 1999, and alleged that appellants waived their right to intervene by filing their motion in an untimely manner, and because the statute of limitations had expired on its cause-of-action. Judge Gary Isbell presided over the May 6, 1999 hearing on Town and Country's motion for summary judgment and the objections to the motion to intervene. Judge Isbell granted Town and Country's motion for summary judgment, and struck the order granting the petition to intervene because the parties were apparently unaware the order had been filed and no hearing on the matter had been conducted. He then heard testimony on appellants' petition to intervene.

Golmon argued below that appellants had notice of their right to intervene since the date of Norma Golmon's injury, October 6, 1995, and that appellants had notice of the pending suit in December 1998 but chose not to act until March 11, 1999. Golmon also argued that the statute of limitations had expired on the claim. Appellants argued that they did not receive timely notice of the lawsuit but had acted in timely fashion after they received notice.

The trial court considered how far the proceedings had progressed, the prejudice to other parties caused by the appellants' delay in filing the petition to intervene, and the reason for the delay in filing. The court stated that appellants admitted that their right to pursue repayment began when Norma Golman was injured in 1995. The court found that the proceedings had progressed to the point of settlement and that there would be substantial prejudice to the rights and expectations of Golmon to have the terms of the settlement diluted by claims that were not in contemplation during the litigation or during settlement negotiations, and that no viable or reasonable reason was given for the delay. However, the court declined to rule on the statute of limitations issue, stating that sufficient facts had not been presented upon which the court could make such a ruling.

I. Law Governing Motions to Intervene

Arkansas Code Annotated section 11-9-410 (Repl. 1996), which allows a carrier to recover some of the funds expended on workers' compensation benefits, provides:

> (a) Liability Unaffected.
>
> (1)(A) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make a claim or maintain an action in court against any third party for the injury, but *the employer or his carrier shall be entitled to reasonable notice and opportunity to join in the action.*
>
> (B) If they, or either of them, join in the action, they shall be entitled to a first lien upon two-thirds (2/3) of the net proceeds recovered in the action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.

(Emphasis added.)

Rule 24 of the Arkansas Rules of Civil Procedure governs interventions, and provides:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) *when a statute of this state confers an unconditional right to intervene*; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(Emphasis added.)

[redacted] It is clear under Arkansas law that a denial of a motion to intervene is appealable. *See Cupples Farms Partnership v. Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992). While a party may intervene to enforce his interest under section 11-9-410 as a matter of right, the intervention must nonetheless be timely. *See Bank of Quitman v. Phillips*, 270 Ark. 53, 603 S.W.2d 450 (1980). It is also clear that a party who does not intervene to assert

his rights under section 11-9-410 waives those rights. *See John Garner Meats v. Ault*, 38 Ark. App. 111, 828 S.W.2d 866 (1992). Whether an intervention is timely under Rule 24 lies within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *See Cupples, supra.*

Appellants argue they were denied both reasonable notice of the suit and an opportunity to intervene because Golmon did not provide notice of the lawsuit until December 21, 1998, three months after the suit was filed. Appellants maintain that they acted timely in that when they received notice, they retained counsel in this matter. Even so, appellants failed to act until March 11, 1999, and only after they were notified that the parties had reached a settlement. Appellants defend their failure to act until March 11 by noting that they relied on a letter from McCarney's insurance adjuster in which the adjuster acknowledged their lien and stated that they would be a payee on Golmon's settlement check when it was issued. Therefore, appellants argue they had no reason to think that settlement would be "quickly made."

Appellees are correct that this letter from the insurance adjuster in no way relieves appellants of their obligation under section 11-9-410 or Rule 24. Moreover, it is true that appellants did not file their motion to intervene until after the parties had reached a tentative settlement and had petitioned the court for a date for the court to approve the settlement. However, we hold that appellants' motion to intervene was not untimely and that the trial court abused its discretion in striking the motion.

First, we note that the trial court granted Golmon's motion for extension of time from January 15, 1999, until March 16, 1999, to complete service upon McCarney. Appellants' March 10, 1999 motion to intervene was brought six days before the end of the extended period for completing service on McCarney. The trial court noted appellants' failure to act until after the parties reached a settlement, stating, "[T]he concept of joining-in does not to this Court contemplate riding along on the efforts of others and then sharing in the proceeds." We do not share the trial court's characterization of appellants' actions. When appellants filed their motion, the court had neither approved the settlement nor scheduled a court date for reviewing the settlement. Had that court date been set, appellants would have been entitled to three days' written

notice of that date and would have been entitled to a hearing on the issue of whether the court should approve the settlement. *See* Ark. Code Ann. § 11-9-410(c)(3)(Repl. 1996). The record contains no facts which support the conclusion that time was of the essence.

Second, we do not reach the merits of the statute of limitations argument because the trial court did not decide that issue. However, we note the incongruity of Golmon's conduct and the argument that the motion to intervene was untimely. Golmon knew that appellants' right to intervene might arguably expire on October 6, 1998, three years after the date of Norma Golmon's accident. Yet, Golmon neglected to notify appellant of the lawsuit until after that date had passed.

Further, it is inaccurate to maintain that Golmon will now be prejudiced by claims that were not in contemplation during the litigation or during settlement negotiations. Golmon plainly contemplated appellants' right to intervene in this case while conducting settlement negotiations because he notified appellants of the suit *before* appellees reached a tentative settlement negotiation.

The trial court allowed Golmon an additional sixty days to serve McCarney. Golmon waited almost three months after filing the lawsuit before notifying appellants that they had sued. Given all of the foregoing factors, we hold that the trial court abused its discretion in denying appellants' motion to intervene as untimely.

Reversed and remanded.

JENNINGS and NEAL, JJ., agree.

Teresa Lynn MINER v. STATE of Arkansas

CA CR 99-1346 15 S.W.3d 356

Court of Appeals of Arkansas
Division III
Opinion delivered April 26, 2000
[Petition for rehearing denied May 31, 2000.*]

R. Paul Hughes, III, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Leslie Plowman Fisken*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Teresa Lynn Miner appeals from an order of the Sebastian County Circuit Court revoking her probation and sentencing her to five years in the Arkansas Department of Correction with an additional five years suspended. On appeal, she argues that there was insufficient evidence that she violated the terms and conditions of her suspended sentence. We affirm because Miner failed to preserve her argument for appellate review.

On March 3, 1993, Miner pled guilty to felony overdraft and received a five-year suspended sentence and was placed on probation for two years. She was also ordered to make restitution in the amount of $2,243.94, and pay fines and court costs of $639.75, in

* MEADS, J., would grant. PITTMAN, J., would grant for certification.

monthly payments of $100. On March 16, 1995, Miner again pled guilty to felony overdraft, received a five-year suspended sentence and two years' probation, and was ordered to make restitution in the amount of $2,638.58, and pay fines and court costs of $1,145.75, in monthly payments of $75. After Miner failed to make several payments, the State petitioned to revoke her suspended sentences. A hearing on the petition was held on August 11, 1999. In its case-in-chief, the State only introduced ledgers that showed Miner had failed to make payments on either the court costs and fines or the restitution for both the 1993 and 1995 convictions. However, Miner entered into evidence a receipt from the prosecuting attorney dated June 23, 1999, that showed that she made a fifty-dollar payment towards money owed as a result of her 1993 conviction and that her balance was only $1,480. Further, Miner testified that she was unable to work until a month prior to the hearing because she lacked transportation and was trapped in an abusive relationship in which her boyfriend did not let her "go anywhere." She testified that she had left her boyfriend the month before and obtained employment in order to "try to get this taken care of." Miner claimed that at the present time, she only earned $373 every two weeks and it, along with $200 per month in child support, was all that she had to support herself and her two children, ages seven and twenty months. According to Miner, she was not receiving any state aid. She brought with her to court $63 that she offered to pay toward her arrearage and stated that she hoped she could resume payment of her restitution and fees on an amended payment plan that would require her to pay $125 per month.

Miner, however, admitted that her father held Wal-Mart stock in her name and it had not been sold to pay her arrearage, but claimed that her father doubted that it would be enough to significantly help her case. She also conceded that she had not asked the court to reduce her monthly payments. On cross-examination, Miner further admitted that she had three counts of felony overdraft and that she owed a total of $9,321.27 in restitution on the three charges. Miner also admitted that she did not make a payment between February 1997 and June 1999 and that she failed to make the payments of $500 and $1,200 that she had promised to make in two prior court appearances.

On appeal, Miner argues that the trial court erred in granting the State's petition to revoke because there is insufficient evidence

that appellant violated the terms and conditions of her suspended sentence. She asserts that the instant case is analogous to *Baldridge v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990), in which this court reversed a probation revocation where the appellant presented testimony that he was financially unable to fully pay his court costs and restitution or report in person to his probation officer despite making a significant effort to do so. Further, she contends that her ability to secure the assistance of her family by selling stock was foreclosed as a reason for revoking her suspended sentences by *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997). The State, however, asserts that Miner failed to move for a directed verdict at either the close of the State's case or the close of all the evidence, and therefore she is procedurally barred from challenging the sufficiency of the evidence on appeal, and we agree.

Rule 33.1 of the Arkansas Rules of Criminal Procedure was amended on April 8, 1999, to require a motion for directed verdict in a non-jury trial and now states in pertinent part:

> (b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.
>
> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

Conversely, we note that the rules of civil procedure do not require a directed-verdict motion to preserve a challenge to the sufficiency of the evidence for appellate review. Ark. R. Civ. P. 50.

Although the supreme court has stated that a revocation hearing is "not the same as a criminal proceeding" for the purpose of granting a continuance to secure a psychiatric evaluation, *Pyland v. State*, 302 Ark. 444, 790 S.W.2d 178 (1990)(citing *Minnesota v. Murphy*, 465 U.S. 420 (1984)), in *Cook v. State*, 59 Ark. App. 24, 952 S.W.2d 677 (1997), the court of appeals used Rule 1.4 of the Arkansas Rules of Criminal Procedure, because it "applies to statutes governing criminal proceedings," to determine that the sixty-day speedy-hearing rule was not violated, and we recognized that the right to counsel applied to revocation proceedings because it was a "stage" in criminal proceedings. Furthermore, in *Crouch v. State*, 62 Ark. App. 33, 968 S.W.2d 643 (1998), this court interpreted Rule 33.3 of the Arkansas Rules of Criminal Procedure to require a hearing to be set, if requested, for a "Motion for Arrest of Judgment and for New Trial" filed after a probation revocation. Accordingly, we hold that a specific directed-verdict motion is required by Rule 33.1 to preserve a sufficiency-of-the-evidence challenge in revocation proceedings, and Miner's failure to make such a motion requires that we affirm without reaching the merits of her argument.

Affirmed.

JENNINGS and HART, JJ., agree.

EAGLE BANK & TRUST COMPANY *v.*
Kurt DIXON and Big Mamou, Inc.

CA 99-1187 15 S.W.3d 695

Court of Appeals of Arkansas
Division III
Opinion delivered May 3, 2000

[redacted]

Williams & Anderson, LLP, by: *Leon Holmes* and *Timothy W. Grooms*, for appellant.

James & Carter, PLC, by: *Daniel R. Carter*, for appellees.

JOSEPHINE LINKER HART, Judge. This is an appeal from the trial court's refusal to award a deficiency judgment following a sale of collateral. The trial court found that the sale had not been conducted in a commercially reasonable manner. We affirm.

In 1996 and 1997, appellant Eagle Bank & Trust made two loans to appellee Kurt Dixon totaling $45,000. The loans were secured by the furniture, fixtures, and equipment used in the operation of appellee's restaurant, Big Mamou. On November 18, 1998, appellee sold the assets of the restaurant to Club Rio, USA, Inc.[1] Thereafter, Club Rio took possession of the premises, including the

[1] Appellant was aware of the sale. The contract between appellee and Club Rio provided that, in addition to other consideration, Club Rio, as buyer, would "assume the outstanding balance due and owing [appellant] effective December 1, 1998, until paid in full."

furniture, fixtures, and equipment.[2]

On December 23, 1998, appellant filed suit against appellee in Pulaski County Circuit Court alleging that he had defaulted on the loans. The court issued an order of delivery allowing appellant to take immediate possession of the collateral, and appellee was notified that the collateral would be sold at a private sale. However, the sale never took place. Shortly after the order of delivery was issued, appellant's representative visited Club Rio to inspect the collateral and discovered that some of it was either missing or destroyed. As a result, appellant filed an amended complaint adding Club Rio as a defendant and asserting a cause of action for conversion. Attached to the complaint was the affidavit of Susan Barre, appellant's assistant vice-president and loan officer. Barre stated that she had seen the collateral and believed that its value was sufficient to satisfy appellee's debt.

Within days after the amended complaint was filed, appellant sold the collateral to Club Rio for $22,500 and moved to dismiss Club Rio from the lawsuit because a settlement was reached. The motion was granted, and appellant proceeded to trial seeking a deficiency judgment of approximately $18,000 against appellee. That sum represented the amount owed on the loans (approximately $40,500) less the $22,500 received from Club Rio as settlement. Appellee contended that appellant was precluded from seeking a deficiency judgment because the sale of the collateral was not conducted in a commercially reasonable manner. The trial judge agreed and found that appellant's disposition of the collateral was not a commercially reasonable sale but rather the settlement of the lawsuit between appellant and Club Rio. He also found that the price obtained for the collateral was not commercially reasonable given appellant's strong bargaining position with Club Rio (Club Rio was using the collateral to operate its restaurant), and the fact that appellant's representative, Susan Barre, stated in her affidavit that the value of the collateral was equal to the value of appellee's remaining debt, *i.e.*, approximately $40,000. The trial court denied appellant's complaint for a deficiency judgment, and this appeal followed. On appeal, appellant argues that the trial court erred in

[2] Club Rio obtained possession by forcing Dixon to leave the premises, with the assistance of law enforcement officers. Dixon filed a federal court lawsuit as a result, and appellant was aware of the suit.

finding that the sale was not conducted in a commercially reasonable manner.

Every aspect of the disposition of collateral, including the method, time, manner, place, and terms must be commercially reasonable. *See* Ark. Code Ann. § 4-9-504(3) (Repl. 1991). Once the collateral has been disposed of, the debtor remains liable for any deficiency. Ark. Code Ann. § 4-9-504(2) (Repl. 1991). However, a creditor may be barred from seeking a deficiency judgment if the sale of the collateral was not commercially reasonable. *See First Nat'l Bank of Wynne v. Hess*, 23 Ark. App. 129, 743 S.W.2d 825 (1988); *Farmers & Merchants Bank v. Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986). Whether a sale has been conducted in a commercially reasonable manner is essentially a factual question. *See Mercantile Bank v. B & H Associated, Inc.*, 330 Ark. 315, 954 S.W.2d 226 (1997). A trial court's finding on such a question will not be reversed unless it is clearly against the preponderance of the evidence. *See Jones v. Union Motor Co., Inc.*, 29 Ark. App. 166, 779 S.W.2d 537 (1989). It was appellant's burden to prove that the sale proceeded in a commercially reasonable manner. *See Mercantile Bank v. B & H Associated, Inc., supra.*

At trial, appellant's case centered on the testimony of its assistant vice-president, Susan Barre. Barre testified that, after the order of delivery was issued, she made contact with Club Rio and attempted to repossess the collateral. She examined the collateral on two separate occasions and saw that it included various tables, chairs, and kitchen equipment. According to her, the collateral was not in the best condition, and five or six small items were missing. She admitted that she originally thought the bank would receive the $40,000 still owed on the loans, based on Club Rio's offer to assume the loans (which the bank rejected). However, Club Rio offered only $20,000 to purchase the collateral, and the bank countered with a $30,000 offer. After negotiations, Club Rio and the bank agreed to the final $22,500 figure. Club Rio paid that amount and was released from all liability in connection with the bank's lawsuit, including liability for conversion.

At trial, Barre offered her opinion that, based upon her experience, $22,500 was a fair price for the collateral. She also said that, by selling the collateral to Club Rio, the bank did not have to pay any storage, moving, or selling costs that would ultimately have

been borne by appellee. However, on cross-examination, she admitted that an appraisal of the collateral was not conducted. Further, she was unable to explain why, in her affidavit attached to the bank's amended complaint, she stated that the value of the collateral was sufficient to satisfy appellee's debt.

The only other evidence of the value of the collateral came from the testimony of appellee. He said that, based upon his experience in the restaurant business, the collateral was worth $45,000 to $50,000.

Appellant argues on appeal that the trial judge's finding of a lack of commercial reasonableness was improperly based upon appellee's argument that an inadequate price was received for the collateral. It is well settled under Arkansas law that price alone is not dispositive of whether a sale is commercially reasonable. *See Goodin v. Farmers Tractor & Equip. Co.*, 249 Ark. 30, 458 S.W.2d 419 (1970); *Prince v. R & T Motors, Inc.*, 59 Ark. App. 16, 953 S.W.2d 62 (1997). *See also* Ark. Code Ann. § 4-9-507(2) (Repl. 1991). To establish commercial unreasonableness, decidedly stronger proof is needed than an inadequate sale price. See Goodin v. Farmers Tractor & Equip. Co., supra. However, a large discrepancy between the sale price and the fair market value of the collateral signals a need for close scrutiny of the sale procedures. *See Womack v. First State Bank of Calico Rock*, 21 Ark. App. 33, 728 S.W.2d 194 (1987). The trial court in this case did not base its ruling merely on sale price, but acknowledged that a court is required to look at the time, method, and place of the sale as well as the price. In arriving at a decision, the trial court focused on two aspects of the sale other than price. First, the court noted the discrepancy between Barre's testimony at trial that the collateral was worth $22,500 and her statement in her affidavit that the collateral had sufficient value to cover a $40,000 debt. This discrepancy reflected on the credibility of Barre, appellant's primary witness, who bore the responsibility of meeting appellant's burden of proof.

On appeal, the trial court's determination of credibility is considered in deciding whether the findings were clearly against the preponderance of the evidence. *See Beard v. Ford Motor Credit Co.*, 41 Ark. App. 174, 850 S.W.2d 23 (1993). We defer to the trial court's superior ability to judge the credibility of the witnesses and the weight to be given their testimony. See *id.* Barre could not

explain the discrepancy in her statements. Therefore, the trial court may well have found that Barre's testimony at trial regarding the value of the collateral was not credible and concluded that the bank sold the collateral to Club Rio for $22,500 knowing the price was far below the collateral's true value. Ultimately, commercial reasonableness requires that the secured party act in good faith to maximize returns on collateral. *See Marks v. Powell*, 162 B.R. 820 (E.D. Ark. 1993).

Secondly, the trial court determined that the disposition of the collateral was a settlement of a lawsuit between appellant and Club Rio rather than an actual sale. The importance of this consideration lies in the fact that appellant may have acted strictly in its own interest for the purpose of ending litigation without regard to whether the disposition of the collateral was commercially reasonable. Further, a secured party's desire to settle may prevent it from seeking other potential buyers of collateral, a factor that has been considered in determining commercial reasonableness. *See Mercantile Bank v. B & H Associated, Inc., supra.* Accordingly, we hold that the sale of collateral in this case was not conducted in a commercially reasonable manner and affirm.

Affirmed.

JENNINGS and ROAF, JJ., agree.

Emilio TIRADO, M.D. *v.*
John O'HARA and Jo O'Hara, His Wife

CA 99-857 15 S.W.3d 715

Court of Appeals of Arkansas
Division III
Opinion delivered May 3, 2000

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

Compton, Prewett, Thomas & Hickey, P.A., by: *Ted Botner*, for appellee.

JOHN E. JENNINGS, Judge. This is an appeal from an order granting appellees' motion for a new trial in a medical malpractice case. Appellant Dr. Emilio Tirado surgically repaired appellee John O'Hara's hernia in March 1993. During the surgery, appellant placed one stitch through and another one around Mr. O'Hara's femoral nerve, which damaged the nerve and allegedly caused him to suffer pain in the right leg. At trial, the jury returned a verdict in favor of Mr. O'Hara and, based on interrogatories, set his damages at a total of $77,332.03. Although the jury also found in favor of Mr. O'Hara's wife, Jo, on her claim of loss of consortium, it awarded her no damages.

Appellees timely filed a motion for a new trial in which they argued that the jury's award of damages was inadequate and was clearly against a preponderance of the evidence. The trial court agreed and granted the motion. On appeal, appellant contends that the trial court erred in granting appellees' motion for a new trial. We disagree and affirm.

At the time of trial, Mr. O'Hara was fifty-one years old and had worked primarily as a carpenter. The surgery in question was Mr. O'Hara's third repair of a hernia located on the right side. His first hernia surgery occurred in 1990. He experienced a second hernia in 1992. He was also involved in a car accident at that time in which he ruptured a cervical disc. He received treatment for this injury from Dr. Jay Lipke, who kept him off work until January 1993. While convalescing from the neck injury, he had the second hernia repaired by Dr. Kerry Ozment in July 1992.

Mr. O'Hara soon developed another hernia that was repaired by appellant in March 1993. At the trial held on December 8, 1998, Mr. O'Hara testified that he experienced excruciating pain in his right leg the moment he regained consciousness from surgery. He said that the pain has persisted since the surgery but that its intensity comes and goes. He described the pain as a constant burning sensation that also felt like needles or briars were being stuck into his leg. He said that it was painful for his leg to be touched; that he wears overalls ninety-five percent of the time; and that he sleeps with a pillow between his legs. Mr. O'Hara further testified that he

has had trouble sleeping as much as four times a week and that he takes medication to help him sleep. A release procedure was done on the nerve in July 1993, and Mr. O'Hara did say that the pain had been worse prior to the procedure. Mr. O'Hara has not worked since the surgery, and he testified that the main disabling feature of his problem was the pain he felt in his right leg.

In terms of medical treatment, Mr. O'Hara was seen for his complaints of leg pain by Dr. Victor Martinez, a vascular surgeon, in June 1993. From his examination, the doctor suspected an injury to the right femoral nerve. He referred Mr. O'Hara to Dr. Jorge Martinez, a neurosurgeon. This doctor agreed with that diagnosis, and exploratory surgery was scheduled for July 22, 1993. Both Martinez doctors participated in the surgery in which they dissected the nerve and performed a neurolysis. During the procedure, they discovered that the right femoral nerve was entrapped in a large amount of scar tissue that was compressing the nerve. They also found that a suture had pierced the nerve and that another suture had been placed tightly around the nerve, which contributed to its compression. Dr. Jorge Martinez testified that it would take a year for the nerve to heal and that he would consider the damage to the nerve permanent if there was still pain after that time. It was also said that, if the sutures had been placed there before the surgery performed by appellant, Mr. O'Hara would have previously experienced the symptoms of leg pain. Along the same lines, Dr. Lipke testified that appellant did not complain of leg pain at the time of the second hernia surgery. Dr. Lipke also assigned a fifty percent permanent impairment rating as a result of the damage to the nerve.

Dr. Albert Beatty testified that hernia surgery was now done on an out-patient basis. He said that, given Mr. O'Hara's symptoms, he would have suspected a problem with the femoral nerve three to four days after the surgery. He further testified that, if there is an injury to a nerve because of a suture going through it, it is incumbent to remove the suture as soon as possible so as to reduce the chance of permanent damage. He felt that it would have been too late for a neurolysis to have been done as early as May 1993.

Dr. David Kline, a neurosurgeon, saw Mr. O'Hara in September 1995. He said that Mr. O'Hara had a mild femoral neuropathy that was associated with pain. He testified that the muscles served by the nerve were working well but that Mr. O'Hara's knee-jerk

reaction was absent and that he showed hypethesis and hyperthesia in the areas served by the nerve. Dr. Kline had suggested another procedure to clean out the nerve, which Mr. O'Hara declined. Dr. Kline said that he understood that decision because there was only a fifty to sixty percent chance that the procedure would help and a small chance that it might make the condition worse. He also believed it doubtful that the procedure would be helpful now after the passage of so much time.

Dr. William Ackerman, a pain-management physician, testified that he felt Mr. O'Hara's complaints of pain were genuine by observing changes in his hemodynamic perimeter by monitoring changes in pulse, blood pressure, and an EKG during his examination. Dr. Kerry Ozment testified that the placement of a suture through the femoral nerve would cause a tremendous amount of discomfort and excruciating pain.

Dr. Reginald Rutherford, a neurosurgeon, was a witness for the defense. He did not personally conduct an examination of Mr. O'Hara, but he reviewed Mr. O'Hara's medical records for the purpose of offering an opinion regarding the extent of his injury and resulting disability. Dr. Rutherford assigned a four percent permanent impairment rating. He said that one could draw the conclusion that there was excellent surgical intervention and a good recovery of motor function and that there was nothing objectively identified that would prevent gainful employment. He further testified that he did not question that Mr. O'Hara had suffered pain and that he did not disbelieve Mr. O'Hara's complaints of pain.

Rule 59 of the Arkansas Rules of Civil Procedure permits a trial court to grant a new trial if there is error in the assessment of the amount of the recovery, whether too large or too small, or if the verdict is clearly contrary to the preponderance of the evidence. Ark. R. Civ. P. 59(a)(5) and (6). The test this court applies in reviewing a trial court's granting of a motion for a new trial is whether the trial court abused its discretion; a showing of an abuse of discretion is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Lloyd's of London v. Warren,* 66 Ark. App. 370, 990 S.W.2d 589 (1999). Abuse of discretion in granting a new trial means a discretion improvidently exercised, i.e., exercised without

due consideration. *Razorback Cab of Fort Smith, Inc. v. Martin,* 313 Ark. 445, 856 S.W.2d 2 (1993).

To arrive at its decision, the jury was asked a series of nine interrogatories. The questions and the jury's responses were as follows:

> INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that there was negligence on the part of Dr. Emilio Tirado which was the proximate cause of any damages?
>
> ANSWER: Yes.
>
> Only if your answer to Interrogatory No. 1 is yes, then answer the following Interrogatories. In those Interrogatories, state the amount of any damages which you find from a preponderance of the evidence were sustained by John O'Hara as a result of the occurrence.
>
> VERDICT NO. 2: For the nature, extent, duration and permanency of his injury: *$-0-*.
>
> VERDICT NO. 3: For past medical expenses: *$16,832.03*.
>
> VERDICT NO. 4: For the present value of medical services reasonably certain to be required in the future: *$25,000.00*.
>
> VERDICT NO. 5: For pain, suffering and mental anguish experienced in the past: *$-0-*.
>
> VERDICT NO. 6: For the present value of any pain, suffering and mental anguish reasonably certain to be experienced in the future. *$-0-*.
>
> VERDICT NO. 7: For the value of any working time lost. *$10,500.00*.
>
> VERDICT NO. 8: For the present value of any ability to earn in the future. *$25,000.00*.
>
> VERDICT NO. 9: We, the jury, find the issues in favor of the plaintiff, Jo O'Hara, and assess damages in the following amount. *$-0-*.

On appeal, appellant posits various theories to explain the jury's verdict. However, the trial court does not abuse its discretion when it can fairly be found that the jury failed to take into account all the elements of the total injury proven, even if it might be

possible to explain the verdict on the basis of something like awarding the plaintiff only the proven pecuniary losses. *Carr v. Woods*, 294 Ark. 13, 740 S.W.2d 145 (1987); *see also, e.g., Hamilton v. Russell*, 307 Ark. 478, 821 S.W.2d 35 (1991). In *Saber Mfg. Co. v. Thompson*, 286 Ark. 150, 689 S.W.2d 567 (1985), the plaintiff was lifted into the air and both of his forearms were broken when a tire ruptured with an explosive force. He was disabled for eight weeks, including substantial hospitalization; he lost wages of $500.00 a week; and he suffered great pain and injuries that were both permanent and disfiguring. The trial court granted the plaintiff's motion for a new trial when the jury awarded damages only in the amount of the medical expenses incurred. On appeal, the supreme court found no abuse of discretion in the trial court's decision.

■ In the case at bar we hold that the trial court could fairly conclude that the jury failed to take into account all of the elements of Mr. O'Hara's damages. The record leaves no room for doubt that Mr. O'Hara's femoral nerve had been damaged and that the injury manifested itself in the form of pain. It was also uniformly recognized in the testimony that the injury was most likely to some degree permanent. Yet, the jury awarded damages for only the actual monetary losses sustained by Mr. O'Hara. We find no abuse of discretion in granting the motion for new trial.

■ With respect to Mrs. O'Hara's claim for loss of consortium, appellant further argues that a jury need not, as a matter of law, give a pecuniary award for loss of consortium when damages are awarded to the injured spouse, as was held in both *Waterfield v. Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982), and *Smith v. Pettit*, 300 Ark. 245, 778 S.W.2d 616 (1989). Those cases, however, are distinguishable from the one at bar. In both of them, it was argued that the trial court erred in refusing to order a new trial based on the perceived inconsistency of damages being awarded to the injured spouse and none being awarded for loss of consortium. Here, the trial court granted the motion for a new trial based on a finding that there was a fundamental error in the assessment of the injured spouse's damages. We therefore can find no abuse of discretion in permitting the claim for loss of consortium to be retried as well.

Affirmed.

NEAL and GRIFFEN, JJ., agree.

Victoria FARRELLY *v.* STATE of Arkansas

CA CR 99-1167 15 S.W.3d 699

Court of Appeals of Arkansas
Division II
Opinion delivered May 3, 2000

William R. Simpson, Jr., Public Defender and *Andy O. Shaw*, Deputy Public Defender, by: *David Sudduth*, Deputy Public Defender, for appellant.

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

OLLY NEAL, Judge. Victoria Farrelly was convicted in a bench trial of committing the felony offense of battery in the second degree. Using the evidence presented in the prosecution of the second-degree battery case, the trial court revoked appellant's previously imposed probationary sentence. Appellant received consecutive sentences of thirty-six months' incarceration, with thirty months suspended, for her second-degree battery conviction, and thirty-six months' incarceration, with thirty months suspended, for the revocation. She has appealed to this court to reverse her conviction and revocation, arguing that the evidence was insufficient to establish either that she committed battery in the second degree or that she violated the conditions of her probationary sentence. Upon reviewing the evidence presented, we find the evidence is sufficient to support both the conviction and revocation. We, accordingly, affirm.

On December 21, 1998, Stacie Prime drove to the Wendy's Restaurant located on Markham Street in Little Rock. She placed her order and proceeded towards the drive-through window where she attempted to pay for her order by placing cash on the window sill. According to Ms. Prime, her boyfriend Roderick Crutchfield, and Tunita Thornton, who was driving behind Ms. Prime's car,

appellant closed the drive-through window on Ms. Prime's hand. Ms. Prime parked her car and went inside the restaurant.

While inside the restaurant appellant and Ms. Prime engaged in a physical altercation. It is undisputed that at some point during the course of the altercation, appellant stabbed Ms. Prime three times with a knife taken from the restaurant's kitchen. Ms. Prime was transported by ambulance to a local hospital, but was not hospitalized. Appellant was arrested and charged with committing second-degree battery.

At trial, appellant moved for a directed verdict at the conclusion of the State's case-in-chief, and again at the close of the defense's case. On appeal, she contends that the evidence is not sufficient to sustain the conviction because the State had failed to show that the victim suffered a physical injury from the altercation.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997). The test for determining the sufficiency of the evidence is whether the evidence is supported by substantial evidence, which is evidence of such certainty and precision to compel a conclusion one way or another. *Id.* We review the evidence in the light most favorable to the appellee, considering only the testimony that tends to support the verdict. *Jenkins v. State*, 60 Ark. App. 122, 959 S.W.2d 427 (1998).

In order for the court to have found appellant guilty of second-degree battery in violation of Arkansas Code Annotated section 5-13-202(a)(2) (Repl. 1997), the State was required to prove that appellant caused "physical injury" to Stacie Prime by means of a deadly weapon other than a firearm.

Arkansas Code Annotated section 5-1-102(14) (Repl. 1997) defines "physical injury" as the impairment of physical condition or the infliction of substantial pain. Pain is a subjective matter and difficult to measure from testimony. *Sykes v. State*, 57 Ark. App. 5, 940 S.W.2d 888 (1997). In determining whether an injury inflicts substantial pain, the fact-finder must consider all of the testimony and may consider the severity of the attack and the sensitivity of the area of the body to which the injury is inflicted. *Id.* Moreover, the fact-finder is not required to set aside its common knowledge and

may consider the evidence in light of its observations and experiences in the affairs of life. *Id.*

Appellant cites *Kelly v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983), in support of her argument that the State failed to produce sufficient evidence to support the second-degree battery conviction. However, the facts in *Kelly* are easily distinguished from the facts in the case presently before the court. In *Kelly*, the victim was stabbed in the shoulder, but did not require medical attention for an injury described by one witness as a "fingernail scratch."

We believe the facts found in the present case are more akin to those found in *Hundley v. State*, 22 Ark. App. 239, 738 S.W.2d 107 (1987). In *Hundley*, we upheld a battery conviction where the victim, a police officer, was stabbed completely through the shoulder with a three-inch knife and testified afterward that he felt faint, experienced chest pains and difficulty in breathing. This court held that these symptoms, in addition to evidencing substantial pain, showed the "temporary impairment of physical condition." 22 Ark. App. at 243, 738 S.W.2d at 110.

In the present case, the victim testified that she was stabbed in the shoulder, back, and arm and that the knife penetrated the muscle in her shoulder area. Ms. Prime testified that she felt faint and "felt this warmness run down my body." She also testified that she was scarred as a result of the attack, and that she continued to receive treatment for those scars. In light of the severity of the attack, we hold that the evidence is sufficient to sustain the conviction for second-degree battery.

With regard to the issue of the revocation, the standard of review is slightly different. In revocation cases, the trial court must find by a preponderance of the evidence that the defendant has failed to comply with the conditions of his probation before it may be revoked. Ark. Code Ann. § 5-4-309(d) (Repl. 1997). On appeal, we do not reverse the trial court's decision unless it is clearly against the preponderance of the evidence. *See Baldridge v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990). In light of the evidence outlined above, we cannot conclude that the trial court erred in revoking appellant's probation.

Affirmed.

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

Virginia JONES, Carolyn Smalling,
and Margaret Barron *v.* Vernita ELLISON

CA 99-803 15 S.W.3d 710

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 3, 2000
[Petition for rehearing denied June 7, 2000.*]

* PITTMAN and CRABTREE, JJ., would grant.

J. V. Spencer, III, for appellants.

Compton, Prewett, Thomas & Hickey, by: *Ted Botner*, for appellee.

OLLY NEAL, Judge. Minnie Lou Timmins died testate on September 24, 1998, leaving an estate worth more than $2,000,000. On October 27, 1998, the executor of the decedent's estate, First United Trust Company (First United), through its attorney, Michael F. Mahoney, filed a petition to construe the last will and testament of Ms. Timmins in relation to a jewelry box containing several pieces of jewelry and a handwritten note discovered in the decedent's dresser drawer. The note found in the jewelry box was handwritten entirely by the decedent and contained the following words: "I want Vernita Ellison to have these items and Snuggles." The end of the note contained the signature and date "Minnie Lou, September 29, 1997." In its petition, First United asserted that in determining the assets of the decedent's estate, it discovered the following items of tangible personal property in the jewelry box: (1) a watch on a chain; (2) one ring—one center stone—six small stones; (3) one necklace—one center stone—four small stones, (4) one engagement ring—one center stone—one side stone, (5) one wedding ring—five small stones, (6) a note. First United asserted that it was unable to determine from the decedent's will whether the property contained in the jewelry box should be distributed to the residuary beneficiaries, the appellants in this case, or whether the handwritten note was part of the will, which would require the contents of the jewelry box to be given to Vernita Ellison. On November 10, 1998, Vernita Ellison filed a response to the petition claiming that she served as a paid caretaker for the decedent and that on many occasions, the decedent made it known to her that the jewelry box in the decedent's dresser drawer contained items of jewelry as described in the petition, which were to be given to her. The appellants, Virginia Jones, Carolyn Smalling, and Margaret Barron (now deceased), filed a separate response to the petition claiming that the handwritten note did not comply with the decedent's reservation of right under Ark. Code Ann. § 28-25-107 (1987), in paragraph two of the will. Paragraph two of the decedent's last will and testament states as follows:

> I reserve the right, pursuant to Section 4 of Act 814 of the Acts of the General Assembly of the State of Arkansas for 1979 (Ark. Code Ann. 28-25-107), to make disposition of tangible personal property by attaching or associating with this Will a written, dated statement and list signed by me or in my handwriting designating the devisees of items of tangible personal property.

The appellants alleged that the handwritten note did not evidence testamentary intent as required by law in that it did not state "at my death" or other words evidencing testamentary intent. They further alleged that the note did not describe any object with reasonable certainty and that there was a patent ambiguity in the words "these items" of personal property. The appellants requested the trial court to disallow any extrinsic evidence as to the intention of the decedent and asked the trial court to grant them a summary judgment determining that the handwritten note was an ineffective testamentary disposition of the decedent's personal property.

At a hearing on these matters presented by the parties, the appellants objected to any testimony by Vernita Ellison on the ground that testimony relating to the intention of the testatrix should not be admitted into evidence. The trial court allowed Ms. Ellison to proffer her testimony and reserved its ruling on the appellants' motion for summary judgment and their objection to Ms. Ellison's testimony.

In his letter opinion dated February 24, 1999, the trial judge made the following findings:

> Mrs. Timmins knew she had a will. She also knew that the will provided that she could dispose of personal property by a separate written, signed and dated list.
>
> . . . .
>
> She may not have used the words testamentary disposition but "have" means that she wanted the items to belong to Mrs. Ellison. There is no specific list but "these items" inside the jewelry box which contained the note left no doubt as to what the items were.

On appeal, appellants first argue that the trial court erred in finding that the handwritten note found in the jewelry box described the items therein with reasonable certainty under Ark. Code Ann. § 28-25-107(b)(2) (1987). Section 28-25-107(b)(2) states that "to be admissible under this subsection as evidence of the intended disposition, the writing must either be in the handwriting of the testatrix or be signed by her and must describe the items and devisees with reasonable certainty."

■■ Probate cases are reviewed *de novo* on the record. *Balletti v. Muldoon*, 67 Ark. App. 25, 991 S.W.2d 633 (1999). The decision of the probate court will not be disturbed unless clearly

erroneous, giving due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Vier v. Vier*, 62 Ark. App. 89, 968 S.W.2d 657 (1998). The cardinal principle in the interpretation of wills is that the testatrix's intent governs. *Gifford v. Estate of Gifford*, 305 Ark. 46, 805 S.W.2d 71 (1991). That intention is to be gathered from the four corners of the instrument and by giving meaning to the provisions in their entirety, if possible. *In re Estate of Conover v. Mobley*, 304 Ark. 268, 801 S.W.2d 299 (1990).

When construing a testamentary document to arrive at the testatrix's intention, one does not look at the intention that existed in the testatrix's mind at the time of the execution, but that which is expressed by the language of the instrument. *Acklin v. Riddell*, 42 Ark. App. 230, 856 S.W.2d 322 (1993). A testatrix's intention should be ascertained from the instrument itself and given its expressed intent. *Id.*

In the present case, the handwritten note found in the decedent's jewelry box stated that the decedent wanted Vernita Ellison to have her dog "Snuggles" and what she termed "these items." The parties stipulated that after Voncile Berry, Trust Officer at First United Trust Company, learned of the jewelry, she went to the decedent's home and found the jewelry box containing the note inside the dresser drawer.

The appellants argue that the note in question is uncertain because it is portable in nature and capable of being placed in any confined area by a third party, and that the appellee and her husband had "clear and unfettered" access to the decedent's home at least two days before the decedent's death. However, the abstract does not reflect that the appellants' arguments were made to the probate judge. *Cleveland v. Estate of Stark*, 324 Ark. 461, 923 S.W.2d 857 (1996). The record on appeal is limited to that which is abstracted. *Id.* The appellate court does not address arguments raised for the first time on appeal. *McNeely v. State*, 54 Ark. App. 298, 925 S.W.2d 177 (1996). Nonetheless, the testatrix recited words of testamentary intent to give Ms. Ellison her dog and the jewelry contained within the jewelry box by stating in the note that she "want[ed] Vernita Ellison to have" the items and by placing the note directly in the jewelry box with the items. Further, there was no evidence introduced reflecting that Ms. Ellison had tampered with the note left by the testatrix. The paramount principle in the

interpretation of wills is that the intention of the testatrix will govern and in the absence of fraud or deception in the execution of a will, strict technical construction of the statutory requirements is avoided in order to give effect to the testatrix's wishes. *Clark v. National Bank of Commerce*, 304 Ark. 352, 802 S.W.2d 452 (1991).

For their next point on appeal, the appellants argue that the trial court erred in admitting the testimony of Vernita Ellison to prove the intent of the testatrix as it related to the note found in the jewelry box. However, we find no merit in this argument for two reasons. First, the abstract does not reflect that the appellants obtained a ruling on their objection to Ms. Ellison's testimony. To preserve a point for appellate review, a party must obtain a ruling from the trial court. *Vaughn v. State*, 338 Ark. 220, 992 S.W.2d 785 (1999). The burden of obtaining a ruling on a point is on the movant and any objections and questions left unresolved are waived and may not be relied upon on appeal. *Casteel v. State Farm Mut. Auto. Ins. Co.*, 66 Ark. App. 220, 989 S.W.2d 547 (1999). Secondly, the letter opinion of the trial court does not appear to have relied on Ms. Ellison's testimony in its finding that the decedent intended to dispose of the items in the note by giving them to Ms. Ellison.

For their last point on appeal, the appellants argue that the trial court erred in failing to give effect to paragraph two of the decedent's will. As previously stated, paragraph two of the decedent's last will and testament stated that the decedent reserved the right to make disposition of her tangible property by "attaching or associating" with her will "a written, dated statement and list" signed in her handwriting. In this case, although the note found in the jewelry box was not attached to the will, it was enclosed in the jewelry box with specific items that could be identified, and it listed the devisee of the items. The note was further dated and signed in the handwriting of the testatrix. In finding that Section 28-25-107 was met in this case, the trial court made the following remarks:

> On September 29, 1997, the decedent left such a note in a jewelry box along with various rings and other jewelry. The note stated: "I want Vernita Ellison to have these items and Snuggles." The facts produced at trial conclusively showed that Mrs. Timmins knew that she had a Will, and knew that the Will allowed her to dispose of personal property by a separate written, sign [sic] and dated document.

On these facts, we cannot say that the probate court's findings that the note should be admitted as a part of the decedent's will and that the tangible personal property listed in the note should be distributed to Vernita Ellison are clearly erroneous.

Affirmed.

HART, JENNINGS, and MEADS, JJ., agree.

PITTMAN and CRABTREE, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I agree with the facts as stated in the majority opinion, but I am unable to agree that the handwritten note indicated granting of the property to the appellee in accordance with the statute. Ark. Code Ann. § 28-25-107 (1987) provides:

> (a) Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.
>
> (b)(1) Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, securities, and property used in trade or business.
>
> (2) *To be admissible* under this subsection as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him *and must describe the items and devisees with reasonable certainty.*
>
> (3) The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will (emphasis added).

I simply do not believe that the writing in this case describes the items with reasonable certainty as required by statute. The note left by Mrs. Timmins stated, "I want Vernita Ellision to have these items and Snuggles (the dog)." The note was left in a jewelry box. The note does not describe anything, much less the property to be

disposed of. This writing simply is not sufficient to describe the property.

Another problem with the writing left in the jewelry box is that it could be moved to a lock box or anywhere and still carry the weight of the testatrix's signature. In my opinion, the possibility of fraud is too great to extend the meaning of the statute as far as the majority opinion does.

I would reverse.

PITTMAN, J., agrees.

ULTRACUTS LTD., and Ultracuts Franchises, Inc.
v. WAL-MART STORES, INC., and Wal-Mart Canada, Inc.

CA 99-449 16 S.W.3d 265

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 3, 2000

Everett Law Firm, by: *John C. Everett*; *Shemin Law Firm*, by: *Kenneth R. Shemin*, for appellants.

Ranae Bartlett and *Jon B. Comstock*, for appellees.

WENDELL L. GRIFFEN, Judge. This case concerns a breach-of-contract and fraud lawsuit filed by appellants Ultracuts Ltd. and Ultracuts Franchises, Inc. (hereafter Ultracuts), against appellees Wal-Mart Stores, Inc., and Wal-Mart Canada, Inc. (hereafter Wal-Mart). The suit was based upon a purported oral agreement whereby Ultracuts was granted the right to operate its hair salons as "stores-within-a-store" in various Wal-Mart locations in western Canada. The circuit judge granted summary judgment in favor of Wal-Mart. We reverse and remand because genuine issues of fact remain to be tried.

In 1994, Wal-Mart acquired the assets of more than one hundred retail stores from Woolworth Canada, Inc. Until that time, a company called Magicuts had provided hair-care services in the Woolworth stores. However, after the buyout, Meril Rivard, the president of Ultracuts, contacted Wal-Mart about the possibility of Ultracuts placing hair salons within the new Wal-Mart stores. According to Rivard, he was informed by Brad Messer, Wal-Mart's international property manager, that Magicuts would be removed

from the stores. Later, Messer contacted Rivard through a realty agent to inform him that there was an opportunity for a hair-care provider to be placed in forty-three stores in western Canada. When Rivard expressed interest, Messer sent him four proposed lease agreements concerning four different Wal-Mart locations.

Rivard quickly executed the lease for one store in Winnipeg. However, he encountered two problems. First, the Winnipeg store manager was unhappy with the lease agreement. Secondly, he was told by Brian Luborsky, president of Magicuts, that Magicuts hair salons would be placed in some of the new Wal-Mart stores. In light of these events, Rivard requested an immediate meeting with Messer. The two met in Bentonville on October 12, 1995, and, according to Rivard, entered into the oral agreement that is the subject of this case. The purported agreement contained four parts and essentially provided that: 1) Ultracuts hair salons would occupy space in certain Wal-Mart stores in western Canada; 2) Wal-Mart would not place any other hair salons in those stores without first giving Ultracuts the right to occupancy; 3) in any market in which Ultracuts occupied space in a Wal-Mart store, Wal-Mart would not enter into a business relationship with any other salon in the market; and 4) Wal-Mart would offer space in its existing stores to Ultracuts before offering space to any other "store-within-a-store" licensees.

After the October 12 meeting, Rivard signed lease agreements for two additional stores. Ultracuts then began preparing for its entry into other Wal-Mart stores and incurred expenses for equipment, staffing, and travel.

In November 1995, Messer learned that another Wal-Mart executive named Mel Redman had made an oral agreement in 1994 promising to give Magicuts the opportunity to place its hair salons in the new Wal-Mart stores in Canada. However, neither Messer nor any other Wal-Mart representative communicated this information to Rivard. In fact, on December 4, 1995, Messer sent a letter to Rivard's realtor enclosing a list of seventeen stores in western Canada "which could have available tenant space." Rivard was instructed to contact Messer if he was interested, and Messer stated that he would "operate under the assumption that we are able to put Ultracuts in the stores." Approximately two weeks later, Rivard

wrote to Messer expressing interest in some of the listed stores and providing sketches for four others.

Still unaware of any possible conflicting agreement between Wal-Mart and Magicuts, Rivard executed a written contract with Wal-Mart in early 1996 entitled, using the British spelling, "Licence Agreement." The agreement did not contain the terms of the oral agreement entered into between Messer and Rivard on October 12. However, its stated purpose was to establish the framework within which Wal-Mart would grant Ultracuts licenses to operate hair-care salons in its stores. The agreement contained no set terms for payment or duration of the licenses, but it had schedules attached for that purpose. Schedules A and D set out the specific terms for four particular stores. Schedule B, entitled "New Store Licence Schedule" was left open for completion as further licenses were granted in other Wal-Mart stores.

By mid-1996, it became clear to Wal-Mart executives that conflicting agreements had been entered into between Ultracuts and Magicuts. A meeting was held in July 1996 during which Rivard asked that his agreement be honored. At some point he was told by David Ferguson of Wal-Mart that the Magicuts agreement preceded the Ultracuts agreement. Thus, on September 18, 1996, Ultracuts sued Wal-Mart in Benton County Circuit Court. The complaint set out the purported October 1995 oral agreement between Rivard and Messer and alleged that Wal-Mart had breached the agreement and had committed fraud by failing to disclose its conflicting agreement with Magicuts. Wal-Mart moved to dismiss the complaint on the grounds that the oral agreement, if it existed, violated the statute of frauds and the rule against perpetuities. The motion was denied, but Ultracuts later amended its complaint to characterize its agreement as a license rather than a lease to avoid the specter of those defenses.

On June 10, 1998, Wal-Mart filed its motion for summary judgment with numerous attachments, to which Ultracuts responded in kind. Wal-Mart contended that the purported oral agreement was too indefinite to enforce because it was simply an "agreement to agree." Further, it noted that, because it had not actually placed any competing hair salons in its western Canadian stores, it had not breached the agreement. The statute of frauds and

rule against perpetuities defenses were raised again as they had been in the motion to dismiss. Additionally, Wal-Mart claimed that a merger clause in the 1996 written contract negated any prior oral agreements or representations.

The motion was the subject of three separate hearings and, in the interim between the hearings, the parties continued to file affidavits, discovery responses, and excerpts from depositions. On October 16, 1998, two months before the final hearing, Ultracuts amended its complaint to set out the fourth component of the alleged oral agreement, which had not been recited in its earlier complaint, *i.e.,* that Wal-Mart had agreed to offer store space to Ultracuts before offering it to any other licensees. After the final hearing, the circuit judge granted summary judgment in favor of Wal-Mart on the breach of contract claim for the following reasons: 1) the oral agreement was too indefinite to be enforced; 2) the oral agreement had not been breached; 3) the oral agreement violated the statute of frauds and the rule against perpetuities; and 4) the oral agreement was merged into the later written contract. Summary judgment was granted on the fraud claim based on the doctrine of merger and on the absence of any reasonable reliance by Ultracuts. Additionally, the trial judge struck Ultracuts's second amended complaint. This appeal followed.

■■ Summary judgment, while no longer considered a drastic remedy, is only approved when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to his day in court. *Guidry v. Harp's Food Stores, Inc.*, 66 Ark. App. 93, 987 S.W.2d 755 (1999). The burden of sustaining a motion for summary judgment is on the moving party. *Id.* On appeal, we view the evidence in a light most favorable to the nonmoving party. *Id.* It is our task to decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Hawkins v. Heritage Life Ins. Co.*, 57 Ark. App. 261, 946 S.W.2d 185 (1997).

We address first the issues regarding the merger clause. The 1996 "Licence Agreement" contained a clause which recited that it constituted the entire agreement between the parties regarding

Ultracuts' use of the "Licensed Premises." The clause further stated that there were no agreements or representations other than the ones contained therein and that all prior agreements or statements were superseded. Wal-Mart contends that, as a matter of law, this clause precludes any action by Ultracuts on a prior oral agreement. Ultracuts claims that the terms of the Licence Agreement were limited to the four particular stores expressly mentioned in the agreement.

We hold that a genuine issue of fact remains to be decided on the interpretation of the merger clause. Generally, a written contract merges with and thereby extinguishes all prior and contemporaneous negotiations, in the absence of fraud, accident, or mistake. *Farmers Cooperative Ass'n, Inc. v. Garrison*, 248 Ark. 948, 454 S.W.2d 644 (1970). The same is true regarding prior representations that are alleged to be fraudulent. *Stevens v. Arkansas Power & Light Co.*, 197 Ark. 798, 124 S.W.2d 972 (1939). Although the merger clause in this case states unequivocally that there are no agreements or representations, oral or otherwise, other than those contained in the written contract and that all prior understandings, arrangements, agreements, statements, or communications are superseded, it cannot be said as a matter of law that the contract governs all of Wal-Mart's agreements with Ultracuts on each store-within-a-store arrangement. On the one hand, the stated purpose of the agreement is to provide a framework within which the licensing operation will take place. However, the term "Licensed Premises" is defined in the contract to mean either one store or all the stores collectively. Further, the only specific terms or payment schedules contained in the Licence Agreement are for the four individual stores. Where a contract is susceptible to different interpretations, it is ambiguous. *See Lee v. Hot Springs Village Golf Sch.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997). If an ambiguity exists, there is a question of fact as to the contract's meaning. *See First Nat'l Bank of Crossett v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992), *cert. denied*, 507 U.S. 919 (1993).

We also take into account the fact that, prior to signing the Licence Agreement, Ultracuts had already executed three other written agreements for individual stores, which at least raises the possibility that the arrangement between Wal-Mart and Ultracuts

was not going to be governed by one master agreement. Further, Wal-Mart's conduct after the Licence Agreement was executed in January 1996 may be seen as inconsistent with the notion that the contract fully integrated its agreement with Ultracuts. In mid-1996, Wal-Mart attempted to work out a compromise whereby it would give some stores to Magicuts and some stores to Ultracuts. For these reasons, we hold that the trial judge erred in granting summary judgment on both the contract and fraud claims based upon the merger clause contained in the Licence Agreement.

The next issue concerns the trial court's ruling that the October 1995 oral agreement was too indefinite to be enforced. To have a valid contract, all terms should be definitely agreed upon. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). *See also Kinkead v. Estate of Kinkead*, 51 Ark. App. 159, 912 S.W.2d 442 (1995). The terms must be "reasonably certain." *ERC Mtg. Group, Inc. v. Luper,* 32 Ark. App. 19, 795 S.W.2d 362 (1990). Wal-Mart claims that the alleged oral agreement in this case was simply an agreement to engage in future negotiations and so was not a definite contract. Generally, such a contract would be void for indefiniteness. *See Hatch v. Scott*, 210 Ark. 665, 197 S.W.2d 559 (1946); *Lonoke Nursing Home, Inc. v. Bennett Family Partnership*, 12 Ark. App. 282, 676 S.W.2d 461 (1984); *Phipps v. Storey*, 269 Ark. 886, 601 S.W.2d 249 (Ark. App. 1980). However, whether this oral contract was simply an agreement to agree in the future is a fact question. Although the actual rental/license prices and terms were not set in October 1995, the agreement, when viewed in the light most favorable to Ultracuts, was more in the nature of a general agreement that Ultracuts would be the exclusive hair salon in Wal-Mart stores in western Canada and would have right of first refusal regarding available space in those stores. Considering the purpose of the agreement, a factfinder could determine that it contained all terms necessary to establish a contract.

Next, we consider the trial judge's ruling that Wal-Mart did not breach the oral agreement. Wal-Mart argues that no breach occurred because, undisputedly, it has not placed any hair salons in its western Canadian stores other than Ultracuts. However, Wal-Mart executives made statements to Rivard indicating that they felt bound by the company's agreement with Magicuts.

These statements could constitute anticipatory repudiation. It has been said that, to prove anticipatory repudiation, one must show a present, positive, and unequivocal refusal to perform. *See Kellum v. Gray*, 266 Ark. 996, 590 S.W.2d 33 (Ark. App. 1979). It has also been said, less strictly, that a breach occurs when one party by words or conduct indicates that the agreement is being repudiated or breached. *See Oaklawn Bank v. Alford*, 40 Ark. App. 200, 845 S.W.2d 22 (1993). Wal-Mart's failure to wash its hands of the Magicuts deal coupled with a Wal-Mart executive's deposition testimony that the Magicuts deal preceded Ultracuts deal and Mel Redman's deposition testimony that he felt the Magicuts deal was binding all serve to create a fact question on the issue of anticipatory repudiation. Likewise, a fact question exists regarding whether Wal-Mart breached the fourth component of the alleged agreement, which was that Wal-Mart would offer space in its stores to Ultracuts before offering it to any other licensee. Ultracuts interprets this to mean any licensee, including non-hair salon licensees. It is undisputed that there are other licensees such as photographers or jewelers in Wal-Mart stores where Ultracuts was not offered space first. Viewing the evidence in the light most favorable to Ultracuts, a fact question remains on the point.

We now turn to the complicated issue of whether Ultracuts' cause of action for breach of contract was barred by either the statute of frauds or the rule against perpetuities. Wal-Mart contends that the October 1995 oral agreement is unenforceable because it is not in writing. Indeed, the statute of frauds provides that a contract for the lease of lands for a term of longer than one year is unenforceable unless it is in writing. Ark. Code Ann. § 4-59-101(a)(5) (Repl. 1996). Wal-Mart also contends that the agreement violates the rule against perpetuities because it gives Ultracuts a perpetual right of first refusal. Indeed, the rule against perpetuities provides that an interest in property must vest within a period measured by a life in being plus twenty-one years. *Comstock v. Smith*, 255 Ark. 564, 501 S.W.2d 617 (1973). However, neither the statute of frauds nor the rule against perpetuities applies to license agreements. *See Mikel v. Development Co., Inc.*, 269 Ark. 365, 602 S.W.2d 630 (Ark. App. 1980); *Comstock v. Smith, supra*; *First Nat'l Bank & Trust Co. v. Sidwell Corp.*, 234 Kan. 867, 678 P.2d 118 (1984). Wal-Mart argues in this case that the purported oral agree-

ment between it and Ultracuts is a lease, not a license. However, a genuine issue of material fact remains to be decided on this issue. A lease divests the owner/lessor of possession and the right to possession and gives the right to possession to the tenant. *Harbottle v. Central Coal & Coke Co.*, 134 Ark. 254, 203 S.W. 1044 (1918). A license, on the other hand, conveys no interest in land but is simply an authority or power to use land in some specific way. *Id.*

Arkansas courts have never addressed this distinction in the case of a hybrid lease/license like we have here. However, courts from other jurisdictions have done so. It has generally been held that one who occupies space in another's business is a licensee rather than a lessee. *See Union Travel Associates, Inc. v. International Associates, Inc.*, 401 A.2d 105 (D.C. App. 1979); *Bewigged by Suzzi, Inc. v. Atlantic Dept. Stores, Inc.*, 49 Ohio App. 2d 65, 359 N.E.2d 721 (1976); *Schloss v. Sachs*, 63 Ohio Misc. 2d 457, 631 N.E.2d 212 (1993). *But see Stevens v. Rosewell*, 170 Ill. App. 3d 58, 523 N.E.2d 1098 (1988) for a contrary holding. As the Ohio court recognized in *Schloss v. Sachs*, with today's commercial complexities, the ability to distinguish between a license and a lease is difficult. Generally, the issue is one of fact. *Union Travel Associates, Inc. v. International Associates, Inc., supra.*

The oral agreement in this case contains elements of both a license and a lease. Further, the parties have, at one time or another, referred to their arrangement as both a lease and a license. Clearly, a fact question is presented that would preclude summary judgment.

Wal-Mart also argues that its purported agreement with Ultracuts comes within the statute of frauds because it is a contract that cannot be performed within one year of its making. *See* Ark. Code Ann. § 4-59-101(a)(6) (Repl. 1996). This portion of the statute of frauds has been interpreted to apply only to contracts that are incapable of being performed in one year. *Chadwell v. Pannell*, 27 Ark. App. 59, 766 S.W.2d 38 (1989). It does not apply if the contract can be performed in one year, even though there is a possibility or even a probability that it may take longer. *Id.* It is possible in this case that the oral agreement could have been performed in one year, including that part of the agreement in which Ultracuts was given right of first refusal on store space. Therefore,

Wal-Mart would not have been entitled to summary judgment on this point.[1]

Next, we address the trial judge's determination that Ultracuts did not reasonably rely on representations made by Wal-Mart. Whether reliance is reasonable is a question of fact. *Van Dyke v. Glover*, 326 Ark. 736, 934 S.W.2d 204 (1996). It is arguable that Ultracuts's reliance was reasonable for two reasons. First, it received a letter from Brad Messer two months after the agreement that implied that the agreement was intact (the December 4 letter). Secondly, some of the Wal-Mart executives felt that they had a binding agreement with Ultracuts. In a June 1996 letter, Messer confirmed by his signature that he had agreed with Rivard in October 1995 just as Rivard now contends.

Finally, we address Ultracuts' contention that the trial judge erred in striking its amended complaint. Arkansas Rule of Civil Procedure 15(a) provides that, upon motion of an opposing party, a trial court may strike an amended pleading based upon a determination that the amendment would result in prejudice or undue delay. A trial judge has broad discretion in allowing or denying an amendment. *Stoltz v. Friday*, 325 Ark. 399, 926 S.W.2d 438 (1996). However, an order striking an amended pleading may not be reversed absent a finding of undue delay or prejudice. *Harris v. First State Bank of Warren*, 22 Ark. App. 37, 732 S.W.2d 501 (1987). When the trial judge in this case decided to strike Ultracuts' amended complaint, he specifically found that Wal-Mart knew of the additional allegation set forth in the complaint and was not surprised by it. Further, he made no finding that the amendment would unduly delay the lawsuit. Therefore, we reverse on this point.

Reversed and remanded.

HART, STROUD, and NEAL, JJ., agree.

PITTMAN and JENNINGS, JJ., dissent.

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[1] The trial judge did not base his decision on this portion of the statute of frauds. Wal-Mart asserts this ground as an alternative reason for affirmance.

JOHN E. JENNINGS, Judge, dissenting. I would affirm the trial court's granting of summary judgment based upon the merger clause. The purported oral agreement between the parties was a general agreement covering the basics of the entire licensing operation. Likewise, the License Agreement is a framework within which the overall licensing operation between appellants and appellees is to take place. It contains general terms applicable to any store that becomes part of the store-within-a-store arrangement. It is clearly a master agreement that covers the entire licensing operation between Wal-Mart and Ultracuts, with the details for each individual store to be recited in attached schedules or addenda. The merger clause provides that any prior understandings, arrangements, agreements, statements, or communications, oral or written, with respect to "this agreement" are superseded. I can see no ambiguity here. The parties are businessmen, dealing at arms length. They are bound by the agreement they entered into.

Because it is clear to me that the trial court was correct in granting summary judgment to the appellee on the basis of the merger clause, I would not reach the issues of the alternative bases for summary judgment.

I respectfully dissent.

PITTMAN, J., joins in this dissent.

Annalee PATTERSON *v.*
ARKANSAS DEPARTMENT of HEALTH, Employer;
Arkansas Insurance Department, Carrier;
Second Injury Trust Fund

CA 99-438 15 S.W.3d 701

Court of Appeals of Arkansas
Divisions II, III, and IV
Opinion delivered May 3, 2000
[Petition for rehearing denied June 7, 2000.]

Larry Hartsfield, for appellant.

Richard S. Smith, for appellees Arkansas Department of Health and Arkansas Insurance Department.

Judy W. Rudd, for appellee Second Injury Fund.

MARGARET MEADS, Judge. This case involves an appeal and a cross-appeal from a decision in which the Workers' Compensation Commission held that the preponderance of the evidence shows that appellant is not permanently and totally disabled and that Second Injury Fund (SIF) has no liability. We reverse and remand on direct appeal and affirm on cross-appeal.

At the hearing on appellant's claim, it was stipulated that appellant, Annalee Patterson, sustained a compensable injury on December 19, 1991, and that appellees, Arkansas Department of Health (ADH) and the Arkansas Insurance Department, Public Employee Claims Division, have accepted and are paying benefits consistent with a twenty-five percent anatomical impairment. Appellant contended that she is permanently and totally disabled as a result of her compensable injury. ADH contended that appellant's disability did not exceed her anatomical impairment and, alternatively, that any wage-loss suffered by appellant is SIF's responsibility. SIF contended that it has no liability; that appellant's disability was solely the result of her job-related injury; and that she is not entitled to benefits for disability exceeding her anatomical impairment because ADH had made a *bona fide* offer of employment at wages equal to or greater than appellant's average weekly wage at the time of the "re-injury."

Appellant, who was forty-seven years old on the date of the hearing, is a registered nurse who was employed in an administrative position by ADH on December 19, 1991, when she sustained a back injury after reaching across her desk to plug in a surge protec-

tor. She felt an immediate, sharp pain in her lower back. She was initially treated by Dr. John Wilson, who referred her to Dr. Jim Moore, a neurologist, who eventually performed five spinal surgeries on appellant as a result of her injury. Subsequent to surgery in 1994, appellant developed arachnoiditis[1] in the lower thecal sac, for which there is no specific treatment other than pain management. After surgery performed on July 11, 1995, appellant developed a cerebrospinal fluid leak (CSF), which is not a normal result of that surgery. Appellant also suffers from migraine headaches and Sjogren's syndrome and has been diagnosed with depression, failed spinal surgery syndrome, and cauda equina[2] syndrome. Appellant is currently taking a narcotic synthetic codeine three times a day for pain, anti-inflammatories for Sjogren's syndrome, and blood pressure medication.

At the hearing on her claim, appellant testified that as a result of her injury and surgeries she spends most of the day in bed due to pain. She generally spends the morning sitting in a recliner or wheelchair. By noon her legs swell to the knees. She has developed foot drop in both feet as a result of the surgeries and drags her toes; because she does not have a steady leg to stand on, she cannot use crutches. She is unable to walk any distance. Appellant suffered from migraine headaches prior to her first surgery, but they are now more frequent. Prior to her last surgery, appellant was able to work as a part-time consultant because she was still mentally alert. After the last surgery, appellant developed cognitive problems and has experienced a change in her ability to think, to remember, and to perform mental tasks; Dr. Moore told her she is incapable of working. Since 1986, appellant has been afflicted with Sjogren's syndrome, a condition involving the inability of a gland to secrete; however, she never missed any work due to this condition, and she was able to do her job.

Appellant testified that she would prefer to go back to work, but since her 1991 injury ADH has not offered her job back at full

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[1] Thickening and adhesions of the leptomeninges in the brain or spinal cord resulting from previous meningitis, other disease processes, or trauma. *Sloan-Dorland Annotated Medical-Legal Dictionary* 48 (1987).

[2] The bundle of spinal nerve roots arising from the lumbrosacral enlargement and medullary cone and running through the lumbar cistern within the vertebral canal below the first lumbar vertebra; it comprises the roots of all the spinal nerves below the first lumbar. *PDR Medical Dictionary* (1st ed. 1995).

pay, and after she used all her "comp" time, vacation time, and sick leave, ADH asked her to resign. She does not believe that she can withstand an eight-hour job or sit behind a desk forty hours per week. If she stays up more than three or four hours a day, the next day she hurts so badly that she cannot move. Appellant is never free of pain. Her husband helps her bathe and dress, then takes her to the sun porch where she sits in a wheelchair or recliner. She normally sleeps between 9 a.m. and noon, then watches television until 2 or 3 p.m. She lies down until her husband gets home and cooks supper. She now rarely cooks. The activity of having to lift pots and pans and having to concentrate is difficult, and she burns things "all the time." She retires about 8 p.m., but cannot sleep all night because of leg cramps. Appellant has no sensation in the lower part of her legs.

Once a month, appellant takes calls for ADH as part of a back-up service for home health nurses. This involves consulting a list of nurses and notifying them that they have a call, for which appellant is paid $25 per day. Appellant has also answered questions over the telephone about ADH supplies.

The medical evidence reveals that appellant suffered a series of back problems which have not resolved despite several surgeries. After her last back surgery, appellant suffered several falls. Her vehicle was equipped with hand controls, but she had difficulty learning to use them. She continues to have intense pain. After appellant developed the CSF leak, she experienced severe low-back pain radiating into the right lower extremity and severe spasms, which interfere with her daily living and ambulation. A Baptist Rehabilitation Institute (BRI) report dated August 14, 1995, states that since the CSF leak, appellant has an increased risk of falls, and declines in activities of daily living, self care, and mobility. In September 1995, it was noted that appellant required a ramp built for entry into her house. In December 1995, Dr. Thomas Shinder diagnosed appellant with arachnoiditis and significant behavioral overlay enhancing non-physiological neurological examination. He was of "somewhat" firm conviction that appellant has primary psychological overlay causing the majority of her symptoms. On April 2, 1996, Dr. Shinder wrote that he expected appellant to be at full improvement and ready to return to work within the next two months. However, in a Physician's Statement of Medical Necessity dated April 18, 1996, Dr. Shinder prescribed a TENS unit with a

diagnosis of "failed back syndrome" and a prognosis of "fair," and on May 17, 1996, Dr. Shinder admitted appellant to the hospital. Dr. William Ackerman, who examined appellant at Dr. Shinder's request, noted on May 22, 1996, that appellant's pain was severe and that she was in a wheelchair.

Dr. Reginald Rutherford, who initially saw appellant in Dr. Shinder's absence, noted on August 30, 1996, that appellant's complaints are referable to her documented arachnoiditis for which there is no specific treatment other than pain management, and that she has been treated with anti-convalescents and anti-depressants without benefit. Dr. Shinder arranged for physical therapy, the goal being to increase appellant's level of functioning so that she may get out of the wheelchair. However, on October 1, 1996, Dr. Rutherford noted that physical therapy proved without benefit, and there was no rational basis for further physical therapy. Dr. Rutherford considered appellant capable of working in a sedentary capacity, dependent upon her motivation and whether or not she would be accommodated by her employer. On October 1, 1996, Dr. Rutherford noted appellant had undergone five lumbar spinal surgeries complicated by arachnoiditis, which yields a DRE category 5 impairment for lumbosacral disorders, and he assigned appellant a twenty-five percent impairment to the person as a whole.

Dr. Moore did not agree with Dr. Rutherford's assessment. On October 3, 1996, Dr. Moore noted that appellant has continued and ongoing pain problems. She is on pain medication, which is ineffective in giving her long-term relief. She obtained rehabilitative treatment at BRI where a number of exercises in "relative futility" were carried out. Her leg braces have been removed, which tends to relegate her even more to her wheelchair because she has no functional capacity in dorsiflexion, eversion, or inversion in the ankles. She remains neurologically compromised and is relegated to her wheelchair. She is compromised as far as peroneal sensation (relating to the lateral side of the leg or to the muscles there present), which goes along with the cauda equina syndrome and arachnoiditis which have been established in her ongoing evaluation. Dr. Moore believed appellant's residuals would be significant and assessed them at sixty percent to the body as a whole. On November 4, 1996, Dr. Moore wrote that appellant's neurological residuals remain significant; she is essentially relegated to a wheelchair; and she has sensory deprivation. He did not believe appellant

capable of returning to working activities unless possibly in sedentary activities, but "certainly medication will be required and this would only be on a trial basis." He felt that considering her various neurologic residuals with the foot drop and sensory alterations, an off-work status was appropriate.

In a consultation report dated November 11, 1996, Dr. Ackerman noted that he had nothing further to offer with respect to pain management. He felt that appellant might benefit from an aquatic therapy program with the institution of progression-resistive exercises to attempt to get her out of a wheelchair to a walker with the ultimate goal of increasing her daily activities. Dr. Ackerman felt that appellant may ultimately be a candidate for a subarachnoid morphine drug delivery system.

The administrative law judge (ALJ) found that the preponderance of the evidence shows that appellant has not been rendered permanently and totally disabled, but sustained permanent disability in an amount equal to eighty percent to the body as a whole, including anatomical impairment of twenty-five percent and wage-loss disability of fifty-five percent. He further found that the preponderance of the evidence fails to show that there has been a combination of the effects of a prior disability or impairment with the effects of appellant's compensable injury to produce permanent disability or impairment greater than that resulting from the compensable injury alone, and fails to show that appellant received a *bona fide* offer of employment at wages equal to or greater than her average weekly wage at the time of her injury. The full Commission affirmed and adopted the ALJ's findings.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark v. Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The Commission's decision should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Johnson v. Democrat Printing and Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138

(1997). 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. *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999). These rules insulate the Commission from judicial review and properly so, as it is a specialist in this area; however, a total insulation would render the appellate court's function in reviewing these cases meaningless. *Id.*

Appellant argues that the Commission erred in finding that she had not been rendered permanently and totally disabled, because the "odd-lot" doctrine is applicable to her 1991 injury. We first note that Act 796 of 1993 abolished the odd-lot doctrine for permanent disability claims on injuries that occurred after July 1, 1993. However, because appellant's injury was sustained in 1991, the odd-lot doctrine is applicable to her case.

The odd-lot doctrine refers to employees who are able to work only a small amount; the fact that they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible. *M.M. Cohn Co. v. Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979). An employee who is injured to the extent that she can perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist may be classified as totally disabled. *Lewis v. Camelot Hotel*, 35 Ark. App. 212, 816 S.W.2d 632 (1991). If the evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training, or age, places appellant *prima facie* in the odd-lot category, the burden should be on the employer to show that some kind of work is regularly and continuously available to the appellant. *M.M. Cohn, supra.* Because of appellant's total and permanent disability claim, appellee was on notice that the odd-lot doctrine was at issue. *Walker Logging v. Paschal*, 36 Ark. App. 247, 821 S.W.2d 786 (1992).

In the opinion that was affirmed and adopted by the full Commission, the law judge wrote:

> Her testimony and the medical record shows that she did fairly well until after the last surgery, which resulted in a cerebrospinal fluid leak. In spite of extensive follow up care, which included a clot patch for the CSF leak, additional diagnostic stud-

ies, medication, adhesiolysis, and physical therapy, the claimant experienced little relief from her difficult symptoms.

At the time of the hearing she testified that she spent most of the day in bed due to pain, by noon her legs were swollen to the knees. She further stated that she is up only about four hours a day, spends about three and a half hours in a wheel chair, and has very limited ability to walk, even with crutches. She further testified that she has foot drop in both legs and now has very intense headaches which interfere with her ability to sleep and her activities of daily living. She also described a decline in her mental acuity, which included difficulty with her memory and cognitive functions. She stated that since the last surgery she has not had an offer of employment at equivalent pay, but was instead asked to resign after she had used up her sick leave and compensatory time. She also doubted that she could handle a full time job because she could not stay up more than three or four hours without experiencing an increase in pain which makes it difficult for her to move. However, from time to time, about once a month, she takes calls for the Health Department on the weekends, assisting in locating nurses in the county from which the call originated. She is also able to do a limited amount of other telephone work and some paperwork. However, *this limited employment* is not equivalent to her usual employment which had paid more than $30,000.00 per year.

On October 1, 1996, Dr. Reginald J. Rutherford wrote that he considered the claimant capable of working in a sedentary capacity, depending on her motivation and whether the employer is accommodating, and then assessed her anatomical impairment at 25% to the body as a whole, which was accepted by respondents 1. On October 3, 1996, Dr. Moore wrote that the claimant's residuals were going to be significant, noting that she had cauda equina syndrome and arachnoiditis, and he rated her impairment at 60% to the body as a whole. He also remarked that the claimant would require ongoing medication that is generally best provided by a pain clinic surrounding. On November 4, 1996, he wrote that he did not believe that the claimant was "capable of returning to working activities, possibly sedentary, but certainly medication will be required...." He noted that the claimant had ongoing cauda equina syndrome which is not thought likely to improve.

When the entire record is reviewed, in light of the claimant's age, education, work experience, level of motivation, physical condition, and other matters reasonably expected to affect her future earning capacity, the preponderance of the evidence shows

> that she has sustained substantial permanent disability but has not been rendered permanently and totally disabled. Even though she had sustained a significant low back injury and undergone four surgeries, the claimant continued to return to the work place, until the consequences of the last surgery, which were more substantial. Even though she is severely limited by her physical condition and the effects of the medication related to her compensable injury, she has been able to undertake *limited employment* by being on call, being available to give advice over the telephone, and by doing paperwork, *employment which is not constant in its demands on the claimant's time, but which is not full time and are* [*sic*]*not widely available with other employers.* (Emphasis ours.)

We think from a reading of the ALJ's opinion, which was adopted by the Commission, that fair-minded persons with the same facts before them could not have reached the same conclusions. Indeed, there is no suggestion that appellant's testimony is not credible, and the opinion outlines appellant's severe and ongoing medical problems. Further, Dr. Moore, appellant's treating physician, did not believe appellant capable of returning to work, unless possibly in sedentary activities, but "certainly medication will be required" and only on a trial basis. Moreover, the evidence is that appellant needs continuing pain medication, which is ineffective in giving her long-term relief and which impairs her ability to think. We are not unmindful of Dr. Rutherford's opinion that appellant is able to return to work and that conflicts in the medical evidence are a question of fact for the Commission. When the Commission chooses to accept the testimony of one physician over another in such cases, we are powerless to reverse the decision. *Henson v. Club Prods.*, 22 Ark. App. 136, 736 S.W.2d 290 (1987). However, we note that the ALJ's opinion is silent in regard to any findings of credibility and fails to state that it accepts Dr. Rutherford's opinion over that of Dr. Moore. Finally, we think it significant that the ALJ's opinion states that appellant has performed some employment which is not constant in its demands on the claimant's time, *but which is not full-time and is not widely available with other employers.* This language substantially tracks the language required for a finding of total disability under the odd-lot doctrine.

■ Considering appellant's obvious physical impairment, work experience, and medical evidence, we hold that appellant made a *prima facie* case that she was totally and permanently disabled as a result of her five surgeries necessitated by her compensable

injury, and the burden shifted to appellee to show that work is readily and consistently available within appellant's capabilities. Appellee did not meet this burden, and indeed the law judge recognized that any work appellant performed was not full-time and not readily available with other employers. The Commission should have awarded appellant permanent and total disability benefits; therefore, we reverse and remand for an award of benefits.

On cross-appeal, ADH and the Public Employee Claims Division argue that the Commission erred: (1) in finding that appellant was entitled to an additional fifty-five percent wage-loss disability; (2) in finding that appellant did not receive a *bona fide* offer of employment from ADH; and (3) in finding that SIF had no liability. Because of the view we take of this case, we do not address cross-appellants' first argument.

■ In regard to cross-appellants' argument that the Commission erred in finding that appellant did not receive a *bona fide* offer of employment from ADH, we simply note that the Commission found that the preponderance of the evidence fails to show that appellant received a *bona fide* offer of employment at *wages equal to or greater than her average weekly wage at the time of the injury.* Appellant testified that she currently works for the health department part-time and earns about $100.00 per month. She also testified that no one with the health department has offered her a job back at full pay since the injury in 1991, and after she used up all her "comp" time, vacation time, and sick leave, she was asked to resign. ADH offered no testimony to the contrary, and under the circumstances we cannot say there is no substantial evidence to support the Commission's finding on this matter.

■ Cross-appellants also argue that the Commission erred in finding that SIF had no liability in this case. The test that is used to determine whether SIF has liability for compensating an injured worker was set out in *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 5, 746 S.W.2d 539, 541 (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.]

Appellant was diagnosed in 1986 with Sjogren's syndrome, which usually affects her eyes and salivary glands, and has been taking medication for this condition since that time. Prior to the 1991 accident, appellant never missed a day's work due to this condition. Appellant testified that she was not limited in any way from her Sjogren's disease before her 1991 injury, and that it only caused her jaw to swell, and her salivary glands and tear ducts to dry out.

On April 29, 1997, Dr. Robert Cheek wrote that he did not believe appellant's Sjogren's syndrome is either a cause or contributing factor to her present physical disability which has been present since her initial back injury. Dr. Eleanor Lipsmeyer, a rheumatologist who treated appellant's Sjogren's syndrome, testified by deposition on September 24, 1997, that Sjogren's does not interfere with one's ability to work, and she does not think that it interfered with appellant's functioning in any way. She agreed with Dr. Cheek's assessment that appellant's Sjogren's syndrome is neither a cause nor a contributing factor to appellant's present disability. While she agreed with Dr. Cheek's assessment that five percent of appellant's current disability is due to Sjogren's disease, she said that refers only to the swollen glands, dry eyes and mouth, and pain in her hands. Dr. Lipsmeyer testified further that there is no evidence that Sjogren's has affected appellant's central nervous system.

■ The ALJ found that the record failed to show that there was a combination of the effects of appellant's compensable injury with any prior disability or impairment to yield disability greater than that arising from the compensable injury alone. This finding is supported by substantial evidence, and the Commission did not err when it found SIF has no liability in this case.

Reversed and remanded on direct appeal.

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

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

Affirmed on cross-appeal.

ROBBINS, C.J., HAYS, S.J., BIRD, NEAL, STROUD, JENNINGS, PITTMAN, and ROAF, JJ., agree.

JOHN E. JENNINGS, Judge, dissenting. I have no serious disagreement with the majority's view as to the applicable law, but I cannot agree with the majority that the appellee falls prima facie in the odd-lot category as a matter of law.

Certainly whether the claimant is "odd-lot" was initially a fact question for the Commission to decide. *See Lewis v. Camelot Hotel*, 35 Ark. App. 212, 816 S.W.2d 632 (1991). The factors to be considered in making that assessment are the degree of obvious physical impairment, together with the claimant's mental capacity, education, training, and age. *See Hyman v. Farmland Feed Mill*, 24 Ark. App. 63, 748 S.W.2d 151 (1988). In *Lewis*, we reversed the Commission's decision that the claimant did not fall within the odd-lot category. The claimant in that case was a fifty-five-year-old banquet manager. He was a high-school graduate whose prior experience was primarily as a waiter. It was clear that his right leg had been crushed in an on-the-job accident.

In *Moser v. Arkansas Lime Company,* 40 Ark. App. 108, 842 S.W.2d 456 (1992), we came to the same conclusion. There the claimant was a sixty-two-year-old laborer with a fifth-grade education who had lost the use of his right eye. The Commission in *Moser* found as a fact that the claimant was "borderline mentally retarded."

In the case at bar, the claimant is a forty-seven-year-old registered nurse. The Commission found that she had a twenty-five percent anatomical disability resulting from her on-the-job injury. The Commission was entitled to make this finding based on the evidence before it. There was evidence that she could work and that her employer would take necessary steps to accommodate her disability. Had the Commission found that this claimant was 100% permanently and totally disabled, I believe that such a decision might well have been supported by substantial evidence. Instead, the Commission found that she was eighty percent permanently and totally disabled. On the facts of this case, I am persuaded that reasonable minds could reach that conclusion. I cannot agree that the claimant falls within the odd-lot category as a matter of law.

For the reasons stated, I respectfully dissent. I agree with the majority opinion on the cross-appeal. I am authorized to state that

Judges PITTMAN and ROAF, and Special Judge HAYS join in this opinion.

Gerald JOHNSTON and Bebe Dare Johnston *v.* Glen CURTIS and Deanna Curtis

CA 99-941 16 S.W.3d 283

Court of Appeals of Arkansas
Division I
Opinion delivered May 10, 2000
[Petition for rehearing denied June 21, 2000.]

Rice, Adams, Beckham & Pulliam, by: *Ben E. Rice*, for appellants.

Clinton D. McGue, for appellees.

SAM BIRD, Judge. Appellants Gerald Johnston and Bebe Dare Johnston bring this appeal from the Circuit Court of Lonoke County contending that the court erred in finding that the parties orally modified a written real-estate contract and that their non-performance of the contract was not excused. Appellees Glen Curtis and Deanna Curtis have cross-appealed, stating that the court should have awarded them "expectancy" and punitive damages.

We affirm the decision of the trial court on direct appeal and cross-appeal.

On October 9, 1997, the parties entered into a written real-estate contract, whereby the Curtises offered to sell and the Johnstons agreed to buy a house in Cabot for $114,000. A real estate agent was not involved. Under the terms of the contract, the transaction was subject to the Johnstons obtaining a home loan of $102,600, which was 90 percent of the purchase price. Specifically, the contract provided that the Johnstons' obligation was subject to:

> The Buyer's ability to obtain a loan secured by the property in an amount no less than $102,600, with Jan Turbeville at Arkansas Fidelity Mortgage Co., payable over a period of not less than __Years, with interest not to exceed __% per annum.

Deanna Curtis testified that after the Johnstons told her and her husband that they had been pre-approved for their loan, the Curtises purchased a home in Searcy, and they moved out of the home in Cabot after they signed the contract with the Johnstons. However, because the house appraised for only $110,000, the mortgage company denied the loan to the Johnstons. Thereafter, the parties entered into an oral agreement whereby the Johnstons agreed to buy and the Curtises agreed to sell the house for $110,000. On November 3, 1997, after the lease on the Johnstons' home in Hot Springs expired but before the parties closed on the house in Cabot, the Johnstons paid the Curtises $500, took "early possession" of, and moved into, the home in Cabot. Deanna Curtis testified that she and her husband allowed the Johnstons to move into the home before closing only after they had made "some kind of a show of good faith." The Johnstons tendered a check for $500 to the Curtises for the Curtises to hold until closing.

Jan Turbeville, a mortgage loan originator, testified that she had a difficult time obtaining a loan for the Johnstons, but that a loan for ninety percent of the purchase price was finally approved at the reduced price of $110,000, and the transaction was set for closing on November 17. She testified that when the loan was approved, the Johnstons were informed of the terms. She also testified that one of the terms of the loan was that Bebe Dare Johnston's name would not be on the title of the home, but that the title of the home would be in Gerald Johnston's name only. She also testified that during the initial meeting that she had with the

Johnstons, Gerald Johnston did not put any parameters on the type of financing that he would accept. In addition, she testified that he accepted the terms of the final loan for which he was approved. She stated that had Gerald Johnston not approved the terms of the loan, she would have neither set a closing date nor ordered any of the documents needed for closing.

Deanna Curtis testified that the parties were to close on the house on November 17, but that they were informed that day that the Johnstons had refused to close. Thereafter, the Curtises demanded that the Johnstons vacate the premise. The Curtises then listed the home with a realtor and sold the property in March 1998 for $100,000. Deanna Curtis testified that after deducting the six-percent commission, they received $94,000, less closing costs.

Gerald Johnston testified that the parties had entered into a real-estate contract, but stated that the terms of the agreement were that he purchase the home for $110,000 if he could obtain a loan at an acceptable rate of interest and acceptable closing costs. He stated that he had been led to believe by a mortgage lender that the interest rate would be between nine and ten percent. However, he admitted that the written real-estate contract did not state that the offer was contingent upon obtaining a loan with an interest rate between nine and ten percent. Johnston testified that he and his wife were originally set to close on the house on November 8 or 9, and that they showed up at the office to close, but that the papers were not ready. He said that he was told on November 17 that the closing would take place that afternoon, but at that time the mortgage company did not know the amount of the closing costs or the interest rate. He said that someone by the name of Brown called him later that afternoon and told him the interest rate and the amount of the closing costs and that they were beyond what he had discussed. Gerald Johnston told Brown that he and his wife were not interested. He said that he was quoted an interest rate of 10.75%, but that it was too high and that he was only interested in purchasing the house if he would obtain an acceptable interest rate. Gerald Johnston also stated that he was never informed, until the trial, that his wife was not going to be named on the deed, and he said that he would not have purchased the home without her name being included on the deed. He denied that Turbeville had several conversations with him concerning the transaction. Gerald Johnston stated that the $500 check he wrote to the Curtises when they

moved into the home was not earnest money, but was given to cover any damages that they might cause to the home. He stated that he stopped payment on the check because the Curtises were not acting in good faith.

The trial court found that the parties had orally modified their agreement to reduce the price from $114,000 to $110,000, but subject to all the other terms of the original contract, that the oral modification to the contract was not subject to the requirements of the statute of frauds, and that the Johnstons had breached the contract by their failure to close. Damages were awarded to the Curtises in the amount of $10,000, representing the difference between the modified contract price and the amount for which the Curtises later sold the house to someone else.

For appellants' first point on appeal, they argue that the court erred in finding that the parties had orally modified the written contract and that the oral modification was not barred by the statute of frauds. Appellants argue that there was not a meeting of the minds between the parties because they had not agreed on an acceptable loan amount, interest rate or closing costs. In the alternative, they argue that even if an oral contract existed, it violated the statute of frauds.

A meeting of the minds, or what is more commonly known as an objective indicator of agreement, *see Fort Smith Serv. Fin. Corp. v. Parrish*, 302 Ark. 299, 789 S.W.2d 723 (1990), does not depend upon the subjective understanding of the parties, but instead requires only objective manifestations of mutual assent for the formation of a contract. *Hagans v. Haines*, 64 Ark. App. 158, 984 S.W.2d 41 (1998). The meeting of the minds is essential to the formation of a contract and is determined by the expressed or manifested intention of the parties. *Id.* The question of whether a contract has been made must be determined from a consideration of the parties' expressed or manifested intention determined from a consideration of their words and acts. *Id.*

The Johnstons argue that the oral contract between the parties provided that they would purchase the home for $110,000 if they were given an acceptable interest rate and closing costs. After a consideration of the parties' words and acts, it is clear that the contract was modified from $114,000 to $110,000. Through their

testimony, both parties admit that they changed the terms of the agreement from the purchase prices of $114,000 to $110,000. They also state that those were the only terms changed. The original real-estate contract was silent as to what would constitute an acceptable rate of interest or acceptable closing costs. In addition, Turbeville testified that the Johnstons did not discuss with her what interest rate or amount of closing costs would be acceptable to them.

The Curtises argue that the statute of frauds is an affirmative defense and that the Johnstons are barred from arguing it as a defense because they did not specifically plead such in their answer. While it is true that the statute of frauds is an affirmative defense, *see* Ark. R. Civ. P. 8, the court in this case amended the pleadings to conform to the proof. Arkansas Rule of Civil Procedure 15(b) states, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." In the case at bar, after the Curtises presented their case, the Johnstons made a motion to dismiss the case, the court denied the motion, stating that the pleadings were amended to conform to the proof, and it considered the issues of the applicability of the statute of frauds. Therefore, even though it was not raised in the Johnstons' answer, this court can address the defense of the statute of frauds.

A contract for the sale of land comes within the statute of frauds and must be in writing to be enforceable. Ark. Code Ann. § 4-59-101 (Repl. 1996). A material modification of a contract comes within the statute of frauds and must be in writing in order to be valid and binding. *Shumpert v. Arko Telephone Communications Inc.*, 318 Ark. 840, 888 S.W.2d 646 (1994). Such a contract cannot be modified in essential parts by parol agreement so as to be valid against a plea of invalidity under the statute of frauds. *Id. See also Arkmo Lumber Co. v Cantrell*, 159 Ark. 445, 252 S.W. 901 (1923); *J.W. Davis v. Patel*, 32 Ark. App. 1, 794 S.W.2d 158 (1990). The court found that the statute of frauds did not apply in this case because a written agreement may be modified by an oral agreement. We disagree, but we affirm the court because, even though the trial court applied the wrong reason, it reached the correct result. *Van Camp v. Van Camp*, 333 Ark. 320, 969 S.W.2d 184 (1998).

In the case at bar, the statute of frauds is not applicable because of the Johnstons' part performance of the contract. In order to remove an oral agreement from the statute of frauds, it is necessary to prove both the making of the oral agreement and its part performance by clear and convincing evidence. *Langston v. Langston*, 3 Ark. App. 286, 625 S.W.2d 554 (1981). A requirement that the evidence be clear and convincing does not mean that the evidence be uncontradicted. *Freeman v. Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987). Partial performance of a contract by payment of a part of the purchase price and placing a buyer in possession of land pursuant to an agreement of sale and purchase is sufficient to take the contract out of the statute of frauds. *Sossamon v. Davis*, 271 Ark. 156, 607 S.W.2d 405 (1980). In the case at bar, the parties orally modified the contract by changing the purchase price from $114,000 to $110,000. The Johnstons admit that they took possession of the home, and they admit to tendering a check to the Curtises for $500. In addition, Deanna Curtis testified that when the Johnstons requested to take possession of the home prior to closing, she and her husband asked the Johnstons to show their good faith by tendering the check for $500 before they allowed the Johnstons to take early possession of the home. The Johnstons' acts of taking possession of the property and paying a portion of the purchase price are sufficient to take the oral modification to the contract out of the statute of frauds.

For appellants' second point on appeal, they argue that the court erred in not finding that the contract between the parties was subject to conditions precedent that appellants obtain acceptable financing and acceptable closing costs. In addition, they argue that because Mrs. Johnston's name was not going to appear on the deed, another condition of their contract was not satisfied. They contend that because all of these conditions precedent were not satisfied, their failure to perform was excused.

Whether a provision of a contract amounts to a condition precedent is generally dependent on what the parties intended, as adduced from the contract itself. *Stacy v. Williams*, 38 Ark. App. 192, 834 S.W.2d 156 (1992). When the terms of a written contract are ambiguous and susceptible to more than one interpretation, extrinsic evidence is permitted to establish the intent of the parties and the meaning of the contract then becomes a question of fact. *Id.* Furthermore, evidence of a parol agreement that a written

agreement is being delivered conditionally constitutes an exception to the parol evidence rule. *Id.*

For this argument, the Johnstons rely on *Stacy v. Williams, supra.* However, that case is distinguishable from the one at bar because in *Stacy*, the parties made obtaining financing a condition precedent to the contract, and the appellees were never approved for any financing. In the case at bar, the Johnstons were approved for financing, but refused to close because they found the rate and the closing costs unacceptable. However, the original contract stated only that the Johnstons would receive a loan for $102,600, which was ninety percent of the purchase price. Although the contract form that the parties used contained a blank space where a limitation on the interest rate of their loan could have been inserted, it was left blank. The contract contained no mention of any limitation in the amount of the closing costs.

The Johnstons also argue that they should be excused from performing the contract because Mrs. Johnston's name was not going to be on the deed. However, the Johnstons did not become aware of that fact until the day of the trial, more than a year after they refused to perform the contract. They cannot rely on a fact of which they were unaware at the time of their breach as an excuse for their failure to perform. *See Barbara Oil Co. v. Patrick Petroleum Co.*, 566 P.2d 389 (Kan. Ct. App. 1977).

The Curtises have cross-appealed, contending that the court erred in not awarding them special and punitive damages. The court found that the Johnstons had breached the contract, and it awarded the Curtises $10,000, which represented the difference between the $110,000 purchase price agreed upon between the two parties and the $100,000 sale price that the Curtises accepted from another buyer several months later. The Curtises argue that they should also have been awarded damages for the $6,000 realtor's commission fee that they paid when their house eventually sold, that they should recover damages for interest on the mortgage, as well as taxes, hazard insurance and mortgage insurance that they were obligated to pay on their Cabot house until it was eventually sold, and that they should recover the rent they expended on their new residence in Searcy up until the time the Cabot house was sold.

The measure of damages for a vendee's breach of an executory contract for the sale of land is the difference between the contract price of the land and its market value at the time of the breach, less the portion of the purchase price already paid. *Williams v. Cotten*, 14 Ark. App. 80, 684 S.W.2d 837 (1985) (citing *McGregor v. Echols*, 153 Ark. 128, 239 S.W. 736 (1922)). In *McGregor*, the court wrote:

> In actions against a vendee on a contract for the purchase of real estate, we had supposed it to be a well settled rule that when a party agreed to purchase real estate at a certain stipulated price and subsequently refuses to perform his contract, the loss in the bargain constitutes the measure of damages, and that is the difference between the price fixed in the contract and the salable value of the land at the time the contract was to be executed.

153 Ark. at 132, 239 S.W. at 736.

The court in *Williams v. Cotten, supra*, went on to state that the general rule does not prevent a party from ever recovering other damages flowing directly from a breach, and cited the expenses of abstracts of title and title opinions as examples of expenses that might be incurred in preparation for the sale for which a seller might recover damages. But the court specifically excluded expenses connected with the resale to third parties, such as a real-estate commission, monthly house payments, and utilities. The court in *Williams v. Cotten, supra*, found that these types of damages were not directly connected with a party's breached sale and were remote and speculative in that the ultimate or total amount for these items depends solely upon when the party consummated a resale. Because the Curtises were awarded the difference between the contract price with the Johnstons and the amount for which the Curtises eventually sold their Cabot house, we do not find that the Curtises are entitled to any other damages.

Regarding the Curtises's argument on cross-appeal that they should recover punitive damages, their complaint contained no prayer for punitive damages, they made no argument in the trial court that punitive damages should be awarded, and no authority is cited to this court why punitive damages should be awarded in an action for breach of contract. We do not consider arguments made for the first time on appeal, *Dobie v. Rogers*, 339 Ark. 242, 5 S.W.3d 30 (1999), or arguments not supported by convincing authority,

National Bank of Commerce v. Dow Chem. Co., 338 Ark. 752, 1 S.W.3d 443 (1999).

Affirmed on direct appeal and on cross-appeal.

KOONCE and GRIFFEN, JJ., agree.

POTLATCH CORPORATION *v.* Larry Dale TRIPLETT

CA 99-1153 16 S.W.3d 279

Court of Appeals of Arkansas
Division II
Opinion delivered May 10, 2000

McKenzie, McRae, Vasser & Barber, by: *Barry Barber*, for appellant.

James H. Pilkinton, Jr., for appellee.

JOHN F. STROUD, JR., Judge. This is a quiet-title action that was filed by appellant, Potlatch Corporation. At the end of appellant's case, appellee, Larry Dale Triplett, moved to dismiss the petition to quiet title. The chancellor granted appellee's motion. For its sole point of appeal,[1] appellant contends that the chancellor erred in doing so. We agree and reverse and remand.

Rule 50(a) of the Arkansas Rules of Civil Procedure provides in pertinent part that "[i]n nonjury cases a party may challenge the sufficiency of the evidence at the conclusion of the opponent's evidence by moving either orally or in writing to dismiss the opposing party's claim for relief." A directed verdict is only proper where the evidence, when viewed in the light most favorable to the nonmovant, is so insubstantial as to require a jury verdict for the movant to be set aside. *Jamison v. Estate of Goodlett*, 56

[1] Although not as a point of appeal, appellant mentions in its brief that its request for findings of fact and conclusions of law was denied by the chancellor. However, neither the request nor the denial was abstracted. We therefore do not address the matter.

Ark. App. 71, 938 S.W.2d 865 (1997). On appeal from a chancery court order granting a directed verdict, the court on appeal must decide specifically whether the plaintiff made out a *prima facie* case of entitlement to the relief requested. *Id.* This requires that the evidence presented by the party against whom the directed verdict is sought must be given the highest probative value, taking into account all reasonable inferences therefrom. *Id.* A *prima facie* case to quiet title requires a showing that the plaintiff has legal title to the property and is in possession. *Gingles v. Rogers*, 206 Ark. 915, 175 S.W.2d 192 (1943).

To understand this property dispute, it is necessary to examine all of the evidence that was presented. The evidence shows that appellee owns Lots 13 through 18 of a subdivision called North View in Hempstead County. All of the subdivision lots lie side by side and are bounded on the north by U.S. Highway 67, which runs in a northeasterly and southwesterly direction. Appellant owns property that adjoins the subdivision on the east, west, and south sides. The problem giving rise to this case stems from the manner in which the lot lines within the subdivision were drawn. That is, they were drawn at a perpendicular angle from Highway 67, rather than due north and south from the highway. This error in the drawing created a rectangle, having all ninety-degree angles, rather than a parallelogram, having two acute opposing angles and two obtuse opposing angles. As a result, the drawing extends the rear boundary line of each lot in the subdivision onto, or overlapping, the property claimed by appellant that adjoins the subdivision's southern boundary. Furthermore, with respect to appellee's easternmost lot, Lot 18, more than half of the lot as drawn overlaps the property claimed by appellant that adjoins the subdivision's eastern boundary.

Both appellant and appellee trace their titles to a common owner, A.P. and Alice C. Deloney. Where the plaintiff and defendant both deraign title from the same source, the plaintiff usually need not go behind this source to prove his title. *Coulter v. O'Kelly*, 226 Ark. 836, 295 S.W.2d 753 (1956). As the supreme court explained in *Collins v. Heitman*, 225 Ark. 666, 671, 284 S.W.2d 628, 632-33 (1955):

> It is apparent from the record compiled in this case, that appellant and appellee trace their respective titles to Mrs. Thomas. The appellant contends that in a suit to quiet title, the plaintiff

> must prevail upon the strength of his record title, and, an equitable title is not sufficient against a subsequent purchaser with superior record title. In this statement of the law appellant is in error. The law governing this situation was clearly announced . . . where this court said: "It is true, in an adversary suit, that the plaintiff must recover on the strength of his own title and not the weakness of the defendant's title. . . . *This rule is applicable where the parties claim title from independent sources, and has no application in cases where the parties trace their respective titles to a common source. Where parties trace their title to a common source, the one must prevail who has the superior equity." Since both parties claim title through Mrs. Thomas and since appellee's title antedates and is superior to that of appellant, it necessarily follows that appellee is entitled to have same quieted.*

(Emphasis added.)

Appellant established its chain of title beginning with a deed from A.P. and Alice C. Deloney to Inell Jones, executed on July 9, 1955, and recorded on July 12, 1955; from Jones to Ozan Lumber, executed on July 11, 1955, and recorded on July 18, 1955; and finally from Ozan Lumber to appellant, Potlatch, executed on July 8, 1966, and recorded on July 21, 1966. In each of these three deeds a larger tract was conveyed, with each saving and excepting from the property conveyed the tract of land that was developed as North View subdivision. In each save-and-except clause, the property was described with the east and west boundary lines running due north and south.

Appellee's chain of title from the Deloneys began with the deed from the Deloneys to R.D. and Irene Franklin, executed and recorded on August 4, 1958, that is *after* the deed from the Deloneys to Inell Jones. This deed conveyed the property by lot and block with the east and west boundary lines running perpendicular to U.S. Highway 67, and not due north and south.

Duane Leamons, West Operations Manager for appellant, testified about appellant's exercise of possession over the property. Chris de France, a surveyor who testified for appellant, stated that the North View Subdivision was originally platted and filed for record by an A.G. Prescott in 1957, which would have been prior to appellant's purchase of the property from Ozan Lumber Company in 1966. In addition, Roberta Dougan, a licensed abstracter, testified on cross-examination that in her opinion the title to Tract

No. 5 in the Ozan to Potlatch deed would have been considered clouded.

Viewing this evidence in the light most favorable to the nonmoving party, appellant, it is clear that the trial court erred in directing a verdict in favor of appellee. That is, appellant established an unbroken chain of title to the property and showed that it was in possession of it. Moreover, even if the plat was recorded prior to appellant's purchase of the property in 1966 and represented a cloud on the title, that fact alone would not affect appellant's title because a grantor conveys no more interest than he has, and if he has no interest, then he conveys nothing. *See generally Parker v. Bowlan*, 242 Ark. 192, 412 S.W.2d 597 (1967); *Hope v. Hope*, 218 Ark. 322, 236 S.W.2d 572 (1951). In fact, the chain of title into appellant would represent an even greater cloud on appellee's title than the cloud on appellant's title resulting from the previously filed plat of the subdivision.

Furthermore, appellant presented evidence showing that the plat was drawn erroneously, with the property lines running perpendicular to the highway rather than due north and south, thus causing the overlap onto the property to which appellant and his predecessors in title received record title. No underlying deed to support appellee's ownership of the overlapping part was introduced, and the fact that the plat was erroneously drawn prevents the conveyance of title to the disputed portion of appellant's property.

In *City of Little Rock v. Southwest Builders, Inc.*, 224 Ark. 871, 875, 276 S.W.2d 679, 682 (1955), Justice George Rose Smith commented, "Thus when the appellee invested $8,500 in the purchase of Lot 23, it did so merely with notice that its right to build involved a disputed question of law. *That one buys property with notice of a legally doubtful claim does not preclude him from asserting its invalidity.*" (Emphasis added.) Similarly, the recorded, erroneously drawn plat of the subdivision in the instant case may have given appellant notice of potential trouble, or a cloud on the title; however, it does not preclude him from asserting the invalidity of the claim.

We hold that appellant presented a *prima facie* case to have title quieted in its favor, and that the chancellor erred in directing a verdict in favor of appellee.

Reversed and remanded.

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

DeJuan TRAMMELL *v.* STATE of Arkansas

CA 99-1085 16 S.W.3d 564

Court of Appeals of Arkansas
Division II
Opinion delivered May 10, 2000

Wendy Coffey, Deputy Public Defender, for appellant.

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

JOHN F. STROUD, JR., Judge. DeJuan R. Trammell was adjudicated to be a juvenile delinquent by reason of terroristic threatening. On appeal he challenges the sufficiency of the evidence to show that he committed the offense of first-degree terroristic threatening, a Class D felony. The State responds that the issue was not preserved because appellant filed to renew his motion for directed verdict at the close of all the evidence. The abstract confirms that at the conclusion of the State's case appellant moved for a directed verdict on the ground that the State had not proven the element of communicating the threat; the motion was not, however, renewed at the conclusion of all the evidence. Therefore, as explained below, we are prohibited by our rules of criminal procedure from addressing the merits of appellant's argument.

A person commits the offense of first-degree terroristic threatening if, with the purpose of terrorizing another person, he threatens to cause physical injury to a teacher or other school employee acting in the line of duty. *See* Ark. Code Ann. § 5-13-301(a)(1)(B) (Repl. 1997). At the adjudication hearing, the State presented evidence regarding actions by appellant when he was ten years old and a fifth-grade student at Sutton Elementary School in Fort Smith. Testimony was given by Linda Rupe, appellant's teacher in both the fourth and fifth grades; by Nicole "Nikki" Shepard Misner, who taught in the room across the hall from Ms. Rupe; and by Charles Shipman, the school's principal. Their testimony revealed that on January 22, 1999, Ms. Misner assigned "detention" to about twenty students, including appellant, who did not line up properly at recess. Appellant protested, as did other students, that he "wasn't doing anything," and he seemed no more upset than the others.

Appellant said nothing further to Ms. Misner. He went straight to his desk when he entered his classroom, but he refused to get out materials for his mathematics assignment. Ms. Rupe, who had worked with him on anger management, could see that he was angry. Appellant began writing and drawing on a sheet of paper. She looked at his drawing about five times while she walked around and monitored the classroom. She let him cool down and continue drawing, but she approached him at some point, acting on information she had received, and asked for "the gun." Nervously, he told her that the gun was not real. He produced a toy gun from his desk and gave it to her. At her request, he also gave her the paper on which he had drawn and written.

Ms. Rupe took appellant to Mr. Shipman, to whom she gave the note and toy gun. Mr. Shipman showed those items to Ms. Misner in the afternoon. Appellant was suspended from Sutton Elementary for five days, but he never returned. Appellant was not arrested that day even though a police officer was called to the school and informed about the incident.

The drawing that Ms. Rupe took from appellant, included in appellant's addendum as State's Exhibit No. 2, shows a person lying in a horizontal position. An arrow connects the figure to the words "that is Nikki!!" Another person stands over the first person, holding what appears to be a gun; words from his mouth appear to be "hu hu hu," but are somewhat illegible. Above the drawing is written the following, reproduced as closely as possible with original punctuation and spelling:

> I wich that all the teachers' were dead who at Sutton. And some of the students' I hit to! And I wich *Nikki* was *dead* to. *Nikki* the teacher who is across the hall.
>
> I mean Nikki across the hall!!

The above testimony and evidence was presented during the State's case-in-chief. On cross-examination, Mrs. Rupe denied telling appellant's mother that appellant had thrown his note into a restroom trash can.

After the denial of his motion for directed verdict, appellant presented his defense in the form of testimony by his mother and Ms. Misner, which revealed the following version of events. Appellant began taking Ritalin in the fourth grade, but it had been stopped after about a year because it had not helped him. His mother had tried to get counseling for him, starting while he was at Sutton, but her insurance wasn't covering it and nothing came of her requests for help at the school. Appellant transferred to another school after the incident at Sutton, and things got better. Appellant told his mother that he had received the toy gun from a little boy on the school ground in trade for a bicycle ride. Appellant was punished at home after the January incident by being kept inside for a month with no television. He told his mother that he wrote the note because he wanted to put his feelings on paper, and he told her that he didn't mean any harm. Ms. Rupe told her that appellant had

thrown the note into a trash can in the restroom. He was not arrested until March 29, 1999.

The rules of criminal procedure are applicable to juvenile delinquency proceedings. Ark. Code Ann. § 9-27-325 (Repl. 1998); *L.H. v. State*, 333 Ark. 613, 973 S.W.2d 477 (1998). The rule that controls our review of this juvenile adjudication, Ark. R. Crim. P. 33.1, was amended by per curiam order of the Arkansas Supreme Court less than a month before the date of the adjudication hearing, held on May 4, 1999. This seems an inadequate time for the trial judge and the attorneys to reasonably learn of the change.

It is the amended rule, regrettably made effective as of the date of the per curiam, that prohibits our addressing the merits of this appeal. The per curiam reads as follows:

We hereby adopt, *effective immediately*, these amendments and republish Rule 33.1 as set out below:

RULE 33.1. Motions for Directed Verdict and Motions for Dismissal.

> (a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor.
>
> (b) *In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence.* The motion for dismissal shall state the specific grounds therefor. *If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.*
>
> (c) *The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment.* A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. *A renewal at the close of all of*

> *the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal.*

In Re Ark. R. Crim. P. 33.1, 337 Ark. 621 (1999) (emphasis added).

The reporter's note to Rule 33.1 states that the requirement regarding bench trials, found in subsection (b), is a change in previous procedure and overrules prior case law. Although the incident leading to these proceedings was committed prior to the effective date of the rule's amendment, application of the new requirement does not violate constitutional prohibitions against *ex post facto* laws because it does not criminalize conduct that was previously noncriminal, does not increase the severity or harshness of the punishment for the offense, and does not deprive appellant of a defense that was available to him at the time he committed the offense with which he was charged. *See Williams v. State*, 318 Ark. 846, 887 S.W.2d 530 (1994). Thus, appellant's failure to renew his directed-verdict motion at the close of all the evidence precludes appellate review of his challenge to the sufficiency of the evidence.

Affirmed.

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

Elwin HOOVER *v.* Gae Von HOOVER

CA 99-944 16 S.W.3d 560

Court of Appeals of Arkansas
Division I
Opinion delivered May 10, 2000

Eddie N. Christian Law Office, by: *Eddie N. Christian*, for appellant.

Ledbetter, Cogbill, Arnold, & Harrison, LLP, by: *Ronald D. Harrison* and *Virginia C. Trammell*, for appellee.

WENDELL L. GRIFFEN, Judge. Appellant Elwin Hoover and appellee Gae Von Hoover were divorced by a decree entered May 18, 1999. The chancellor divided more than $1,500,000 in marital property between the parties and awarded appellee $2,000 per month alimony for a period of ten years. He also awarded appellee custody of the couple's two minor children and ordered appellant to pay $3,500 per month child support. On appeal, appellant argues that the property division was inequitable and that the chancellor erred in calculating his income for the purpose of the support awards. We agree that the chancellor erred in dividing the couple's marital property and therefore reverse and remand the case.

Appellant and appellee were married in 1982. For the great majority of the marriage, appellee did not seek outside employment but, by agreement with appellant, remained at home to take care of the house and the children. Meanwhile, appellant pursued a career

in the oil and gas industry. By the early 1990s, he had become the very successful owner of Hoover Oil & Gas, Inc., and the part owner of a related operating company, Hoover/Wilson Exploration & Production, Inc. According to appellee, the couple had an average yearly income of $500,000 between 1995 and 1998. They enjoyed a lavish lifestyle that included a $700,000 home, three luxury vehicles, a boat, a condominium, jewelry, and various parcels of real property.

In 1996, the appellant and appellee separated temporarily. During this time, appellant met with several financial difficulties. First National Bank, which had made a $1,670,000 loan to Hoover Oil & Gas, restructured the loan in the fall of 1997 to require payments of $33,000 per month. According to loan officer James Fourmy, the loan was undercollateralized, and no payments had been made toward reducing the principal. Around the same time period, appellant discovered that an employee of Hoover/Wilson had embezzled a substantial amount of funds belonging to other persons. Additionally, appellant and appellee, while briefly reconciled, obtained a $400,000 mortgage on their home at appellant's suggestion. According to appellant, he used $300,000 of the funds to pay business expenses and $100,000 to repay the embezzled funds. Appellee claims that $300,000 of the money was used to finance several unsuccessful drilling projects.

Shortly after obtaining the mortgage, appellant left the marital home, and the parties remained separated. Appellant became more concerned about his financial situation and decided to sell some of his producing wells. The largest sale involved what were known as the Greasy Creek wells, which brought a price of $972,479.84. Another sale, called the Vastar sale, generated $423,336.59. The proceeds of these sales and two smaller sales were dedicated to First National Bank, thereby reducing the Hoover Oil & Gas debt to $156,106. These sales substantially reduced the number of the company's producing wells.[1]

In April 1998, appellant sued appellee for divorce. It was agreed that appellee would receive custody of the children. However, the parties disagreed about the division of marital property, the amount of child support that appellant should pay, and whether appellee was entitled to alimony. Therefore, a trial was held on

[1] The extent of the reduction is unclear. It appears that, at its height, Hoover Oil & Gas operated seventy-nine producing wells. After the 1998 sales, the number was reduced to either thirty-seven or fifteen, depending upon which trial exhibit is referenced.

these issues. Following a two-day hearing, the chancellor issued a detailed letter ruling and a decree in which he made an unequal division of the property in appellee's favor, awarded her $2,000 per month alimony for ten years, and ordered appellant to pay $3,500 per month child support. Appellant filed a timely notice of appeal from the chancellor's ruling.

We note at the outset that chancery cases are reviewed *de novo* on appeal. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). However, we will not reverse a chancellor's findings of fact unless they are clearly erroneous. *Id.* We will defer to the superior position of the chancellor to judge the credibility of the witnesses. *Id.*

We address first appellant's contention that the chancellor erred in dividing the parties' marital property. Arkansas law provides that, at the time a divorce decree is entered, all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable. Ark. Code Ann. § 9-12-315(a) (Repl. 1998). In the event the court finds that an equal division would be inequitable, it shall make some other division that it deems equitable, taking into consideration the many factors set forth in Ark. Code Ann. § 9-12-315(a)(1)(A) (Repl. 1998), which include length of the marriage, the age, health, and station in life of the parties, and each party's occupation, sources of income, and vocational skills. The overriding purpose of the property-division statute is to enable the court to make a division of property that is fair and equitable under the circumstances. *Smith v. Smith*, 32 Ark. App. 175, 798 S.W.2d 443 (1990). A chancellor's unequal division of marital property will not be reversed unless it is clearly erroneous. *See Franklin v. Franklin*, 25 Ark. App. 287, 758 S.W.2d 7 (1988).

In his letter ruling, the chancellor set out an item-by-item recitation of the marital assets and debts assigned to each party. Appellee was awarded, free of debt, the couple's marital home, two vehicles, and other items with a total value of $917,406. Appellant was awarded the assets of Hoover Oil & Gas, valued at $421,642, an additional $210,821 enhancement to the company's value, the remainder of the couple's real property, and various other items with a total value of $1,319,514. Appellant was also assigned over $700,000 in debt, which included the $371,093 remaining mortgage on the marital home. His net award was therefore $618,998, or approximately forty percent of the marital property.

The chancellor's decree, entered the same day as his letter ruling, disposed of some additional items such as sports tickets and a country club membership not mentioned in the letter. These items have some value, but their worth is negligible compared with the overall property owned by the parties. However, one significant item that was mentioned in the decree was not mentioned in the letter ruling — the $156,106 debt owed by Hoover Oil & Gas to First National Bank. In the decree, the debt is assigned to appellant. However, it is not included in the mathematical calculations in the letter ruling.

Appellant argues that the chancellor, in his letter ruling, obviously intended to divide the property 60/40 between the parties, but, due to several errors, the actual division was much more unequal. In particular, he contends that the assets assigned to him are much less valuable than they appear because the chancellor failed to reduce the worth of Hoover Oil & Gas by the $156,106 debt owed to First National Bank and because the chancellor arbitrarily added a 50% enhancement ($210,821) to the value of Hoover Oil & Gas. We agree that the chancellor erred on both counts.

To prove the value of the Hoover Oil & Gas assets at trial, appellee presented the testimony of CPA Matthew Scott James. James testified that, assuming the company's wells continued to produce, their value was approximately $2.1 million. However, he admitted that he did not conduct engineering studies which are customary in valuating wells, and he admitted that in arriving at his figure, he included wells that the company had already sold. In fact, he said that he was not purporting to tell the court the value of Hoover Oil & Gas, Inc., but was attempting to provide a "snapshot" of a particular part of the business. There is nothing in any of the chancellor's findings to indicate that he gave any credence to James's valuation. Instead, it appears that in arriving at a value for Hoover Oil & Gas, the chancellor relied on appellant's expert, petroleum engineer Tom Alexander. Alexander valued the company's well reserves at $421,074.95. This valuation was apparently used by the chancellor, with a small correction, in arriving at the figure of $421,642 listed in the letter ruling as the value of Hoover Oil & Gas. Appellant has no quarrel with this value other than his claim that is should be reduced by the $156,106 owed to First National Bank.

■ ■ A chancellor's valuation of property for purposes of property division will not be reversed unless it is clearly erroneous.

See Vestal v. Vestal, 28 Ark. App. 206, 771 S.W.2d 800 (1989). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). We are firmly convinced that a mistake was committed on this point. The chancellor's letter ruling was a worthy attempt to clarify and explain the matters in the accompanying decree and to set out, mathematically, the ultimate division of property between the parties. However, the letter ruling makes no mention of the $156,106 debt. The debt was not mentioned either in assessing the value of Hoover Oil & Gas, nor in the listing of debts assigned to appellant. By inadvertently failing to consider this large amount as part of his mathematical calculations, the chancellor's valuation of the company's assets, as assigned to appellant, was erroneously inflated.

We also agree with appellant that the chancellor erred in assigning $210,821 in enhanced value to the worth of Hoover Oil & Gas. That amount is precisely 50% over and above the $421,642 value the chancellor assigned to the company. Even though neither party asked the chancellor to place an enhanced value on the company's assets, the chancellor explained in his letter that "Elwin Hoover's testimony regarding actual sales indicated a 50% higher sales price when compared to the [value estimates made by Tom Alexander]." The chancellor was referring to the four sales that Hoover Oil & Gas made for the purpose of reducing its debt to First National. Exhibits in the record show that the properties had the following values and sale prices: 1) one well to Seagull Energy valued at $28,879.50, sold for $58,879.54; 2) two wells to Foundation Life valued at $18,049.75, sold for $25,088.68; 3) Greasy Creek wells valued at $524,950.58, sold for $972,479.84; and 4) Vastar sale wells valued at $401,733.35, sold for $423,336.59. The percentage by which each sale exceeded the value of the property was 104%, 39%, 85%, and 5%, respectively (averaging 58.25%).

■ ■ Obviously the four above-mentioned properties sold for more than the value of their engineered reserves. However, we cannot say that those sales created a reasonable basis for the chancellor to virtually take judicial notice that the value of the company's remaining reserves should be enhanced. There was no testimony at trial that, as a matter of custom or practice, the value of oil and gas properties is to be calculated by adding an enhanced value based on past sale prices. The chancellor, in using this enhanced value, did

not rely on any expert testimony or industry rule of thumb but simply decided, based on four prior sales, that Hoover's oil properties could be valued by adding 50% to the engineered value of their reserves. Even though the sales prices of the above four properties averaged 58% above their values, the actual range of variance is 5% to 104%. This indicates that while Hoover Oil's remaining wells may have some value in excess of their engineered reserves, it is pure speculation, given the evidence in this case, to say that if they are sold they will be worth 50% more. Predictability is favored over mere surmise in the valuation of marital property. *Grace v. Grace*, 326 Ark. 312, 930 S.W.2d 362 (1996).

We acknowledge that our state's property division statute does not compel mathematical precision in property distribution but only requires that property be distributed equitably. *Creson v. Creson,* 53 Ark. App. 41, 917 S.W.2d 553 (1996). Further, the chancellor is vested with a measure of flexibility in apportioning total assets, and the critical inquiry is how the total assets are divided. *Id.* However, the problem here is not the percentage distributed to each party but the erroneous calculation of the value of an asset assigned to appellant.

Because we find errors in the chancellor's division of marital property, we reverse and remand to allow the chancellor to redivide the property in light of the considerations expressed in this opinion. *See Grace v. Grace, supra.* Additionally, we reverse the alimony and child-support awards because the chancellor's awards and his calculation of appellant's income are likely to be affected in light of his redivision of property consistent with our decision.

Reversed and remanded.

BIRD and KOONCE, JJ., agree.

RITCHIE GROCERY *v.* Sherry K. GLASS

CA 99-1206 16 S.W.3d 289

Court of Appeals of Arkansas
Division IV
Opinion delivered May 10, 2000

[redacted]

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

Georgia L. Taylor, for appellee.

ANDREE LAYTON ROAF, Judge. Ritchie Grocery (Ritchie) appeals from an order of the Arkansas Workers' Compensation Commission that awarded one of its employees, Sherry Glass, who was the victim of an armed robbery, medical benefits for treatment of post-traumatic-stress disorder (PTSD). On appeal, it argues that the Commission erred in its decision because it misinterpreted the Diagnostic Statistics Manual of Mental Disorders-IV (DSM-IV). We affirm.

On the night of January 14, 1998, Sherry Glass was attempting to lock the door to one of Ritchie's convenience stores, Rainbow Food Mart #3, where she worked as a night clerk, when a gun-wielding assailant surprised her from behind, forced his hand over her mouth, and ordered her not to scream. The assailant prodded her into a dark corner outside the store and pressed her into the corner with his body. A second man approached and demanded Glass's purse and keys. When the sound of an approaching vehicle caused her to look up, Glass's assailant placed his gun against her temple and ordered her to look down again. The second assailant

unlocked Glass's car door and took Glass into the store. He ordered her to turn off the alarm and open the safe. When he found out that she could retrieve only $300 and could not access the floor safe, he threatened her. She put her hands over her face, turned away from the robber, and silently prayed for her life. Glass heard the robber leave the store and turned around in time to see the tail lights of her car as it left the parking lot.

Glass started having nightmares about the robbery, and on February 9, 1998, she went through an intake appointment at a psychological counseling center, Neuropsychiatry Associates of South Arkansas. She was subsequently diagnosed with, and treated for, PTSD. Ritchie controverted her claim for workers' compensation benefits, denying that she had suffered a compensable injury.

At a July 31, 1998, hearing before an administrative law judge (ALJ), Glass's treating psychologist, Dr. Taryn Sue Van Guilder, testified that she began treating Glass for PTSD on a weekly basis, beginning on February 16, 1998. According to Dr. Van Guilder, Glass has experienced several of the symptoms associated with PTSD. She also stated that there was no other triggering event in Glass's history, and although Glass was treated for alcohol abuse some seven years before, she opined that alcohol abuse could not cause symptoms of PTSD, although it could "exacerbate" the symptoms. She also stated that Glass was still symptomatic and in treatment as of the day of the hearing, and she could not predict when Glass's symptoms would abate.

On cross-examination, Ritchie's attorney questioned Dr. Van Guilder at length about whether the symptoms that Glass exhibited conformed to the criteria required by DSM-IV. Dr. Van Guilder stated that Glass exhibited markedly diminished interest or participation in significant activities, although that symptom "remitted pretty quickly . . . [after] a month, maybe," but noted that Glass started feeling "a little bit better about that as things progressed." Dr. Van Guilder further noted that Glass exhibited a restricted range of affect, but conceded that this finding was relative to the general population and that she was not familiar with Glass's range of affect prior to the robbery. Finally, Dr. Van Guilder stated that Glass exhibited persistent avoidance of stimuli associated with the trauma, and she disagreed that the fact that Glass had visited the convenience store would detract from the validity of this diagnostic find-

ing because returning to the store was a specific part of Glass's therapy. Dr. Van Guilder concluded her testimony by stating that the nature of Glass's condition had changed over time, at least in part because of the more than five months of treatment that Glass had undergone.

Glass's husband, John Wayne Glass, testified that she began experiencing nightmares immediately after the robbery, which he considered "normal." He eventually urged her to seek help, however, when it seemed to be getting worse. John Glass further testified that after the robbery, "there definitely was a change. Sherry didn't want nobody touching her, you know. I mean, she was just acting strange."

In addition to testifying about the robbery, Glass stated that she had dreams about the incident, overreacted to benign situations such as when a person bumped into her, and was only looking for day-time employment. On cross-examination, she admitted to going back to the store "just a few times" including once to get her last paycheck, "a few times to purchase cigarettes or whatever," and an unspecified number of times to purchase beer. She noted however, that she was required to go to the store as part of her therapy.

John Benson, vice-president of Ritchie Grocery Company, testified that he obtained surveillance video that showed Glass in the store during the early evening hours on March 26, 1998, April 7, 1998, and April 14, 1998. Glass subsequently viewed the video tapes and noted that on April 7, 1998, she was accompanied by her daughter who also appeared on the tape. Glass's supervisor, Carol Dyson, testified that Glass had been in the store "two or three times" since the robbery. Dyson also stated that she worked "days" and that she only waited on Glass one of the times that she came to the store. Dyson also stated that store clerk Bobby Green waited on Glass the other times, and that she was present when Green was working "most of the time." Bobby Green, who stated that she only worked mornings, testified Glass may have been in the store as many as five times, but only twice by herself. Janice Gold, a clerk who worked the 2:00-to-11:00 shift at Rainbow, testified that she was present when Glass came into the store on March 26, 1998, and described the visit. On cross-examination, Gold stated that she was familiar with the times that Glass came into the store because Benson told her to keep a record of each visit. Gold was unable,

however, to explain why only three of the visits were depicted on video tape. She also admitted that it was apparent from the video that the April 7, 1998, visit was conducted during daylight hours.

Ritchie argues on appeal that the Commission misinterpreted and misapplied the diagnostic criteria in DSM-IV to conclude that Glass was suffering from post-traumatic stress disorder.[1] It contends that although some of the symptoms required to diagnose PTSD were arguably present, Dr. Van Guilder's testimony regarding the symptom of "markedly diminished interest or participation in significant activities" lasting "a month", maybe," was insufficient to establish the presence of the indicator for the requisite one-month period[2]. Further, regarding the symptom of restricted range of affect, it contends that Dr. Van Guilder had no basis to know how Glass's affect had changed. Finally, regarding the indicator of avoiding activities, people, and places that arouse recollections of the traumatic event, Ritchie contends that the videotape showing Glass's presence in the store and other eye-witness testimony contradicts Glass's own account that she was avoiding the store. This argument is without merit.

Arkansas's Workers' Compensation law states in pertinent part that: "No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or

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[1] Under DSM-IV, the diagnostic criteria for PTSD is organized in six sections, all must be present for a diagnosis of PTSD. Ritchie only challenges the diagnostic criteria in one of the sections, Section C. Section C states:

Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma

(2) efforts to avoid activities, places, or people that arouse recollections of the trauma

(3) inability to recall an important aspect of the trauma

(4) markedly diminished interest or participation in significant activites

(5) feeling of detachment or estrangement from others

(6) restricted range of affect (e.g., unable to have loving feelings)

(7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

Dr. Van Guilder only found symptoms 2, 4, and 5 supported the diagnosis.

[2] In DSM-IV, one of the diagnostic criteria for PTSD requires that the symptoms listed in Sections B, C, and D be present for "more than 1 month."

psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders." Ark. Code Ann. § 11-9-113(a)(2) (Repl. 1996). 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 supported by substantial evidence. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Id.* The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Id.*

Regarding Ritchie's argument that the duration of Glass's "markedly diminished interest or participation in significant activities" was not sufficiently long to satisfy Diagnostic Criteria E, the standard of review in workers' compensation cases prevents reversal on this issue. As noted above, we are required to view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision. While it is true that Dr. Van Guilder's assessment of the duration of the symptom in question was somewhat equivocal, to reach Ritchie's conclusion, this court would have to disregard Dr. Van Guilder's testimony that Glass was diagnosed in accordance with DSM-IV, which implies that the symptom was present for more than a month, and then conclude that the Commission erred as a matter of law in interpreting the phrase "a month, maybe" as meaning less than a month. The Commission is empowered to conduct such a *de novo* review; this court is not.

Similarly without merit is Ritchie's contention that because Dr. Van Guilder had no basis to know how Glass's affect had changed, restricted range of affect could not be counted as valid diagnostic criteria. In making this argument, Ritchie ignores the fact that Dr. Van Guilder is a trained professional who was qualified to recognize a flat affect and give an opinion as to its presence. Moreover, DSM-IV states as an example of restricted range of affect, "e.g., unable to have loving feelings." As noted above, the Commission had before it the testimony of Glass's husband of eighteen years who stated that he sought treatment for Glass after

the robbery because she would not allow anyone to touch her, which certainly would support a conclusion that Glass was not demonstrating loving feelings.

Finally, Ritchie's assertion that the indicator of avoiding activities, people, and places that arouse recollections of the traumatic event was not present simply because Glass was observed going to the store, is disingenuous at best. Not only was Ritchie's testimony regarding the number of times that Glass actually visited the store not clearly inconsistent with what Glass had reported, Dr. Van Guilder testified that part of Glass's therapy was to make such visits. Moreover, Dr. Van Guilder testified that Glass's condition was improving; as noted above, under DSM-IV, the symptom need only to be present for one month to be a valid diagnostic criteria.

Affirmed.

HART and JENNINGS, JJ., agree.

J.W. HENDRIX *v.* Pat Cooper WINTER,
Trustee, aka Pat Winter

CA 99-794 16 S.W.3d 272

Court of Appeals of Arkansas
Opinion delivered May 10, 2000

Mitch Cash, for appellant.

The Blagg Law Firm, by: *Ralph J. Blagg* and *Brad A. Cazort*, for appellee.

PER CURIAM. This per curiam order relates to an appeal from the chancellor's award of attorney's fees and costs to

the appellee, Pat Cooper Winter, who prevailed in an action by J.W. Hendrix, appellant, to establish an easement on Winter's land by prescription. The appeal was submitted to a panel of this court on March 15, 2000. However, before an opinion could be rendered, Winter, on March 20, 2000, filed a motion to dismiss the appeal, asserting that Hendrix had voluntarily paid the judgment on March 2, 2000. Hendrix filed a response to the motion admitting that the judgment had been satisfied, but alleging that his attorney had entered into an agreement with Winter's attorney to the effect that Winter's attorney would "hold" the funds paid by him in satisfaction of the judgment pending the outcome of the appeal, and that, upon conclusion of the appeal, the funds would be released to the party who prevailed. Hendrix also alleged that the reason for this agreement was that the existence of the judgment on the record had created financial difficulties for him in conducting his timber business because of his inability to obtain a bank loan as a result of the judgment lien on his land.

Hendrix attached to his response the affidavits of himself and his attorney that set forth in greater detail the circumstances and events that led to the alleged agreement. Attached to his attorney's affidavit was a copy of a portion of the attorney's February 29, 2000, long-distance telephone bill purporting to reflect two calls from Hendrix's attorney to Winter's attorney on February 25, four minutes and seven minutes in duration, respectively. Hendrix's attorney alleged in his affidavit that these telephone conversations resulted in the agreement between the parties' attorneys that Hendrix would pay the judgment funds to Winter's attorney, that a satisfaction of the judgment would be entered of record, but that Winter's attorney would hold the funds pending conclusion of the appeal.

Winter filed a reply to Hendrix's response disputing Hendrix's allegation that the payment of the judgment involved an agreement to hold the funds pending the outcome of the appeal. Winter's reply was accompanied by an affidavit of her attorney stating that a Satisfaction of Judgment was provided to Hendrix in exchange for payment of the judgment, that the exchange was accomplished without a conversation resulting in any agreement that the funds were to be held pending the resolution of the appeal, and that payment of the judgment was voluntarily made by Hendrix at his request.

Obviously, the positions of the respective parties as to the existence of an alleged agreement to "hold" the judgment funds pending the appeal are diametrically opposed, and we believe that we have good reason to be concerned about what appears to be a violation by the attorney for one of the parties of Rule 3.3(a)(1) of the Model Rules of Professional Conduct, which provides that, "a lawyer shall not knowingly make a false statement of material fact or law to a tribunal." This court is without the means or authority to resolve the disputed factual issue of whether either, or which, attorney has committed an ethical violation. However, under Canon 3(D)(2) of the Arkansas Code of Judicial Conduct, we, as judges, having received information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty or trustworthiness, are obligated to either communicate directly with respect to the violation with the lawyer who has committed the violation or report the violation to the Arkansas Supreme Court Committee on Professional Responsibility. Under the circumstances presented here, we consider that it is appropriate to report this matter to the Committee on Professional Responsibility, and we do so at this time by directing the Clerk of this court to provide a copy of this order to its Director, James A. Neal.

Turning to the merits of the matter, we have decided that the motion to dismiss this appeal must be granted. In *DeHaven v. T & D Dev., Inc.*, 50 Ark. App. 193, 901 S.W.2d 30 (1995), we held that if an appellant voluntarily pays a judgment, then the appeal from that judgment would be moot, but that if payment of the judgment is involuntary, an appeal would not be precluded. In Hendrix's response to Winter's motion in the case at bar, he does not contend that his payment of the judgment was involuntary. He alleges that the existence of the judgment on the record, constituting a lien on his land, created a financial hardship on his timber business due to his inability to obtain a bank loan. Consequently, he chose to pay the judgment debt in exchange for a satisfaction of it. In *DeHaven*, we quoted from *Lytle v. Citizens Bank of Batesville*, 4 Ark. App. 294, 630 S.W.2d 546 (1982):

> [I]n the majority of jurisdictions, the effect of the payment of a judgment upon the right of appeal by the payer is determined by whether the payment was voluntary or involuntary. In other words, if the payment was voluntary, then the case is moot, but if the

> payment was involuntary, then the appeal is not precluded. The question which often arises under this rule is what constitutes an involuntary payment of a judgment. For instance, in some jurisdictions the courts have held that a payment is involuntary if it is made under threat of execution or garnishment. There are other jurisdictions, however, which adhere to the rule that a payment is involuntary only if it is made after the issuance of an execution or garnishment. Another variation of this majority rule is a requirement that if, as a matter of right, the payer could have posted a supersedeas bond, he must show that he was unable to post such a bond, or his payment of the judgment is deemed voluntary....

DeHaven, 50 Ark. App. At 193, 901 S.W.2d at 32.

Hendrix does not allege that an execution or garnishment on the judgment against him had been either threatened or issued at the time he paid the judgment. He had an absolute right to post a supersedeas bond in this court that would have stayed enforcement of the judgment pending his prosecution of the appeal. He did not do so, and he does not allege that he was unable to post such a bond. From the fact that Hendrix had the money to pay the judgment in full, it is obvious to us that he could have obtained the approval by this court of a supersedeas bond by filing the appropriate bond with the clerk of this court, accompanied by a certificate of deposit, certified check, cash, bank money order, corporate surety, or irrevocable letter of credit, in an amount sufficient to guarantee his payment of "all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree or order of the trial court." Ark. R. App. P. 8(a); *see also Home Mut. Fire Ins. Co. v. Jones*, 62 Ark. App. 182, 969 S.W.2d 675 (1998); and *Schramm v. Piazza*, 53 Ark. App. 99, 918 S.W.2d 733 (1996).

■ We do not decide by this opinion whether, in a proper case, we would not approve and enforce a written stipulation between the parties for the stay of enforcement of a judgment pending an appeal. However, under the rule applied in *DeHaven*, *supra*, we obviously cannot permit the prosecution of an appeal from a judgment that has been satisfied solely upon the strength of an alleged unwritten agreement that is disavowed by one of the parties to the appeal.

Appeal dismissed.

HART and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I strongly disagree that this appeal should be dismissed. This appeal, from an award of a $6009 attorney fee to appellee in a prescriptive easement case, was submitted to a panel of this court on March 15, 2000. On March 20, 2000, the appellee filed a motion to dismiss the appeal, in which he asserted that the appellant had voluntarily paid the judgment on March 2, 2000. The appellant filed a response to the motion, denying that he had paid the judgment, asserting that he sought only removal of the recorded judgment lien in order to secure financing necessary to operate his business and that, in this regard, appellee's attorney had agreed to 1) hold the judgment funds pending the outcome of the appeal, 2) satisfy the judgment lien on the record, and 3) release the funds later to the party who ultimately prevailed in the appeal. This response was accompanied by a detailed affidavit, signed by appellant's attorney, outlining the alleged agreement, the telephone conversations with appellee's attorney, and had telephone logs attached. The affidavit states in pertinent part:

> Mr. Blagg stated that he would hold the funds until a decision was made and keep the money if the trial court was affirmed *or return the money if the trial court was overturned.* (Emphasis added.)

The appellee's attorney then filed a reply to the appellant's response, to which he appended his sworn affidavit, which states in its entirety:

> I am Ralph J. Blagg and I am the Attorney for the Appellee, Pat Winter. I was approached by the Appellant's Attorney and was asked to provide a Satisfaction of Judgment in exchange for payment of the judgment amount. This was done. *There were no agreements or conversations about holding the funds pending resolution of the appeal.* Payment of the judgment was voluntarily made by the Appellant at the Appellant's request. (Emphasis added.)

I do not agree that this appeal should be dismissed because the determination of whether the judgment has been voluntarily paid by the appellant necessarily hinges on which lawyer is telling the truth in the contradictory affidavits that have been filed with this

court. These two sworn statements clearly cannot be reconciled, and I do not agree that the appeal must be dismissed no matter which lawyer is telling the truth. The propriety of appellee's attorney agreeing to such an arrangement or the wisdom of appellant's attorney making such an agreement without reducing it to writing are not pertinent to the analysis of the issue before us, that is whether the judgment has been voluntarily *paid*. In this regard, the facts as outlined in appellant's affidavit describe what is in essence an agreement by counsel to escrow the judgment funds pending the outcome of this appeal. Although our appellate courts have held that voluntary payment of a judgment will negate an appellant's ability to appeal the judgment, *see Shepherd v. State Farm Auto Property & Cas. Ins. Co.*,312 Ark. 502, 850 S.W.2d 324 (1993), *Lytle v. Citizens Bank of Batesville,* 4 Ark. App. 294, 630 S.W.2d 546 (1982), the escrow-type arrangement described by appellant does not constitute payment of the judgment, voluntary or otherwise. The ministerial act of satisfying the record likewise does not equate to payment of this judgment.

For these reasons, I would defer any decision on the appellee's motion to dismiss this appeal until we, or some other appropriate forum, can address the inconsistent statements of the two attorneys as set out in their sworn affidavits.

HART, J., joins.

Larry LECLERE *v.* STATE of Arkansas

CA CR 99-294 16 S.W.3d 276

Court of Appeals of Arkansas
En Banc
Opinion delivered May 10, 2000

John Wesley Hall, Jr., for appellant.

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

PER CURIAM. In January, a three-judge panel of this court decided that appellant's convictions should be reversed and the case dismissed on grounds that the trial court erred in denying appellant's motion to dismiss for lack of a speedy trial. *See LeClere v. State*, CA CR99-294 (January 26, 2000). The State filed a motion to supplement the record and a petition for rehearing, alleging that our decision was based on a material mistake of fact. We agreed with the State, granted the petition for rehearing, and issued a substituted opinion by which we affirmed appellant's convictions. *See LeClere v. State*, CA CR99-294, substituted opinion on grant of rehearing (May 10, 2000).

In its original brief on appeal, the State contended that we could not reach appellant's speedy-trial argument because appellant had failed to bring up or to abstract the transcript of an August 11, 1998, hearing held by the trial court on appellant's motion to dismiss. *See Dixon v. State*, 314 Ark. 378, 863 S.W.2d 282 (1993). The State referred us to the docket sheet showing that, on August 3, the speedy-trial time was tolled and a hearing was set for August 11 on appellant's motion to dismiss. However, the August 11 docket entry made no mention of any hearing being held. It simply showed that appellant's speedy-trial motion was denied on that date. In his reply brief, appellant's trial and appellate counsel, Mr. John Wesley Hall, Jr., essentially argued that no hearing had been held on the motion to dismiss and that there was therefore no record to bring up or to abstract. He argued that his notice of appeal and designation of record "state[d] that *every* court appearance was required" (emphasis in original) and "*[i]f there was such a hearing*, the court reporter failed in her duty." (Emphasis added.) Counsel affirmatively stated that "*no evidence* was presented by either party for the judge to rely on in *a* hearing on the motion" and "[s]ince *no evidence* was presented at *any* hearing, what more is there to abstract?" (Emphasis added.) He also affirmatively asserted that "[t]he motion was *summarily denied on the docket*" and was "*simply denied on the face of the motion and the State's response*." (Emphasis added.)

In light of what we had before us, we decided to reach the merits of the issue in the following language:

> On appeal, the State makes no argument on the merits of appellant's speedy-trial contention. Instead, it argues only that appellant's argument cannot be considered because he did not abstract an August 11, 1998, hearing on appellant's motion to dismiss. To support its position that such a hearing was actually held, the State points only to an August 3, 1998, docket entry that indicates that a hearing was contemplated for August 11. However, the August 11 docket entry makes no mention of a hearing. It merely states, "Speedy-trial motion denied; defendant taken into custody, no bond." Appellant alleges that the court simply denied the motion on the face of the pleadings, with no evidence being taken. Moreover, appellant's notice of appeal designated as the record on appeal "every court appearance from his first appearance to the trial," yet no hearing on appellant's motion appears in the record. Further, after the transcript was filed in this court, a writ of

> certiorari was issued to the trial court's court reporter. In response to the order that any diminution of the record be corrected, the trial court entered an order in which it stated, "This court finds that the transcript in the above-captioned case reflects a true and accurate record of the proceedings in this case."[1] Under these circumstances, we cannot conclude that a hearing was held, and we will address the merits of appellant's argument. [*LeClere v. State*, CA CR99-294, slip op. at 2-3 (January 26, 2000).]

As is plain from the above, we addressed the merits only because we could not determine that a hearing had been held on appellant's motion. However, after that opinion was handed down, the State secured a transcript of an August 11, 1998, hearing held on appellant's motion to dismiss, and we allowed the record to be supplemented with this hearing. This transcript shows that attorneys for both parties were present (including Mr. Hall), that the subject of the hearing was appellant's motion to dismiss on speedy-trial grounds, that three witnesses testified, that several exhibits were introduced, that argument taking up several pages of transcript was entertained, and that the trial court stated findings and conclusions in denying the motion. Had we known that a hearing had been held but not brought forward or abstracted, we would have written the initial opinion to reject appellant's speedy-trial argument in accordance with *Dixon v. State, supra*. There, the supreme court stated:

> [Appellant] then filed a motion asking for a dismissal for lack of a speedy trial. The trial court heard arguments and apparently examined the docket sheet and various orders and denied the motion to dismiss.
>
> Appellant's abstract does not summarize the proof at that hearing, nor does it summarize the findings of fact by the trial court, nor does it summarize the written order, if any, by the trial

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[1] Appellant's attorney did not point to this writ of certiorari and subsequent order by the trial court as support for the proposition that no hearing had been held. Rather, these items were found by this court when searching the record for something to support the State's assertion that a hearing *had* been held. *See Haynes v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993) (we have the authority to go to the record to affirm a trial court's decision). What was not in the record, but which has subsequently been found in our clerk's office, is the motion that caused us to grant the writ. That motion was concerned with the correctness of the record as to a separate and unrelated point of the case, and it is that motion that the trial court was responding to when it entered the broadly worded order referred to.

> court. We cannot know, without examining the transcript, the periods of time that the trial court found to be excluded. In sum, we have no way of knowing whether the trial court erred without examining the transcript. As we have often pointed out, there is only one transcript and there are seven judges on this court, and it is impossible for each of the seven judges to examine the one transcript. *Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980). We are hesitant to affirm a criminal case for failure to comply with Rule 4-2, but we must do so in this case because the abstract wholly omits the hearing and ruling on the motion that is the basis of the appeal.

Dixon v. State, 314 Ark. at 378-79.

It was appellant's burden to bring up a record sufficient to demonstrate error, yet, while he designated every court appearance as the record on appeal, he not only failed to abstract the crucial hearing, he failed even to bring up a record of the hearing. When faced with the State's argument that a hearing had been held but not brought forward, counsel did not avail himself of Ark. Sup. Ct. R. 3-5 or Ark. R. App. P.—Civ. 6 (the latter of which is made applicable to criminal cases by Ark. R. App. P.—Crim. 4(a)), which provide methods to have record errors or omissions corrected. Nor did he admit the default or merely stand mute. Instead, he filed a reply brief containing the arguments referred to above, misleading us into thinking that no hearing had been held.

Pursuant to Canon 3(D)(2) of the Arkansas Code of Judicial Conduct, we hereby refer Mr. John Wesley Hall, Jr., to the Committee on Professional Conduct for such proceedings as the Committee may deem appropriate regarding whether Mr. Hall violated his duties, including his duty of candor toward this court. *See* Model Rules of Professional Conduct 3.3. The following matters are of particular concern to the court, but of course the Committee is not limited in what it may wish to consider:

I. Counsel made misleading statements of fact in his reply brief.

A. He argued, in essence, that there must not have been any hearing because he designated the entire record but no such hearing appeared in the transcript. In fact, the supplemental record shows that a hearing was held at which counsel was present and participated. Moreover, counsel effectively concedes in his response to the petition for rehearing (*see, e.g.*,

paragraph 10) that he knew at the time that he filed his reply brief that a hearing had been held. Further, he states in his affidavit that he "remembered nothing extraordinary about the hearing" and that he "felt the record [originally presented to this court] was adequate to resolve the issue on appeal."

B. He stated that no evidence was presented to the trial court on the speedy-trial motion when the supplemental record shows that several exhibits were introduced and three witnesses testified.

C. He stated that the trial court summarily denied the motion on the docket and on the face of the pleadings when the supplemental record shows that a formal hearing was held at which evidence was presented, arguments were heard, and the trial court explained its reasoning.

II. Counsel made questionable statements in his response to the petition for rehearing. While counsel no longer appeared to be trying to convince us that no hearing had been held, he did assert that "[i]t was unknown to [him] whether the . . . pretrial hearings were taken down by the court reporter." However, the supplemental transcript shows that, at the close of the hearing, appellant's counsel questioned the court about the details of its ruling. Counsel stated at that time, "So, we're making a record for appellate review," to which the court responded, "Right."

III. Certified Court Reporter Linda Dyer has submitted to this court an affidavit in which she swears that appellant's counsel, despite having designated every court appearance in his notice of appeal and despite counsel's argument referred to in I. A. above, specifically instructed her not to transcribe the August 11, 1998, speedy-trial hearing. Counsel has filed an affidavit denying the reporter's averments.

We wish to make it clear that we make no judgment as to the truth of the affidavits referred to under III. or as to the question of whether the statements referred to under I. and II. were misleading by design or for some other reason. Copies of this opinion, the substituted opinion on grant of rehearing issued this date, our January 26 opinion, the briefs, the State's petition for rehearing and attachments, and appellant's response and attachments will be forwarded to the Committee. The Committee may check out the record from the clerk's office if it sees fit.

ROAF, J., concurs.

HART, J., dissents.

George HOLAWAY *v.* Margaret HOLAWAY

CA 99-1099 16 S.W.3d 302

Court of Appeals of Arkansas
Division II
Opinion delivered May 17, 2000

Gruber Law Firm, by: *Wayne A. Gruber*, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Sam Hilburn* and *Traci LaCerra*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant George Holaway appeals the Pulaski County Chancery Court divorce decree that ordered him to pay lifetime alimony to his ex-wife, appellee Margaret Holaway, in lieu of a division of his non-vested military retirement and without regard to whether she remarried after their divorce. He argues that the chancellor abused his discretion in making this finding. We agree, and reverse and remand this portion of the decree.

Appellee filed for divorce after seventeen years of marriage, but prior to appellant's eligibility for military retirement. At the time of the divorce proceedings, appellant was a lieutenant colonel and pilot in the Arkansas Air National Guard, and appellee was a school nurse. Appellant will not be vested with his military retirement until he has twenty years of service, which would occur on January 28, 2001, however, there is no guarantee that appellant will remain in military employ until that date. Appellee was awarded a divorce from appellant, was granted custody of the two minor

children along with commensurate support, and was awarded one-half of the marital assets.

The relevant portions of the decree for purposes of appeal are sections eighteen and nineteen, which state as follows:

> 18. The Court finds that the Defendant [appellant] will remain in the military through twenty (20) years. The parties have been married not quite eighteen years total or thereabout, so it would be very easy to divide one-half (1/2) of eighteen/twentieths or eighteen/twenty-firsts or whatever number of years that the Defendant remains in the military. However, the law in Arkansas is very clear; and it is not a present vested retirement interest subject to division by this Court. Based upon the case of *Christopher v. Christopher*, 316 Ark. 215, which is a 1994 case, and *Burns v. Burns*, 312 Ark. 61, a 1993 case, it is very clear the Supreme Court is not going to change the law regarding vested military pension. Therefore, the Court cannot award Plaintiff any interest in Defendant's military retirement.
>
> 19. The Court finds that the parties have been married for seventeen-plus years, fourteen of which the Plaintiff did not work. The Plaintiff does have job skills and she does have present employment. The Defendant has job skills and is presently employed, and at a minimum, will continue to be employed in his present occupation for at least another two to three years and possibly longer. The Plaintiff makes roughly twenty thousand dollars a year. The Defendant makes approximately eighty-plus thousand dollars a year plus other benefits. Both parties have good job skills and both parties will be able to continue to earn and support themselves to some extent, although the Plaintiff will not earn nearly as much money as the Defendant, at least in his present job. The Defendant will have much greater likelihood of further acquisition of capital assets and income based upon his present earnings. The Plaintiff will not earn, even if she goes to work in a hospital as a floor nurse, increased earnings appreciably in the foreseeable future.
>
> The Plaintiff will lose her military benefits upon divorce. She has not been married twenty years during which twenty years of active service [*sic*], and it is the Court's understanding that she will lose her benefits upon this divorce. During the course of the marriage, the Defendant earned considerably more money than the Plaintiff, but she employed her skills as mother and homemaker and had a direct bearing upon the parties being able to acquire the savings that they have acquired and the home with the equity

> which they have acquired. Based upon the factors that the Court would consider in awarding alimony, the Plaintiff is entitled to the sum of $1,000.00 per month in alimony.
>
> Furthermore, part of the ruling for the alimony and in the manner which the Court has awarded it is strictly due to the lack of the Court's ability to divide the military retirement pay. The Court finds it completely inequitable that the parties can be married 18, 19-1/2, 19 years and 360 days and get divorced and the Plaintiff could walk away with absolutely nothing as a result of her contribution to the marriage and Defendant's contribution to his military retirement pay. The Court was going to award alimony no matter what the Court ordered regarding the military retirement. Additionally, when the Defendant retires, he will draw approximately $2,000.00 a month or $2,500.00 a month. In keeping the alimony the same as it is, Plaintiff will draw roughly what she would have drawn and she would have drawn that for the rest of her life. However, if she remarries, she gets nothing. Therefore, alimony shall only terminate upon the death of either party and alimony shall not terminate upon the remarriage of the Plaintiff. The Court shall retain jurisdiction of the alimony issue.

The award of alimony is discretionary, and any such award will not be reversed absent an abuse of discretion. *Barker v. Barker*, 66 Ark. App. 187, 992 S.W.2d 136 (1999). If alimony is to be awarded, then it should be set at an amount that is reasonable under the circumstances. *Id.* The purpose of alimony is to rectify, insofar as is reasonably possible, the frequent economic imbalance in the earning power and standard of living of the divorced parties in light of the particular facts of each case. *Id.* The primary factors to be considered in awarding alimony are the need of one spouse and the other spouse's ability to pay. *Mulling v. Mulling*, 323 Ark. 88, 912 S.W.2d 934 (1996). Certain secondary factors may be considered in setting alimony including (1) the financial circumstances of both parties, (2) the amount and nature of the income, and (3) the extent and nature of the resources and assets of each of the parties. *Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980).

If a divorcing spouse has achieved an entitlement to military retirement pay, that entitlement is an asset which may be divided between the parties to the divorce. *Christopher v. Christopher*, 316 Ark. 215, 871 S.W.2d 398 (1994). If, however, the divorcing military spouse has not served for a time sufficient to have earned the right to receive military retirement pay, the right has not

"vested" and there is no asset to be divided upon divorce. *Id.*; *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993); *Durham v. Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986). The right to military retirement pay is not an asset that exists to divide until it so vests. *Christopher, supra.*

Here, the chancellor granted this amount of alimony specifically because he could not by law divide the non-vested military retirement that appellant will likely realize in the future. He stated as much in the decree, and his words were not ambiguous, as was the case in *Womack v. Womack*, 307 Ark. 269, 818 S.W.2d 958 (1991). The chancellor's ruling was an attempt to circumvent established Arkansas law as pronounced in opinions of our supreme court. In an analogous situation, the supreme court in *Belanger v. Belanger*, 276 Ark. 522, 637 S.W.2d 557 (1982), reversed and remanded an award of alimony to a wife because the alimony was used as a substitute for awarding the wife an interest in real estate that was not marital property. This rendered the alimony award improper and resulted in the reversal.

[redacted] While the chancellor was not clearly erroneous in ordering alimony, considering the disparate levels of the parties' earning abilities and sources of income, the chancellor articulated that the reason for setting alimony at $1,000 per month was due to his inability by law to divide unvested military retirement benefits that the chancellor assumed will vest in appellant after the divorce. We remand for reconsideration of the alimony issue in a manner consistent with acknowledged Arkansas law and direct that any alimony awarded be based upon the current economic circumstances of the parties without regard to contingent retirement benefits that appellant may receive in the future.

Because this issue is likely to arise again upon remand, we address appellant's arguments concerning the duration of the alimony awarded, *i.e.*, that the alimony award would "only terminate upon the death of either party and alimony shall not terminate upon the remarriage of the [appellee]." Arkansas Code Annotated section 9-12-312 (Repl. 1998) states in relevant part that when a decree is entered that orders the payment of alimony, unless otherwise ordered by the court or agreed to by the parties, the liability for alimony shall automatically cease upon remarriage of the person who was awarded the alimony. In the case before us, the

chancellor ordered otherwise, which is not prohibited by statute. However, the chancellor did so for the stated purpose of substituting alimony for an interest in appellant's unvested military retirement, and for the reasons stated above this is improper.

As to the matter of the decree ordering that alimony would terminate only upon the death of either party, this appears to violate statutory and case authority in Arkansas that, in the absence of a settlement agreement to the contrary, an award of alimony is always subject to modification, upon application of either party. Ark. Code Ann. § 9-12-314 (Repl. 1998); *Bracken v. Bracken*, 302 Ark. 103, 787 S.W.2d 678 (1990). While the subject decree did state that the "Court shall retain jurisdiction of the alimony issue," it is inconsistent to state that alimony shall not terminate until death and yet retain jurisdiction. Furthermore, this lifetime award of alimony was clearly made for the prohibited purpose of substituting alimony for an interest in appellant's military retirement and is improper for that reason as well.

We reverse and remand with instructions that the trial court determine an equitable amount of alimony in accordance with Arkansas law as discussed herein.

STROUD and NEAL, JJ., agree.

MORRILTON SECURITY BANK *v.* Ronald G. KELEMEN and Jean Louise Kelemen; Charlene Engelhoven, Intervenor

CA 99-1108 16 S.W.3d 567

Court of Appeals of Arkansas
Division III
Opinion delivered May 17, 2000
[Petition for rehearing denied June 21, 2000.]

Brazil, Adlong, & Osment, PLC, by: *William C. Brazil*, for appellant.

Joel Taylor, for appellee.

JOHN E. JENNINGS, Judge. In 1991, Charlene Engelhoven's husband, a Morrilton chiropractor, died. On April 27, 1993, she sold his chiropractic practice and office building to Ronald and Jean Louise Kelemen. The Kelemens financed the purchase by executing a one-year note for $110,000.00 at 8 percent interest, together with a mortgage, in favor of Morrilton Security Bank, the appellant here. To facilitate the sale Mrs. Engelhoven pledged a $35,000.00 certificate of deposit as additional collateral for the loan. She signed an "Assignment of Deposit" in which she agreed to give the bank a security interest in the certificate of deposit to secure the loan to the Kelemens, "plus all extensions, renewals, modifications, and substitutions." On April 7, 1994, the loan was renewed at a rate of eight percent for one year with a principal amount of $148,000.00. Mrs. Engelhoven executed another assignment of deposit and signed the new note.

In 1995, the loan was renewed for one year with the principal amount of $143,000.00 at 9.97 percent interest. In 1996, the loan was renewed for one year with a principal amount of $140,000.00 and interest at 10 percent. In 1997, the loan was renewed again for one year with a principal amount of $135,000.00 and interest at 10 percent. Mrs. Engelhoven signed no additional documents in connection with the last three renewals.

In 1997, the Kelemens defaulted on the note and a decree of foreclosure was ultimately entered. When the property was sold at public auction a substantial deficiency remained, and the bank applied Mrs. Engelhoven's $35,000.00 certificate of deposit to the Kelemens' debt.

Mrs. Engelhoven was then permitted to intervene in the lawsuit and reopen the case. She filed a motion for partial summary judgment, contending that she was a surety or guarantor, that the increases in the interest rate were material alterations, and that because she did not consent to the interest-rate increases she was relieved of her obligation as a surety. The chancellor granted the motion, and the bank now appeals. We agree with the bank and reverse and remand.

■ A guarantor, like a surety, is a favorite of the law, and her liability is not to be extended by implication beyond the expressed

terms of the agreement or its plain intent. *National Bank of Eastern Arkansas v. Collins*, 236 Ark. 822, 370 S.W.2d 91 (1963); *Moore v. First National Bank of Hot Springs*, 3 Ark. App. 146, 623 S.W.2d 530 (1981). A guarantor is entitled to have her undertaking strictly construed and she cannot be held liable beyond the strict terms of her contract. *Inter-Sport, Inc. v. Wilson*, 281 Ark. 56, 661 S.W.2d 367 (1983); *Lee v. Vaughn*, 259 Ark. 424, 534 S.W.2d 221 (1976). Any material alteration of the obligation assumed, made without the consent of the guarantor, discharges her. *Wynne, Love & Co. v. Bunch*, 157 Ark. 395, 248 S.W.2d 286 (1923); *Continental Ozark, Inc. v. Lair*, 29 Ark. App. 25, 779 S.W.2d 187 (1989).

If, however, the guaranty agreement specifically provides it will not be affected by renewals or extensions of the obligation guaranteed, that provision will be honored. *Smith v. Elder*, 312 Ark. 384, 849 S.W.2d 513 (1993); *Germer v. Missouri Portland Cement Co.*, 301 Ark. 277, 783 S.W.2d 359 (1990); *Gentry v. First American National Bank*, 264 Ark. 796, 575 S.W.2d 152 (1979).

Finally, where the guaranty contract contains a provision that authorizes a change in the terms of the principal contract, a change within the scope of that authorization does not discharge the guarantor. *First Commercial Corp. v. Geter*, 547 P.2d 1291 (Colo. Ct. App. 1976); *see also, e.g., United States v. Rollinson*, 866 F.2d 1463 (D.C. Cir. 1989); *Holden v. National Blvd. Bank of* Chicago, 596 N.E.2d 47 (Ill. App. Ct. 1992); *Citizens & Southern National Bank v. Richardson*, 378 S.E.2d 159 (Ga. Ct. App. 1989); *In the Matter of the Estate of Bluestone*, 329 N.W.2d 446 (Mich. Ct. App. 1982);10 Samuel Williston, *Treatise on the Law of Contracts* § 1242 (3d ed. 1961); 38 AM. JUR.2d *Guaranty* § 85 (1999).

In the case at bar, the "Assignment of Deposit" provided that the certificate of deposit was pledged to secure the original loan to the Kelemens, "plus all extensions, renewals, modifications, and substitutions." It is the court's duty to enforce valid agreements between the parties, not to rewrite them. *Curry v. Commercial Loan & Trust Co.*, 241 Ark. 419, 407 S.W.2d 942 (1966).

We conclude that the trial court erred in granting summary judgment in favor of Mrs. Engelhoven.

Reversed and remanded.

HART and ROAF, JJ., agree.

Vincent MAXWELL *v.* State of ARKANSAS CHILD SUPPORT ENFORCEMENT UNIT

CA 98-1090 16 S.W.3d 293

Court of Appeals of Arkansas
Divisions II, III, and IV
Opinion delivered May 17, 2000

Brockman, Norton & Taylor, by: *C. Mac Norton*, for appellant.

Sandra Y. Harris, for appellee.

SAM BIRD, Judge. This case stems from a paternity action in which Vincent Maxwell, the appellant, was adjudicated in May 1995 to be the father of a child born out of wedlock and

ordered to pay child support, past-due and current. Because the child's mother, Jozetta Halton, had received Aid to Families with Dependent Children (AFDC) benefits from the State of Arkansas, the paternity case was prosecuted by attorneys for the Arkansas Child Support Enforcement Unit (CSEU), the appellee, through the Jefferson County Office of Child Support Enforcement.

In November 1995, six months after the paternity action had been concluded, Maxwell and Halton entered into an agreement by which Halton accepted a $2,300 lump-sum payment from Maxwell in full satisfaction of Maxwell's child-support obligations, past, present, and future. They filed a joint petition in the case that had been opened originally for prosecution of Halton's paternity action against Maxwell, and, on November 15, 1995, received from the court an order approving their agreement.

Six months later, CSEU petitioned the court to set aside the November 15 order, contending: (1) that at the time the order was entered Halton was receiving AFDC and had an open child-support case with CSEU; (2) that Halton had assigned her child-support rights to CSEU; (3) that Maxwell owed child support to the State of Arkansas; (4) that Halton lacked authority to enter into the agreement; and (5) that the agreed order was void as against public policy. CSEU later amended its motion to add allegations that CSEU was the real party in interest, and that Maxwell had practiced fraud upon the court in obtaining the agreed order without notice to CSEU.

On February 19, 1997, a hearing was convened, but when Halton failed to appear, the court rescheduled the hearing for May 7, 1997, and ordered Halton to appear on that date with the child or risk being sanctioned for contempt of court. On May 7, Halton again failed to appear, and counsel for CSEU and the child's attorney ad litem argued that the agreed order was void *ab initio* and that the court should set it aside notwithstanding Halton's failure to appear. A lengthy report filed by an attorney ad litem for the child outlined numerous attempts (some successful and some unsuccessful) to communicate with Halton in Texas by telephone. However, despite clear indications that Halton received notices of the hearings, she never attended any of them.

Finally, at a scheduled hearing on January 12, 1998, the court heard the testimony of a witness called by CSEU, a child-support investigator, that revealed the following, in significant contrast to the allegations of CSEU's petition:

> (a) That Halton had been an AFDC recipient "off and on," but that she was not on AFDC in November 1995 (when the joint petition was filed and the agreed order entered);
>
> (b) That the only document CSEU had bearing Halton's signature was a copy of a notice from Halton to the Jefferson County Circuit Clerk stating that she had contracted with CSEU for non-AFDC assistance and directing that all child-support payments collected by the clerk's office be forwarded to CSEU;
>
> (c) That CSEU did not have a contract as referred to in the above-mentioned notice, nor did CSEU have an assignment of child-support payments from Halton; and
>
> (d) That when the agreed order of November 15, 1995, was entered, all AFDC benefits had been repaid and there were no unreimbursed grants owed to the State on Halton's account.

Following the January 12, 1998, hearing, the court entered the order of February 10, 1998, that is the subject of this appeal.[1] In that order the court held: (1) that it had jurisdiction to modify or set aside the November 15, 1995, order; (2) that CSEU had standing to challenge the validity of the November 15, 1995, order; (3) that Maxwell had practiced fraud upon the court in obtaining the November 15, 1995, order by his failure to give notice to CSEU before obtaining Halton's signature on the joint petition; and (4) that the November 15, 1995, order was void as against public policy inasmuch as it permanently terminated the rights of the child to receive support. Because we have found no authority that would permit CSEU to challenge the validity of the court's order of November 15, 1995, we reverse and remand with instructions to reinstate that order.

In reaching this decision, we are not unmindful of the broad language in *State Office of Child Support Enforcem't v. Terry*, 336 Ark.

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[1] Some of the holdings set forth the chancellor's order of February 10, 1998, were originally contained in an earlier order entered January 17, 1997, and restated in the February 10, 1998, order.

310, 985 S.W.2d 711 (1999), relied upon by the dissenting judges, that would appear to support the chancellor's conclusion that CSEU has standing to challenge the court's agreed order. However, we do not find *Terry* to be controlling in the case at bar. In *Terry*, Joey Terry challenged the ethical propriety of CSEU's representation of his ex-wife in proceedings to collect child support from him, where CSEU had previously represented him in the same case in his efforts to collect child support from his ex-wife. The chancellor found that these circumstances resulted in a conflict of interest on CSEU's part, and prohibited CSEU from representing Terry's ex-wife. On appeal, our supreme court held that no conflict of interest existed because, under Ark. Code Ann. § 9-14-210 (Repl. 1998), CSEU's attorneys do not represent the assignors whom it is undertaking to assist in receiving child support, but represent only the interests of the State; thus, no attorney-client relationship existed between CSEU and its assignors.

Although, in *Terry*, the supreme court stated in dicta that, "The State is the real party in interest when there has been an assignment of support rights to CSEU, regardless of whether the custodial parent is receiving public assistance on behalf of the child....," we do not find that language applicable here. In *Terry*, it was undisputed that Joey Terry had assigned his child-support rights to CSEU and had entered into a contract by which he agreed for CSEU to collect his child-support benefits. In the case at bar, CSEU produced neither an assignment of child-support benefits from Halton nor a contract providing that Halton had agreed for CSEU to collect her child-support benefits. Arkansas Code Annotated section 9-14-210(d)(1)—(3)(Supp. 1995)[2] sets forth the following circumstances under which the State is the real party in interest:

> (1) Whenever aid under §§ 20-76-410 or § 20-77-109 is provided to a dependent child; or
>
> (2) Whenever a contract and assignment for child support services has been entered into for the establishment or enforcement of a child support obligation for which an assignment under § 20-76-410 is not in effect; or

[2] All references to statutes in this opinion shall refer to the statutes as they existed in 1995 when the paternity action was prosecuted and the agreed order was entered.

(3) Whenever duties are imposed on the state pursuant to the Uniform Interstate Family Support Act, § 9-17-101 et seq.

Arkansas Code Annotated section 20-77-109 (Supp. 1995), referred to in subsection (1) of the above-quoted statute, provides that child-support rights are deemed to have been assigned to the state when the recipient has accepted medicaid assistance for or on behalf of the child. However, this section is not applicable in this case because there is no indication in the record that Halton ever accepted medicaid assistance for or on behalf of the child here involved.

Arkansas Code Annotated section 20-76-410 (Repl. 1991), also referred to in subsection (1), provides that child-support rights are deemed to have been assigned to the State by a recipient of public assistance grants, but only to the extent of rights that have "[a]ccrued at the time such assistance, or any portion thereof, is accepted." Ark. Code Ann. § 20-76-410(c)(2). The evidence presented by the child-support investigator is that, while Halton had previously been a recipient of AFDC benefits "off and on," all of those benefits had been repaid, and that, in November 1995, Halton was not recieving any public-assistance benefits and there were no unreimbursed AFDC grants. While, under § 20-76-410(c), there had been an automatic assignment of Halton's child-support rights, that assignment had been satisfied by the repayment of all the public assistance that Halton had received.

Subsection (2) of the above-quoted statute is applicable only when a contract and assignment have been entered into with the State for the establishment and enforcement of a child-support obligation. The state produced neither a contract nor an assignment in this case. Therefore, subsection (2) is not applicable.

Likewise, subsection (3) is not applicable to this case because it relates only to cases under the Uniform Interstate Family Support Act, which is not involved in this case.

Even if it could be said Halton had previously contracted with and assigned her child-support rights to CSEU, we do not read *Terry* as authority for the State to continue to prosecute child-support collection on behalf of a former AFDC recipient, such as Halton, on whose behalf all benefits previously received from the state have been repaid, who subsequently entered into a private agreement with the child-support obligor for the compromise of

her personal child-support claims, who is currently neither receiving nor claiming any public assistance benefits, and who has expressed no interest in modifying or setting aside her private agreement with, or receiving child support from, Maxwell. Although, in *Terry*, the supreme court quoted from *Haney v. State*, 850 P.2d 1087 (Okla. 1993), that "the Social Security Act 'was not only enacted in order to recoup payments made for AFDC recipients, *but also to help families avoid becoming dependent on the State through lack of support from the absent parent,*'" *Terry*, 336 Ark. at 317, 985 S.W.2d at 715 (emphasis in original), we do not interpret this language to mean that, in cases where all public assistance has been repaid, the CSEU is empowered to prosecute child-support cases on behalf of former public-assistance recipients against their will, in the absence of some showing that the former recipient is still in need of public assistance, or is at risk of becoming dependent on the State in the foreseeable future. If that were the interpretation to be given to the Social Security Act, we do not see what would prevent the CSEU from targeting a child-support obligor and prosecuting a claim against him or her on the basis of its unsupported, subjective expectation that the child in question may, someday, be in need of some form of public assistance.

■ In the case at bar there was no evidence presented as to the financial needs of Halton or the child. There was no evidence that the child is a potential candidate for the receipt of public-assistance benefits. While it may be true that CSEU has standing to enforce the child-support obligations of its assignors, past and present, we do not interpret *Terry* as granting to CSEU the unfettered authority to exercise its right of standing in the absence of some showing that the State has some interest, current or potential.

■ Regarding the chancellor's finding that the agreed order of November 15, 1995, is void as against policy we do not believe that our case law supports this position. A careful analysis of *Storey v. Ward*, 258 Ark. 24, 523 S.W.2d 387 (1995), and *Paul M. v. Teresa M.*, 36 Ark. App. 116, 818 S.W.2d 954 (1991), reveals that agreements for the termination of child support are not void, but that the court retains jurisdiction to modify such agreements when they are shown to be detrimental to the child.

In *Storey*, a divorcing party entered into an agreement under which the husband would pay support to the wife "so long as she

shall remain unmarried...." After the wife had twice remarried (during which periods of marriage the husband quit paying support), she petitioned for retroactive support for the periods during which she was married. In discussing the question of the validity of the agreement, Justice George Rose Smith said:

> In a number of cases, such as *Robbins v. Robbins*, 321 Ark. 184, 328 S.W.2d 498 (1959), we have said that the duty of child support cannot be bargained away by the parents. That does not mean, however, that the duty of support cannot be affected by the contract. What our cases actually hold is that *the duty cannot be bartered away permanently to the detriment of the child.*
>
> ...
>
> *There is certainly no principle of public policy making such a contract absolutely void*, because upon remarriage a divorced mother may have no need for child support payments from her former husband, who may himself be destitute.
>
> ...
>
> On the other hand, the parents' inability to permanently bargain away the children's right to support preserves the court's power to modify the original decree to meet subsequent conditions.

Storey v. Ward, 258 Ark. at 26-27, 523 S.W.2d at 390 (emphasis added).

Similarly, in *Barnhard v. Barnhard*, 252 Ark. 167, 174, 477 S.W.2d 845, 849 (1972), an action by a former wife to modify an order approving an agreement by which she was to pay child support to her former husband, the supreme court stated that, "there is no sound policy reason why she may not enter into a contract with her husband governing such contributions, ... *so long as the agreement is not adverse to the welfare of the child....*" *Barnhard v. Barnhard*, 252 Ark. 167, 174, 477 S.W.2d 845, 849 (1972) (emphasis added).

In the case at bar there has been no evidence presented that the agreement between Halton and Maxwell to terminate child support is detrimental to the welfare of their child. We should not presume that the child or the mother needs the money, especially where she refuses to return to Arkansas to present any evidence of

such need. If evidence is hereafter presented that Halton is in need of support from Maxwell for the benefit of their child, the court, acting pursuant to *Storey* and *Barnhard*, has the authority to modify its November 15, 1995, agreed order; but it is not void.

While the statistics referred to in the dissenting opinion from the *Fordham Law Review* article are informative and interesting, we do not see their relevance to this case. No doubt, the child-support caseload, AFDC and non-AFDC, has grown significantly in the past twenty-five years. But this increase in the number of child-support cases should serve as a basis for restricting CSEU's responsibilities to cases in which the State has an interest, not to enlarge its responsibility into cases where there is no showing of the need for CSEU's assistance.

The dissenting opinion's suggestion that Halton has failed to "wrest control" of this case from CSEU by substitution or intervention puts form over substance. Contrary to the dissenting opinion, Halton's involvement in this case entails far more than "simply signing a joint motion which merely added her name at the top." After all, Halton is the mother of the child whose paternity was established in this case, she is the person to whom Maxwell was ordered to make child-support payments, by a check payable to her, and she was identified as a plaintiff in the initial summons and in some of the pleadings and papers filed in the paternity case. Also, with the state having now been fully reimbursed for all benefits previously paid to Halton, she is the only person who would be entitled to receive any child support payments from Maxwell for the benefit of their child. While CSEU contended that it was the real party in interest, it did not contend that Halton was not a proper party. Furthermore, the chancellor's action in ordering Halton to appear at the May 7, 1997, hearing or face sanctions for contempt is a clear indication that the chancellor treated her as a party to the action. Except in cases involving this court's jurisdiction, we should not dispose of cases on the basis of issues neither entertained by the trial court nor briefed by the parties. *Leinen v. Arkansas Dep't of Human Servs.*, 47 Ark. App. 156, 886 S.W.2d 895 (1994).

It is apparently the position of the dissenting opinion that Halton and Maxwell could have properly obtained the court's approval of their settlement without notice to CSEU by simply filing their joint petition as a new case instead of proceeding in the

case that was opened originally by CSEU for the prosecution of the original paternity and child-support action. Regardless of any technical deficiencies in the procedure followed by Halton and Maxwell in obtaining the court's approval of their agreement, the fact remains that after Halton stopped receiving AFDC benefits and all AFDC benefits previously paid to her had been repaid, the State no longer had an interest for CSEU to protect in this case.

The chancellor's order of January 12, 1998, is reversed and this matter is remanded for the entry of an order consistent with this opinion.

HART, KOONCE, NEAL, and CRABTREE, JJ., agree.

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

MARGARET MEADS, Judge, dissenting. I do not agree with reversing this case because I believe the chancellor correctly determined that the agreed order, which forever terminated appellant's "past, present, and future" child-support obligation to his son, Kalil, is a violation of public policy and therefore is void. It is settled law in this state that the duty of child support cannot be bartered away permanently by the parents to the child's detriment. *See Storey v. Ward*, 258 Ark. 24, 26, 523 S.W.2d 387, 390 (1975); *Paul M. v. Teresa M.*, 36 Ark. App. 116, 119, 818 S.W.2d 594, 595 (1991). The rationale for these decisions is based, in part, on the principles that the interests of minors have always been the subject of jealous and watchful care by chancery courts, and that a chancery court always retains jurisdiction over child support as a matter of public policy. *Id. See also Crow v. Crow*, 26 Ark. App. 37, 41, 759 S.W.2d 570, 573 (1988).

The majority would require evidence to be presented establishing that the agreement terminating appellant's child-support obligation is, in fact, detrimental to Kalil's welfare, apparently believing that such an agreement may, in fact, be in Kalil's best interest. I think the better rule is to presume that an agreement to forever terminate a parent's "past, present, and future"child-support obligation is indeed detrimental to a child unless and until evidence is presented to the contrary.

Moreover, the cases on which the majority relies do not involve the permanent termination of child support. In *Storey v.*

Ward, supra, the appellant-father agreed to pay support for the parties' minor children "so long as [appellee-mother] shall remain unmarried." In *Barnhard v. Barnhard*, 252 Ark. 167, 477 S.W.2d 845 (1972), the mother agreed to pay $500 monthly to the father, who was awarded custody of the parties' three minor children. In *Paul M. v. Teresa M., supra*, the court established paternity and ordered the father to pay $30 weekly child support, despite an alleged understanding that the mother agreed to assume financial responsibility for the parties' child. None of these cases spoke to the issue presented in the case at bar.

I believe precedent demands that we hold the agreed order in this case void as against public policy, because it was an attempt to permanently deprive a child of support. I would affirm.

ROBBINS, C.J., agrees.

ANDREE LAYTON ROAF, Judge, dissenting. I cannot agree that this court should reverse a case based upon the lack of "standing" by the only named plaintiff in this action.

When Halton and Maxwell jointly petitioned to terminate Maxwell's child support obligation, the words "For Josetta (*sic*) Halton" were added beneath the caption "State of Arkansas Child Support Enforcement Unit." The State was the only plaintiff listed on all previous pleadings, motions, and orders. The State's motion to set aside the "agreed order" thus correctly asserted that it was the real party in interest. Moreover, on March 17, 1997, the court appointed J. Vernon Walker as guardian ad litem (hereinafter "ad litem") to represent the minor child's interest in the proceeding. The ad litem subsequently filed a motion that reiterated the arguments made by the State and asked that the agreed order be set aside as void on its face. In his response, Maxwell agreed that his future child-support obligation could not be permanently bargained away, but contended that the State had no authority to proceed on Halton's behalf.

Halton, who apparently had moved to Texas shortly after the agreed order was entered, never appeared at the five hearings held over a nearly two-year span on the State's motion. Although Halton never appeared for any of the hearings, both the attorney for the State and the ad litem indicated that they had made contact with her in Texas and that she indicated that she would be present

and, according to the ad litem, was interested in receiving both future and back support. The State represented that its office had child support cases involving other children of both Halton and Maxwell; that Halton had been on AFDC in 1992, 1993, and 1996 during the course of its involvement with her; that her case came to it as an AFDC case in 1990; that she was not receiving AFDC when the paternity complaint was filed in 1994, or when the agreed order was entered in November 1995; and that the only payment received from Maxwell on this case was $686 from a tax intercept in August 1996. The State further stated that its regulations require that it not close an assigned case without a statement in writing from the client that she wants her case closed and that Halton had not provided such a statement.

Ultimately, the chancellor entered an order on February 10, 1998, in which he determined that it was "inappropriate" to allow Maxwell to obtain Halton's waiver of support without notice to the State. Moreover, the chancellor noted that "any order obtained ceasing child-support until that child reaches eighteen (18) would be a violation of public policy. . . . Child-support is a continuing duty that cannot be bargained away, as was done in this case." Despite Maxwell's argument that the State did not have a legal relationship with Halton and therefore lacked standing to pursue an action on her behalf, the chancellor found that the State "had consistently appeared on [Halton's] behalf and [had] produced some documentation showing that there is a continuing legal relationship between the two parties both pursuant to the statutes . . . and the fact that she had in the past received AFDC benefits." The chancellor abated child-support from November 15, 1995, until May 15, 1996, and determined that Maxwell's arrearage totaled $6,525, less credit for the $2,300 he paid to Halton and a $686 tax-intercept credit, leaving a balance due of $3,539. The chancellor set current child-support at $25 per week and ordered that Maxwell pay an additional $25 per week on the arrearage.

On appeal, Maxwell argues that the State had no authority or standing to present this matter to the trial court, and therefore the trial court had no authority to set aside the agreed order. Maxwell points out that Halton never appeared at any of the hearings on the State's motion, despite the court's directives that she should appear and despite notices from both the State and the ad litem for her to appear. Maxwell further asserts that Halton's failure to appear or to

respond to discovery propounded to her by the ad litem was never adequately explained. Maxwell contends that because Halton never authorized the State to file the motion to set aside the agreed order or to proceed on her behalf, and because Halton's case was a non-AFDC case and the State failed to produce the contract that Halton allegedly executed with it, the State had no authority to move to set aside the agreed order.

The question to be resolved is whether, in the absence of a request from Halton, it was appropriate for the State to proceed in this matter and for the trial court to grant the State's motion. Although Maxwell correctly contends that the State never produced a written contract between Halton and the State, he does not challenge the State's authority or standing to initiate the paternity action or its involvement through the entry of the paternity judgment. Significantly, the State of Arkansas was the only plaintiff named in this action, and, contrary to both Maxwell's and the State's contentions, the State did not "represent" Halton, because, according to Ark. Code Ann. § 9-14-210(e)(2), (3) (Repl. 1998) and our supreme court, the State attorneys represent *only* the interests of the State, not the individual assignor of the support rights, and no attorney-client relationship arises out of the State contracts with the custodial parent. *State Office of Child Support Enforcem't v. Terry,* 336 Ark. 310, 985 S.W.2d 711 (1999).

In *Terry,* the supreme court further stated:

> [T]he State is the real party in interest when there has been an assignment of support rights to the State, regardless of whether the custodial parent is receiving public assistance on behalf of the child. . . . The collection of child support ultimately benefits the State by providing for the financial needs of its children, without having to resort to public funds to do so. Thus, regardless of the financial status of the custodial parent, once the child support is assigned to the State, it becomes an obligation owed to the State, not the individual parent, by the noncustodial parent. . . We concur with the reasoning of the Oklahoma Supreme Court in *Haney,* 850 P.2d 1087, that, once the child support rights are assigned to the State, the State has a pecuniary interest in enforcing those rights even though the amounts collected on behalf of those assignors who are not receiving public assistance will ultimately pass from the State to the assignors and their children.

336 Ark. at 320, 985 S.W.2d at 716-17.

Consequently, the State was the only entity with standing in this case because it was the only named plaintiff, and it had a statutorily mandated interest in enforcing child-support rights assigned to it whether or not the custodial parent is a recipient of public assistance. In a case with facts similar to the case at bar, *Department of Rev. v. Pericola,* 662 So.2d 386 (Fla. Dist. Ct. App. 1995), the District Court of Appeals of Florida held that the state agency had standing to bring an appeal and that the trial court erred in forgiving a father's child support arrearage upon stipulations signed by the mother and father but not by the state agency, which was a party and had acted on the mother's behalf in bringing the action.

I share the majority's concern about the conduct of the attorneys for the State in filing and vigorously pursuing this action despite Halton's failure to cooperate or appear for hearings; in contrast, it took the State four years after receiving the case to file the paternity complaint. However, it is not surprising that the State views itself in the driver's seat in these cases. The role of public attorneys in child-support enforcement has grown dramatically since the creation in 1975 of the Child Support Enforcement Program under Title IV-D of the Social Security Act. Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney,* 67 Fordham L. Rev. 2155 (1999). The total IV-D child-support caseload grew from 2.1 to 20.1 million between 1976 and 1995. *Id.* The proportion of non-AFDC Title IV-D cases has likewise grown; such cases now make up nearly half of all IV-D cases. *Id.*

All states participate in the Title IV-D program, and the federal government pays sixty-six percent of state administrative costs. *Id.* Nearly all states, including Arkansas, now expressly disclaim an attorney-client relationship with parents or children or define the relationship as one in which the child-support-enforcement attorney represents the state or enforcement agency alone. *Id.* Clearly, under the current law, public policy, and even the caption of the case, this is the State's case, not Ms. Halton's. Moreover, although it is unclear from the record before us where, or with whom, the minor child resides, Maxwell does not argue that the State lacks

standing because the child is not presently an Arkansas resident, and we need not address that question.

To be sure, there are serious public policy questions raised by this federally mandated legislation, and compounded by the State's current policy in which it no longer even names the custodial parent as a party in its cases. In fact, the Uniform Parentage Act, which has not been adopted in Arkansas, recognizes this problem, and provides that the child, the natural mother, and putative father shall all be made parties to a paternity action. *See* Unif. Parentage Act § 9, 9B U.L.A. 312 (1987). However, any policy questions raised by Arkansas's Title IV-D-mandated legislation are certainly beyond this court's authority to address. Moreover, Ark. Code Ann. § 9-14-105(c)(Repl. 1998) provides that "any person age eighteen (18) or above *to whom support was owed* during his minority may file a petition for judgment against the non-supporting parent or parents," giving the child the independent right to pursue uncollected support arrearages upon reaching adulthood.

It may well be that Ms. Halton wished to wrest control of this case from the State and to remove it, to the extent that it is possible, from her affairs. However, she failed to properly do so by signing a joint motion which merely added her name at the top. Our rules of civil procedure provide the means by which this can be accomplished, through either substitution, Ark. R. Civ. P. 25, or intervention, Ark. R. Civ. P. 24. It goes without saying that the State would be entitled to notice of the filing of any motions in this regard, as provided by Ark. R. Civ. P. 5. Here, Maxwell's failure to give notice to the State of the filing of the "joint" motion is a further reason why this case should be affirmed.

While the prevailing judges apparently believe that this case should be reversed because the State lacks standing, they do not explain how the only named plaintiff in a case in which the trial court has continuing jurisdiction can be deprived of standing without any notice whatsoever, and in a manner that constitutes a flagrant violation of our procedural rules. If this is a "technical deficiency," it is a serious one. It also should go without saying that both our trial and appellate courts are required on a regular basis to apply and enforce our rules of procedure, often with dire consequences to the parties before us. This court certainly lacks the authority to either fashion a special rule for these State child sup-

port cases or to declare an exemption from our present rules for parties such as Mr. Maxwell.

JENNINGS, J., agrees.

Hulda STEPHENSON *v.* TYSON FOODS, INC.

CA 99-1104 19 S.W.3d 36

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 17, 2000

Kenneth E. Buckner, P.A., by: *Kenneth E. Buckner*, for appellant.

Bassett Law Firm, by: *Earl Buddy Chadick*, for appellee.

SAM BIRD, Judge. Hulda Stephenson appeals a decision of the Workers' Compensation Commission that denied her benefits for a herniated cervical disc. The Commission found that

she had failed to connect the herniated disc to her compensable injury. Stephenson argues that the decision is not supported by substantial evidence. We agree, and, consequently, reverse and remand.

At the hearing before the administrative law judge it was stipulated that Ms. Stephenson sustained a compensable injury on January 2, 1997, when she was knocked unconscious by at least three large plastic-coated boxes, weighing as much as 75 pounds each and designed to hold 2000 pounds of chicken, that fell from a second-floor catwalk and hit her in the neck, back, and shoulder while she was working on the first floor.

Stephenson was treated at HealthCare Plus, then referred to Dr. John Lytle, an orthopedist, who diagnosed a shoulder contusion and, on February 4, released her to return to work without restrictions and without the need to return for further treatment. However, Stephenson continued to experience severe pain, so she took a lot of ibuprofen. When the ibuprofen began to upset her stomach, she consulted her family physician, Dr. Ron Tanner. Dr. Tanner ordered a bone scan that showed a compression fracture at T9-10. Tyson sent Stephenson back to Dr. Lytle, who treated her for the compression fracture that Dr. Tanner had diagnosed, and released her again on April 7 to return to work with limited activities.

Stephenson continued to work after her second release by Dr. Lytle, while continuing to see her own doctors in an attempt to find out what was wrong with her. Because she continued to experience pain, Stephenson returned to Dr. Tanner at the end of April, and he referred her to Dr. Terrell Bishop, a neurologist. Dr. Bishop attempted to put Stephenson on light-duty work, but Tyson's workers' compensation claims coordinator would not accept the work restriction because Dr. Bishop was not Stephenson's treating physician. So, Stephenson returned to Dr. Bishop, and he removed her from work completely. Finally, near the end of July 1997, Dr. Bishop discovered that Stephenson had herniated cervical discs at C4-5 and C6-7. Dr. Bishop then referred Stephenson to Dr. Ronald N. Williams, a neurosurgeon, who performed an anterior cervical fusion on October 16, 1997.

The administrative law judge awarded temporary total disability benefits from July 21 through December 2, 1997; permanent

disability benefits for a nine-percent permanent impairment; all related medical treatment, including that obtained from Drs. Lytle, Bishop, Tanner, and Williams subsequent to July 21, 1997; and maximum attorney fees. The Commission reversed, holding that Stephenson had failed to show a connection between her compensable injury of January 2, 1997, and her herniated cervical discs that were diagnosed in July.

Stephenson argues on appeal that the Commission's finding was not based on substantial evidence. In a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Bates v. Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1992); *Wolfe v. City of El Dorado*, 33 Ark. App. 25, 799 S.W.2d 812 (1990). The claimant must also prove a causal connection between the work-related accident and the later disabling injury. *Lybrand v. Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (1979). The determination of whether the causal connection exists is a question of fact for the Commission to determine. *Jeter v. B.R. McGinty Mech.*, 62 Ark. App. 53, 968 S.W.2d 645 (1998); *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986).

On appeal, we view the evidence in the light most favorable to the Commission's findings and will affirm if those findings are supported by substantial evidence. *Morelock v. Kearney Co.*, 48 Ark. App. 227, 894 S.W.2d 603 (1995). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). To reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

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 Mech.*, 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). These rules insulate the

Commission from judicial review and properly so, as it is a specialist in this area and we are not. *Wade v. Mr. C. Cavenaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988). However, a total insulation would obviously render our function in these cases meaningless. *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998); *Boyd v. Gen. Indus.*, 22 Ark. App. 103, 733 S.W.2d 750 (1987).

The Commission found that Stephenson had failed to follow the proper procedure for changing physicians, and, for that reason, was not entitled to benefits for all the medical care she received from doctors other than Dr. Lytle. When a claimant seeks a change of physician, she must petition the Commission for approval. Arkansas Code Annotated section 11-9-514(a)(2)(A) (Repl. 1996) provides:

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

However, if Tyson failed to give Stephenson the change-of-physician form after her injury, Stephenson was not required to petition the Commission in order to be treated by a competent doctor. An exception exists in Ark. Code Ann. § 11-9-514(c), which states:

> (1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified or registered mail, return receipt requested, a copy of a notice, approved or prescribed by the commission, which explains the employee's rights and responsibilities concerning change of physician.
>
> (2) If, after notice of injury, the employee is not furnished a copy of the notice, the change of physician rules do not apply.
>
> (3) Any unauthorized medical expense incurred after the employee has received a copy of the notice shall not be the responsibility of the employer.

It is not disputed that the employer chose Dr. Lytle to treat Stephenson for her injuries. The Commission stated in its opinion:

> At the time of the claimant's injury, the appropriate form advising claimant of her rights and duties was Commission Form N. Claim-

> ant acknowledged at the hearing that the Form N introduced into evidence bore her handwriting at the top and her signature at the bottom. However, claimant denied that she placed the date, "January 2, 1997," on the form or that she signed the form on the date of her injury. Rather, claimant alleged that she completed the form at the time she was hired, approximately six months prior to her injury. *We find claimant's allegations with regard to when she was provided the Form N to be lacking in proof. Aside from claimant's own self-serving testimony regarding when she received Form N, she has presented no corroborating evidence to explain why she would have received and signed this form at the time she was hired. In our opinion, it does not seem logical that an employer would insist that a Form N be signed in blank even before an injury ever occurred.* (Emphasis added.)

We do not believe that there is substantial evidence to support the Commission's finding that Stephenson received the Form N *after her injury*. Ms. Wilkes, Tyson's workers' compensation claims coordinator, testified that she did not know when Stephenson signed the form because she did not give it to her. She said the procedure at Tyson was for the nurse to give an injured employee a tablet of forms and the change-of-physician form is among them. However, the nurse did not testify for Tyson. From the record, the only substantial evidence is that Tyson had a procedure for providing the notification form to an injured employee that is supposed to be carried out by its nurse. The existence of a company procedure is not proof that the procedure is carried out in every instance.

The Commission relies upon the fact that the form bore Stephenson's signature. But Stephenson testified that the rights-notification form was included among papers she received when she was hired by Tyson and that she signed it at that time, not after she was injured. She testified that the date was not in her handwriting and pointed out that nothing was written in the section labeled "accident information." Furthermore, she said she could not have signed the form after her injury because her shoulder was hurting too bad and that the nurse filled out the accident report for her.

The Commission stated that, in its opinion, "it does not seem logical that an employer would insist that a Form N be signed in blank even before an injury ever occurred." However, the issue this court must resolve is whether the Commission's findings are supported by substantial evidence, not whether the existence or non-existence of evidence of a given fact is "logical." From the record

before us, it appears to be just as logical that the Form N was signed before the injury, as testified to by Stephenson, as it does illogical that the employer would have an employee sign the Form N at the time of her employment, particularly where Stephenson's version of the signing was not refuted by the employer, and where there is other tangible evidence that supports Stephenson's version, such as the inconsistency between Stephenson's signature and the handwriting of the date that appears on the form adjacent to her signature.

Ms. Wilkes also testified that she had explained to Stephenson that she could petition the Commission for a change of physician if she did not agree with Dr. Lytle's treatment. However, Ark. Code Ann. § 11-9-514(c)(1) (Repl. 1996) requires the employer to provide to the injured employee "a copy of a notice, approved or prescribed by the commission,..." We think this language clearly connotes that the notice will be in writing, and that verbal notification does not comply with the requirements of the statute.

The Commission held that Stephenson was properly notified of her right to change physicians based solely on her signature at the bottom of the form and company policy. It could not have reached that decision without giving the benefit of the doubt to the employer. The burden to prove delivery of the change-of-physician form was on Tyson. The document bearing only her signature and a date, obviously filled out by someone else, was not substantial evidence to support the Commission's conclusion that Stephenson was given the form after her injury. It would have been a simple matter for Tyson to have had the nurse, who allegedly gave Stephenson the document, testify to that effect. Stephenson's testimony was not rebutted, and there was no proof that she was given the change-of-physician form after her injury, and, thus, no substantial evidence to support the Commission's finding that she was required to seek Commission approval before finding another doctor.

There is no question that Dr. Lytle treated Stepehenson for several months and summarily released her twice without ever performing any diagnostic tests or otherwise attempting to discover the cause of her pain. He first treated her for mere bruises (contusions), after at least three seventy-five-pound boxes fell from the floor above and hit her in the shoulder, neck and back, and then he

treated her for a compression fracture, but only after it had been identified by another doctor. The Commission characterized Dr. Lytle's care of Stephenson as "adequate." Fair-minded persons could not reach that conclusion on these facts. The medical care Stephenson received from Dr. Lytle was almost nonexistent. Even though she continued to complain of serious symptoms, Dr. Lytle merely had Stephenson move her neck, shoulder, and arm, and he released her to return to work. The evidence is also clear that the care Stephenson received from Drs. Tanner, Bishop, and Williams was necessary and reasonable, and there is no evidence that the expense of such treatment was any greater than it would have been had it been provided by pre-approved physicians.

The Commission also held that there was no evidence connecting Stephenson's herniated discs to her compensable injury. To the contrary, there is no evidence in the record, medical or factual, to support the Commission's finding that the herniated cervical discs discovered in Stephenson's neck six months after her compensable injury did not occur at the time the boxes fell on her neck and shoulders. Stephenson continuously complained of pain in her neck, shoulders, and back from the time of the injury until July 22, 1997, when Dr. Bishop ordered a cervical MRI. Dr. Bishop reported that claimant's entire history of complaints dated back to January 2, 1997, when she was knocked out by the boxes.

The Commission cites no evidence to support its finding that appellant's herniated discs did not occur in January 1997, because there is no contrary evidence in the record. The objective medical evidence is clear that appellant had two herniated cervical discs, and there is no evidence at all in the record of any non-work-related event that might have caused the herniated cervical discs.

■ We reverse and remand to the Commission for an award of benefits for all the medical care and treatment Stephenson has undergone and all reasonable, necessary, and related medical treatment she may have in the future due to this injury, temporary total disability benefits, permanent disability benefits for her nine percent permanent physical impairment, and maximum attorney's fees.

HART, CRABTREE, and MEADS, JJ., agree.

ROBBINS, C.J., and ROAF, J., concur in part; dissent in part.

JOHN B. ROBBINS, Chief Judge, concurring in part; dissenting in part. I concur with the majority in reversing the Commission and holding that Ms. Stephenson is entitled to temporary total disability benefits and permanent partial disability benefits for her cervical disc herniation, because I believe there was no substantial evidence that supported the Commission's denial of these benefits. I cannot agree, however, that there was no substantial evidence to support the Commission's finding that the medical treatment Ms. Stephenson received from Drs. Tanner, Bishop, and Williams was unauthorized.

Following her injury at work, Ms. Stephenson's employer, appellee Tyson Foods, directed her to HealthCare Plus, who then referred her to Dr. John Lytle. If Ms. Stephenson wished to change physicians, she was entitled to petition the Commission for a one-time-only change. Ark. Code Ann. § 11-9-514(a)(2)(A) (Repl. 1996). Without doing so, however, she was seen thereafter by Drs. Tanner, Bishop, and Williams. Consequently, medical treatment by these unauthorized doctors and payment for their services was not the responsibility of Tyson, unless Tyson failed to give Ms. Stephenson notice, after her injury, of her rights and responsibilities pertaining to a change of physician as required by Ark. Code Ann. § 11-9-514(c). The Commission found that "at the time of the claimant's injury, the appropriate form advising claimant of her rights and duties was Commission Form N" and the "Claimant acknowledged at the hearing that the Form N introduced into evidence bore her handwriting at the top and her signature at the bottom." Ms. Stephenson does not appeal these findings, but contends that the date of "January 2, 1997," appearing on the form was not written by her, and that she signed the form when she was hired about six months earlier. The Commission held that notice had been given to Ms. Stephenson, and, therefore, she was required to petition for a change of physician, which she did not do.

We should affirm the Commission unless there is no substantial evidence in the record that supports its decision. The substantial evidence standard of appellate review means that the appellate court must affirm the Commission if fair-minded people could have reached the same result after reviewing the evidence in the light most favorable to the result that the Commission reached, *Hubley v. Best Western-Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996), even if the preponderance of the evidence would indicate a

different result. *Tahutini v. Tastybird Foods*, 18 Ark. App. 82, 711 S.W.2d 173 (1986).

There are two items of evidence that are substantial and support the Commission's finding that Tyson gave the required notice. First, there is tangible evidence consisting of form N dated January 2, 1997, the date of the incident, bearing Ms. Stephenson's signature that was introduced as an exhibit at the hearing. This is the form that the Commission found gives the notice concerning a change of physician that is required by section 11-9-514(c). Secondly, Ms. Felita Wilkes, Tyson's workers' compensation claims coordinator at its Pine Bluff plant, testified that it was standard procedure at Tyson that when an employee is injured and is brought in to see one of the plant nurses, the attending nurse gives the employee a tablet of forms that includes the change of physician rights-responsibility notice form. The nurse explains the forms and asks the employee if the employee understands. The employee is then asked to sign the form.

The majority holds today that the above items of proof do not constitute substantial evidence in support of the Commission's conclusion that Tyson gave Ms. Stephenson the statutory notice. In doing so, the majority has engaged in a de novo consideration of the case, and has weighed the evidence and adjudged the credibility of the witnesses and tangible evidence. This is improper on an appeal from the Workers' Compensation Commission. While we are to view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission, *Bates v. Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1999), the majority appears to have considered Ms. Stephenson's testimony which controverted Tyson's proof, then weighed the credibility of this evidence and concluded that Ms. Stephenson's testimony was more credible than Tyson's proof.

The majority opinion also stated that the evidence is "clear that the care Stephenson received from Drs. Tanner, Bishop, and Williams was necessary and reasonable," and that "there is no evidence that the expenses of such treatment was any greater than it would have been had it been provided by pre-approved physicians." I doubt that anyone familiar with this case would dispute these statements; however, one must wonder why these statements appear in the majority opinion. They have no relevance whatsoever to the

substantial evidence standard of review before our court. Even if Drs. Tanner, Bishop and Williams did render reasonable care to Mrs. Stephenson for reasonable charges, this would not convert their status from unauthorized physicians to authorized ones.

While we may be sympathetic to Ms. Stephenson's plight, we should not permit our sympathy to compromise the standard of review that we are obliged to apply. I would affirm the Commission's holding that Tyson gave Ms. Stephenson the required notice concerning a change of physician, and that the treatment rendered to her by Drs. Tanner, Bishop, and Williams was unauthorized.

ROAF, J., joins.

Josh VANESCH *v.* STATE of Arkansas

CA CR 99-1018 16 S.W.3d 306

Court of Appeals of Arkansas
Division III
Opinion delivered May 17, 2000

Charles M. Kester, for appellant.

Mark Pryor, Att'y Gen., by: *Kelly S. Terry*, Ass't Att'y Gen., for appellee.

K. MAX KOONCE, II, Judge. Appellant was found guilty of possession of methamphetamine with intent to deliver, possession of marijuana with intent to deliver, and possession of drug paraphernalia. He appeals the convictions on the grounds that the trial court erred in admitting evidence of his juvenile delinquency adjudication. We affirm the convictions.

On January 21, 1998, appellant was charged with possession of methamphetamine with intent to deliver in violation of Ark. Code Ann. § 5-64-401 (Repl. 1997), possession of marijuana with intent to deliver in violation of Ark. Code Ann. § 5-64-401 (Repl. 1997), and possession of drug paraphernalia in violation of Ark. Code Ann. § 5-64-403 (Repl. 1997). A bench trial was held on February 26, 1999. The State amended the information on the day of trial to allege that appellant was a habitual offender under Ark. Code Ann. § 5-4-501(a) (Repl. 1997), having been convicted of more than one but less than four felonies. The State relied on a felony theft by receiving conviction and a juvenile delinquency adjudication for delivery of a controlled substance.

At trial, Officer Scott Handford testified for the State that he stopped appellant because his taillights were flashing on and off while driving on Highway 65. Handford smelled marijuana and asked for appellant's consent to search the vehicle. With appellant's consent, Handford searched the vehicle and found a black bag containing numerous items which were introduced into evidence. The items included the following: (1) less than a gram of a substance suspected to be methamphetamine; (2) more than an ounce

of a substance suspected to be marijuana; (3) a glass tube with residue; (4) a red pipe with residue; (5) a wire detector; and (6) a list of names, addresses, and telephone numbers.

Jeff Taylor, a drug chemist at the Arkansas Crime Lab, testified for the State that the items introduced into evidence included the following: (1) a bag with 138.2 grams of marijuana; (2) a bag with 4.8 grams of marijuana; (3) a bag with 0.988 grams of 28.5% pure methamphetamine or 0.281 grams of pure methamphetamine hydrochloride; (4) a red smoking device with residue of tetrahydrocannabinol; and (5) a glass tube with residue of methamphetamine.

Appellant testified in his defense. He admitted that he intended to sell the seized marijuana and that the pipe was used to smoke methamphetamine, but denied intending to sell the methamphetamine. He admitted on cross-examination that he had been convicted of felony theft by receiving. The State then attempted to show appellant a certified copy of his juvenile record. Defense counsel objected on the grounds that the records were sprung on him the day of trial and he was not aware of the law on juvenile records. The defense did not object to the State's amendment of the information to include an allegation of habitual offender. The State argued that appellant was aware of his criminal record and that the juvenile offense was a felony and therefore available for enhancement purposes for a habitual offender. Defense counsel objected on the basis that a juvenile record cannot be used for enhancement purposes for a habitual offender. The court overruled the objection. The State proceeded to question appellant about the juvenile record, and defense counsel stated, "I don't see the relevance of this." The State introduced the juvenile records wherein appellant pleaded guilty to seven counts of delivery of a controlled substance.

The trial court found appellant guilty on all charges. The court then asked the parties whether they had anything to present concerning sentencing. The State asked that the court consider appellant's felony records that had been introduced. Defense counsel made no objection to this request, and appellant was sentenced to twelve years for the possession of methamphetamine with intent to deliver conviction (Class Y felony), ten years for the possession of marijuana with intent to deliver conviction (Class C felony), and six

years for the possession of drug paraphernalia conviction (Class C felony). The sentences were to run concurrently.

Appellant first argues that the trial court erred when it admitted evidence of appellant's juvenile delinquency adjudication which was irrelevant and improper impeachment evidence under Rules 402, 608, and 609 of the Arkansas Rules of Evidence. We are unable to consider this argument because this court will not consider an argument raised for the first time on appeal. *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997); *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997). To preserve an argument for appeal, there must be an objection in the trial court that is sufficient to apprise the court of the particular error alleged, and the appellate court will not address arguments raised for the first time on appeal. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996). A party cannot change the grounds for an objection on appeal but is bound by the scope and nature of the arguments made at trial. *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997).

Appellant did not make any objections based on Rules 608 or 609 of the Arkansas Rules of Evidence to the admission of evidence relating to appellant's juvenile adjudication. The only objection that was made by appellant's counsel and ruled on by the trial court was as follows: "I'm objecting that I don't believe you can use the juvenile record against him for a habitual offender status in this case." After the trial court overruled the objection, the State proceeded to question appellant about whether he had an adult case transferred to juvenile court. Appellant's counsel then stated, "I don't see the relevance of this." Appellant contends this statement was a relevance objection pursuant to Ark. R. Evid. 402. Appellant's counsel never indicated he was making a Rule 402 objection, and even if appellant's counsel intended this statement to be an objection, a ruling was not obtained. This court will not review a matter on which the trial court did not rule, and a party seeking to raise the point on appeal concerning a ruling has the burden to obtain a ruling. *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999). Matters left unresolved simply may not be raised on appeal. *Alexander v. State*, 335 Ark. 131, 983 S.W.2d 110 (1998).

Appellant next contends the trial court erred when it considered appellant's juvenile delinquency adjudication as a conviction for purposes of sentence enhancement as a habitual offender under

Ark. Code Ann. § 5-4-501. The habitual offender law is codified at Ark. Code Ann. §§ 5-4-501 *et seq.* and provides in pertinent part as follows:

> (a)(1) A defendant who is convicted of a felony other than those enumerated in subsections (c) and (d) of this section committed after June 30, 1993, and who has previously been convicted of more than one (1) but less than four (4) felonies, or who has been found guilty of more than one (1) but less than four (4) felonies; or
>
> (2) A defendant who is convicted of any felony enumerated in subsection (c) of this section committed after August 31, 1997, and who has previously been convicted of more than one (1) but less than four (4) felonies not enumerated in subsection (c) of this section, or who has been found guilty of more than one (1) but less than four (4) felonies not enumerated in subsection (c) of this section; or
>
> (3) A defendant who is convicted of any felony enumerated in subsection (d) committed after August 31, 1997, and who has previously been convicted of more than one (1) but less than four (4) felonies not enumerated in subsection (d) of this section, or who has been found guilty of more than one (1) but less than four (4) felonies not enumerated in subsection (d) of this section, may be sentenced to an extended term of imprisonment as follows:
>
> (A) For a conviction of a Class Y felony, a term of not less than ten (10) years nor more than sixty (60) years, or life;
>
> (B) For a conviction of a Class A felony, a term of not less than six (6) years nor more than fifty (50) years;
>
> (C) For a conviction of a Class B felony, a term of not less than five (5) years nor more than thirty (30) years;
>
> (D) For a conviction of a Class C felony, a term of not less than three (3) years nor more than twenty (20) years. . . .
>
> (E) For a conviction of a Class D felony, a term of not more than twelve (12) years. . . .

Ark. Code Ann. § 5-4-501(a). In support of his argument, appellant relies on *Rogers v. State*, 260 Ark. 232, 538 S.W.2d 300 (1976). In *Rogers*, the court found that an adjudication of delinquency in federal court was not considered a criminal conviction. *Id.* The court stated that the legislative intent of the Federal Juvenile Delin-

quency Act was that any adjudication of delinquency results in the determination of a status and not a conviction of a crime. *Id.* Therefore, the court held that the trial court erred in allowing the sentence under the Federal Juvenile Delinquency Act to be admitted into evidence. *Id.*

The State contends that the juvenile code provides support for its argument that a defendant's juvenile adjudication may properly be used to enhance his sentence as a habitual offender. In support of its argument, the State relies on Ark. Code Ann. § 9-27-345 (Repl. 1998); which provides that "[j]uvenile adjudications of delinquency for offenses for which the juvenile could have been tried as an adult may be used at the sentencing phase in subsequent adult criminal proceedings. . . ." Ark. Code Ann. § 9-27-345. The State also cites Ark. Code Ann. § 9-27-309, which states that "[r]ecords of delinquency adjudications for which a juvenile could have been tried as an adult shall be made available to prosecuting attorneys for use at sentencing if the juvenile is subsequently tried as an adult. . . ." Ark. Code Ann. § 9-27-309(a)(2) (Supp. 1999). The State also notes that Ark. Code Ann. § 16-97-103 (Supp. 1999) provides that evidence relevant to sentencing under the bifurcated sentencing procedure may include the following:

> (3) Prior judicial determinations of delinquency in juvenile court, subject to the following limitations:
>
> (i) That prior delinquency adjudications be subject to a judicial determination that the relevant value of the prior juvenile adjudication outweigh its prejudicial value;
>
> (ii) That consideration only be given to juvenile delinquency adjudications for crimes for which the juvenile could have been tried as an adult; and
>
> (iii) That in no event shall delinquency adjudications for acts occurring more than ten (10) years prior to the commission of the offense charged be considered. . . .

Ark. Code Ann. § 16-97-103(3).

The Arkansas Code clearly permits the introduction of evidence of juvenile adjudications in the sentencing phase of trial when the requirements of Ark. Code Ann. § 16-97-103(3) are satisfied. However, a juvenile adjudication is not a felony convic-

tion, and thus cannot be used for sentence enhancement under the habitual offender law. Therefore, we find that the trial court erred in admitting appellant's juvenile adjudication in the sentencing phase of trial for the purpose of sentence enhancement under the habitual offender law. However, we will not reverse an evidentiary ruling absent a showing of prejudice. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996). We must now address whether appellant was prejudiced by this error.

Appellant claims he was prejudiced because the trial court unnecessarily injected the issue of his bad acts into the guilt phase of trial. Appellant admits he made no objection below based on Ark. R. Evid. 404(b), but states that "this prejudice [related to Rule 404(b)] is not asserted as an independent basis for reversal, but merely as part of the evidence as a whole which this Court must review to determine whether or not the error in introducing evidence of Mr. Vanesch's prior juvenile delinquency adjudication (which was objected to) was harmless." Because appellant did not object below on the basis of Rule 404(b), we cannot consider this argument on appeal.

Appellant also contends he was prejudiced during the sentencing phase of trial because the use of the juvenile adjudication to support his status as a habitual offender improperly eliminated any possibility of a suspended sentence or a fine, and required a sentence of imprisonment pursuant to Ark. Code Ann. § 5-4-104(e)(4)(Repl. 1997). However, Ark. Code Ann. § 5-4-104(e)(4) has been repealed, and appellant has not demonstrated that the trial court enhanced the sentences pursuant to the habitual offender law. The trial court sentenced appellant to twelve years for the possession of methamphetamine with intent to deliver conviction (Class Y felony), ten years for the possession of marijuana with intent to deliver conviction (Class C felony), and six years for the possession of drug paraphernalia conviction (Class C felony). The sentences were to run concurrently. The maximum non-habitual sentence is ten years for a Class C felony and forty years or life for a Class Y felony. *See* Ark. Code Ann. § 5-4-401 (Repl. 1997). Appellant's sentences did not exceed the maximum non-habitual sentences. Appellant has failed to demonstrate prejudice by the trial court's ruling, and we will not reverse an evidentiary ruling absent a showing of prejudice. *See Clark, supra.* Therefore, we affirm.

Affirmed.

CRABTREE and ROAF, JJ., agree.

MDH BUILDERS, INC. *v.* NABHOLZ CONSTRUCTION CORPORATION

CA 99-1317 17 S.W.3d 97

Court of Appeals of Arkansas
Division IV
Opinion delivered May 17, 2000
[Petition for rehearing denied June 28, 2000.]

[redacted]

David A. Orsini, for appellant.

Friday, Eldredge & Clark, by: *Jeffrey H. Moore*, for appellee.

MARGARET MEADS, Judge. This case concerns a breach-of-contract/promissory estoppel lawsuit filed by appel-

lee Nabholz Construction Corp., a general contractor, against appellant MDH Builders, Inc., a subcontractor. The chancellor found in favor of appellee and awarded $90,998 in damages, plus $22,500 in attorney fees. Appellant raises several points of error on appeal, none of which merit reversal. Therefore, we affirm.

On March 9, 1994, appellee Nabholz submitted a $6,000,000-plus bid to Wal-Mart Stores, Inc., to act as general contractor on a construction project. Earlier the same day, appellant MDH, through its vice-president Ricky Marise, had submitted a $245,777 subcontract bid to appellee to perform the following work on the project: metal stud framing, gypsum board/tape and finish, rough carpentry, roof blocking, millwork installation, acoustical ceiling, F.R.P. panels, installation of door and frame hardware, toilet compartments, toilet accessories, and batt insulation. Appellee used appellant's subcontract bid in computing its own general-contract bid.

By March 11, Wal-Mart informed appellee that it had been awarded the general contract. On or about that same day, appellee's senior vice-president, Earl Ballentine, called Ricky Marise of MDH and informed him that "he [Marise] was the low bidder and we were going to do a job with him." According to Ballentine, Marise had been anxious to hear about the job and was very excited. On March 23, Marise faxed a completed subcontractor information form to appellee, and on April 5, he attended appellee's preconstruction meeting. However, on April 7, appellant's president, Mike Hill, called appellee's CEO, Dan Nabholz, and informed him that Marise would no longer be associated with MDH. He also asked that the subcontract be allowed to go with "an employee who was starting up his own firm." Mr. Nabholz told Hill that the contract was in the name of MDH and that MDH must honor the contract, but also told Hill that he would have to talk to Ballentine. Ballentine spoke with Hill soon thereafter and was told that appellant did not want to perform the subcontract. As a result, appellee acquired substitute performance and executed a $287,669 contract with Systems Painters, Inc. Additionally, some of the work included in appellant's bid was performed by appellee, using its own labor and materials, at a cost of $50,156.

On May 2, 1996, appellee sued appellant in Pulaski County Chancery Court for its failure to perform the subcontract. The

complaint asserted the theories of breach of contract and estoppel and sought damages of approximately $90,000. A trial was held on the matter, and the chancellor entered an order awarding appellee $90,998. This sum represented the total amount of costs expended by appellee ($337,825), less appellant's bid price ($245,777), less $1,050 deducted as the result of a change order issued during the construction process. Appellant appeals from that order.

Chancery cases are tried *de novo* on appeal. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). However, we do not reverse a chancellor's findings of fact unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

Appellant's first argument is that appellee did not prove that a contract existed between Nabholz and MDH. The essential elements of a contract are: 1) competent parties; 2) subject matter; 3) legal consideration; 4) mutual agreement; and 5) mutual obligations. *Hunt v. McIlroy Bank & Trust*, 2 Ark. App. 87, 616 S.W.2d 759 (1981). According to appellant, the element of mutual agreement is lacking in this case. It contends that the chancellor erred in finding that appellee accepted appellant's bid offer based upon appellee's mere use of the bid. However, appellee's use of appellant's bid was not the only evidence of mutual agreement in this case. The words and conduct of Ballentine and Marise manifested a mutual assent to the contract. Acceptance of a contract may be accomplished by words or conduct. *See Childs v. Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995). In this case, Earl Ballentine communicated to Ricky Marise on or about March 11 that Marise was the low bidder and that they would be doing a job together. According to Ballentine, this meant that appellee had accepted appellant's bid. Marise obviously understood because he was excited to get the job. Further, Marise submitted a subcontractor information sheet to appellee on March 23 after receiving Ballentine's call, and attended a preconstruction meeting on April 5 after being invited along with other subcontractors and suppliers. Given this evidence, we cannot say that there is error on this point.

Appellant also contends that mutual assent was lacking because appellee did not accept MDH's bid in accordance with its

terms. According to appellant, appellee attempted to vary the terms of the bid by deleting the millwork from it and awarding that part of the bid to another subcontractor. Appellant cites *Drennan v. Star Paving Co.*, 51 Cal.2d 409, 333 P.2d 757 (1958), for the proposition that a general contractor cannot reopen negotiations with the subcontractor and at the same time claim a continuing right to accept the original offer, and cites *R.J. Daum Constr. Co. v. Child*, 122 Utah 194, 247 P.2d 817 (1952), for the proposition that to create a binding contract, an acceptance must unconditionally agree to all the material provisions of the offer. Arkansas law is in accord with these general statements of law. Our supreme court has recognized that, to be effective, an acceptance must be identical with the terms of the offer. *Rounsaville v. Van Zandt Realtors*, 247 Ark. 749, 447 S.W.2d 655 (1969). Additionally, while the introduction of new terms may indicate a willingness to negotiate further, such a response is a counteroffer, not an acceptance. *See id.*

The evidence in the case at bar shows that, on bid day, appellee completed a bid sheet that listed not only the full amount of appellant's bid, which included millwork, but the full amount of a bid made by another prospective subcontractor, Challenge Construction, which also included millwork. Further, a written contract prepared for appellant's signature, but which was never executed, did not mention millwork. Appellant contends that this evidence, and evidence that appellant had changed the terms of bids on other, unrelated subcontracts, shows that appellee's acceptance did not mirror the offer. However, Earl Ballentine explained at trial that, on bid day, subcontract bids are submitted in various forms, requiring the placement of bid amounts under certain categories. He said he was not aware of an overlap on the millwork at the time he spoke with Mike Hill, nor did he attempt to renegotiate the price of the subcontract bid with Hill. His testimony indicates that the overlap was inadvertent. Further, the unexecuted written contract with MDH was for $245,777, the exact amount of MDH's bid. Thus, the contractor here did not reopen negotiations with the subcontractor, nor attempt to add new, material conditions by submitting a contract with terms that were directly contrary to the original bid. We find no reversible error on this point.

Appellant's next argument is that appellee did not prove it was entitled to recover on the theory of promissory estoppel. Under the promissory-estoppel theory, a subcontractor's bid

may become binding when its promise, which it should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the general contractor, does induce such action or forbearance and injustice can be avoided only by enforcement of the promise. *See Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 374 S.W.2d 818 (1964). Appellant contends that because there was evidence at trial that MDH did not meet certain specifications that Wal-Mart required all subcontractors to meet, appellee could not have reasonably relied on MDH's bid. We need not reach this issue. Promissory estoppel may be used as a basis for recovery when the formal elements of a contract do not exist. *See Reynolds v. Texarkana Constr. Co., supra.* We have held that the trial court was correct in finding that a contract existed between appellant and appellee. Therefore, there is no need to explore whether appellee proved entitlement to relief on an extra-contractual theory. Along these same lines, we need not address the chancellor's declaration that he saw no difference between the contract and estoppel theories. We believe the chancellor was referring to the fact that, under either theory, appellee's monetary recovery would be the same. In any event, we have affirmed the chancellor on his finding that a contract existed, and a trial court's ruling will be affirmed if it is correct for any reason. *Rager v. Turley*, 68 Ark. App. 187, 6 S.W.3d 113 (1999).

We now turn to appellant's claim that Ricky Marise did not have the authority to enter into a contract with appellee. Ricky Marise was the vice-president of MDH. Mike Hill admitted that Marise's duties included submitting prices on bids. Although he claims that Marise's employment was terminated between March 14 and March 30, the evidence is conflicting on that point. There is no evidence that Marise was not employed on March 9 when he submitted the bid or on March 11 when Ballentine accepted the bid. Further, Hill admits that he had discussions with Marise regarding this bid and another, similar Wal-Mart bid. He did not indicate in his testimony that he objected to Marise submitting these offers. It is also noteworthy that Marise submitted the subcontractor information sheet to appellee on March 23 with the assistance of appellant's comptroller and attended the preconstruction meeting on April 5 with another MDH employee and signed in as a representative of MDH.

Whether an agent is acting within the scope of his apparent or actual authority is a question of fact. *Hot Stuff, Inc. v. Kinko's Graphic Corp.*, 50 Ark. App. 56, 901 S.W.2d 854 (1995). Apparent authority is such authority as a principal knowingly permits an agent to assume or which he holds the agent out as possessing. *See Mack v. Scott*, 230 Ark. 510, 323 S.W.2d 929 (1959). It is such authority as an agent appears to have by reason of actual authority that he has and such authority as a reasonably prudent person, using diligence and discretion, in view of the principal's conduct, would naturally suppose an agent to possess. *See id.* Marise was vested with the title of vice-president and had the actual authority to prepare and submit bids on projects. A reasonable and prudent person could thus conclude that he had the concomitant authority to receive communications regarding the acceptance of a project that he had bid upon. We find no error on this point.

The next set of issues concerns items of evidence that appellee introduced to prove damages. Appellant contends first that appellee should not have been allowed to prove its damages by merely introducing a copy of its $287,669 contract with Systems Painters, the substitute subcontractor. It claims that proof of what the job actually cost Systems should have been introduced, preferably through a representative of Systems. Appellant cites *Advance Constr. Co., Inc. v. Dunn*, 263 Ark. 232, 563 S.W.2d 888 (1978), in support of its argument. However, that case is inapplicable. In *Dunn*, a subcontractor sued the general contractor that prevented him from completing his subcontract. As damages, the subcontractor sought the amount of its contract price, less what it would have cost to do the job. To refute the subcontractor's evidence of cost, the general contractor offered proof of what it had paid the substitute contractor. The appellate court held that the proper way to refute the subcontractor's evidence of cost would be to prove what the job actually cost the substitute subcontractor. The case before us, however, does not involve the type of damages sought in *Dunn*; it involves damages sought against a subcontractor for the subcontractor's failure to perform.

Our research has not revealed any Arkansas authority directly on point regarding the proper measure of damages in such a case, nor have the parties cited us to any. However, in *Capital Steel Co. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978), our supreme court impliedly recognized that, when a general con-

tractor sues a supplier for failure to perform, his damages are the difference between the contract price of the materials and what the contractor had to pay elsewhere. Other authorities have held under similar though not identical circumstances that when a contractor refuses to perform, damages may be recovered against him for the difference between his bid and the cost of having the work performed by others. *See Westland Constr. Co. v. Chris Berg, Inc.*, 215 P.2d 683 (Wash. 1950); *Sorenson v. Ewing*, 8 Ariz. App. 540, 448 P.2d 110 (1968). *See also* 17B C.J.S. *Contracts* § 594 (1999), recognizing that a general contractor that is forced to complete a subcontractor's work because of the subcontractor's abandonment of the project may recover for expenses incurred in completing the work less the amount it would have paid the subcontractor had no breach occurred. That is precisely the proof that was offered in this case. Appellee offered evidence of the difference between MDH's bid and the cost of obtaining substitute performance. Therefore, we find no error in the evidence introduced by appellee to prove its damages and hold that the correct measure of damages was used.

Appellant argues next that appellee's evidence did not constitute a reliable computation of items of labor and material to be attributed to MDH due to the breach. The evidence offered by appellant to make this point is complex and difficult to follow. Nevertheless, upon careful review of it, we are persuaded that the chancellor did not err in assessing damages. During appellant's examination of Earl Ballentine regarding improper items purportedly charged to MDH, the chancellor declared that Earl Ballentine testified that "nothing was charged against MDH for those. And I don't know how it can be said any clearer or plainer." The chancellor apparently believed Ballentine's testimony that no charges were made to MDH for work not attributable to the subcontract. On matters of credibility, we defer to the chancellor. *Stout v. Stout*, 4 Ark. App. 266, 630 S.W.2d 53 (1982). Regarding appellant's related argument that Ballentine was not the proper custodian of the records introduced to prove damages, appellant cites no legal authority for its claim. Arguments made without citation to authority or convincing argument will not be addressed on appeal. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 66 Ark. App. 22, 988 S.W.2d 25 (1999).

Finally, appellant asks us to reverse the attorney fees awarded under Ark. Code Ann. § 16-22-308 (Repl. 1999) because

the chancellor awarded damages based upon promissory estoppel rather than breach of contract. Without deciding whether promissory estoppel would support a fee award, we uphold the award based upon our interpretation that the chancellor's decree awarded damages for breach of contract.

Affirmed.

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

MID-STATE TRUST III *v.*
Johnny AVRIETT and Ida J. Avriett

CA 99-976 17 S.W.3d 500

Court of Appeals of Arkansas
Division I
Opinion delivered May 24, 2000

Depper Law Firm, by: *Vicky Bussey Lowery*, for appellant.

Gibson Law Office, by: *Charles S. Gibson*, for appellees.

JOHN F. STROUD, JR., Judge. This is a foreclosure action in which appellant, Mid-State Trust III, sought judgment against the appellees, Johnny and Ida Avriett, on a promissory note and foreclosure of the mortgage securing the note. The chancellor found in favor of the appellees. Appellant's sole point of appeal is that the trial court erred in holding that it was not entitled to accelerate the debt. We disagree and affirm.

In reviewing chancery cases, we will not set aside a chancellor's findings of fact unless they are clearly erroneous or clearly against the preponderance of the evidence. *Mid-State Trust II v. Jackson*, 42 Ark. App. 112, 854 S.W.2d 734 (1993). Moreover, principles of justice permit a court of equity to protect the debtor against an inequitable acceleration of the maturity of a debt. *Id.* In his decree, the chancellor found in pertinent part: 1) that appellees had complied with the terms of the mortgage by providing insurance in the amount of $20,000, and that consequently appellant's demand for reimbursement of premiums paid by it in excess of $20,000 had no contractual basis; and 2) that, therefore, appellant's conduct was inequitable in conditioning its acceptance of house payments upon an additional requirement that it be reimbursed for its premium costs. We find neither clear error in the chancellor's finding of fact with respect to the insurance coverage, nor an abuse of discretion in the chancellor's conclusion that it would be inequitable to allow foreclosure under the facts of this case.

In 1989, the appellees executed a promissory note and mortgage in connection with their purchase of a home from Jim Walter Homes, Inc. The sum of all payments under the note was $67,560, payable in 240 monthly installments of $281.50. However, the amount financed was $29,180. Through various assignments, appellant eventually became holder of the note and the lien securing it. The terms of the note provided in pertinent part that the holder had the right to declare the entire balance due and collectible if appellees failed to make a monthly payment for thirty days. In addition, appellees were required under the terms of the note to reimburse the note holder for any amounts it might have to advance in order to protect the property. Under the terms of the building contract and mortgage, the appellees agreed to maintain insurance on the property in an amount equal to the *lesser* of the actual cash value of the house or the unpaid balance of the cash price of the house. Finally, under the terms of the mortgage, appellees were to

deliver original insurance policies to the holder of the note. If appropriate insurance was not maintained, then the holder had the right, but not the obligation, to purchase coverage and add that cost to the appellees' indebtedness or demand reimbursement of that cost.

Appellee Ida Avriett testified that she knew that she and appellee Johnny Avriett were supposed to maintain insurance on the property. She also stated that "we were late on our July 1997 payment, . . . one payment late and half of another." She gave a representative of the company a check for $563, the amount of two payments, in July. She said that they made the next payment in August 1997; that she did not believe that they were behind at that point because the representative called her and told her they were caught up; and that they did not make a September payment, but sent two payments in October, a money order and a check. She said that those two payments were returned by a man who said they needed to pay "a whole bunch of money, $2,000 and something." She said she tore the check up and sent two more payments, which was three payments in all in October and November, but that the company sent them back to her.

She also testified that they did not have insurance with anyone from 1989, when they moved into the house, through 1990; that they got insurance in 1991 or 1992; and that the "insurance lady" told them $20,000 was as much coverage as they could get on the house. She said they had insurance on the house from 1992 to 1999, and at some point, the amount of coverage was increased to $27,000. She said that she assumed the insurance company would provide the appellant with copies of the policy, and that appellant never informed her that they weren't getting proof of her insurance.

Tom Emerson, a representative for appellant, testified that until trial he had not been aware that the appellees had insurance on the house. He stated that the payment received on August 28, 1997, was applied toward the July 15, 1997, installment; and that the amount expended by appellant for insurance was $2,064.87. He said that he had conflicting documentation, but that it appeared the appellees owed for August 1997 forward. With respect to the insurance purchased by appellant, Emerson's testimony and appellant's Exhibit 5 indicate that around 1993 the premiums paid by appellant dropped from over $200 to $140, and coverage dropped to $9,400.

Emerson stated that "[w]hen my company forces coverage on a piece of property that is uncovered, it would be for the amount financed, the cash price of the house, and at all times in this case, that is more than $9,400. I never understood until today that the Avrietts had coverage." Appellee Johnny Avriett testified that he did not think that at any time after the house was completed it was worth more than $20,000.

In support of its point of appeal, appellant contends that the trial court was clearly erroneous in finding that the appellees' account "was placed in foreclosure . . . based on the claim for reimbursement of insurance premiums rather than the delinquency in the monthly payments." We find no such clear error. In returning the checks to the appellees, the company representative told them that they owed more than that amount, which was attributable to appellant's claim that the appellees owed for insurance premiums. Moreover, appellant contends alternatively that "[o]ne payment behind is still sufficient grounds for it to declare the entire balance due and payable pursuant to the promissory note and mortgage." Even if appellant's foreclosure action was based upon one delinquent payment, rather than the claim for insurance premiums, we find no abuse of discretion in the chancellor's determination that it would be inequitable to allow foreclosure under the facts of this case.

Appellant also contends that appellees' failure to obtain insurance coverage during the approximate two years immediately following the purchase of the property provided a sufficient basis for seeking foreclosure. We find no abuse of discretion in the chancellor's failure to allow such a basis for foreclosure. Under the facts of this case, it would clearly be inequitable to allow appellant to rely upon a claim that was so distant in time in order to claim default, accelerate payment, and foreclose upon the property.

Furthermore, appellant's contention that appellees did not provide adequate proof of insurance and notification of same to appellant for the remaining years, *i.e.*, through 1999, is not convincing. In fact, appellant's own proof established that around 1993 the company-provided insurance on the house was reduced to approximately $9,400, which could be fairly inferred to show that they were aware of the $20,000 coverage purchased by appellees, and consequently purchased only the amount of insurance to bring

coverage to the amount financed, $29,180. In addition, the chancellor was not clearly erroneous in determining that $20,000 of coverage was sufficient under the terms of the parties' agreement. Again, under the terms of the building contract and mortgage, the appellees agreed to maintain insurance on the property in an amount equal to the *lesser* of the actual cash value of the house or the unpaid balance of the cash price of the house. Appellee Johnny Avriett testified that he did not consider the property to have a value of more than $20,000. Appellee Ida Avriett testified further that they were only able to procure coverage for $20,000 because their insurance agent did not consider the property to be worth more than that amount. Appellant presented no proof on this issue.

Finally, the chancellor extended the rights and duties of the parties with reference to the note for a period of twenty months past the original payoff date. Appellant asks this court, if it does not reverse, to remand this case for the chancellor to refashion the manner in which payments are made by the appellees. Appellant contends that appellees "have essentially been allowed to live in the home which is mortgaged and encumbered to [appellant] for 20 months during the pendency of this litigation without being required to make payments for those months." Appellant's argument in this regard is not persuasive as the twenty-month delay was actually attributable to appellant's premature attempt to accelerate the debt and foreclose on the mortgage.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

Kimberly L. VANN (Dill) *v.* Richard M. COOK
and M.J. Construction Company, Inc.

CA 99-1441 17 S.W.3d 103

Court of Appeals of Arkansas
Division IV
Opinion delivered May 24, 2000
[Petition for rehearing denied June 28, 2000.]

Baxter, Jensen, Payne & Young, by: *Ray Baxter* and *John Payne*, for appellant.

Anderson, Murphy & Hopkins, LLP, by: *Randy P. Murphy* and *Mark Hagemeier*, for appellees.

MARGARET MEADS, Judge. This is an automobile accident liability case. Appellant appeals from a judgment based on a jury verdict in favor of the appellees on appellant's complaint of negligence. Appellant's only argument on appeal is that the trial court erred in refusing to instruct the jury with regard to Ark. Code

Ann. § 27-37-501 (Repl. 1994), which provides that every motor vehicle must be provided with adequate brakes.

On August 11, 1995, a three-vehicle accident occurred involving appellee Richard Cook; appellant, Kimberly Vann; and Tony Thompson, who is not a party to this appeal, at the intersection of Willie Ray Drive and James Drive in Cabot, Arkansas. Ms. Vann was traveling south on Ray Drive; Thompson was driving north on Ray Drive; and Cook was driving east on James Drive. Cook was driving a 1973 Chevrolet flatbed truck pulling a trailer with a dozer on it. The owner of Cook's vehicle was his employer, appellee M.J. Construction Company. The accident occurred when Cook failed to stop at a stop sign on James Drive and made a right turn onto Ray Drive to go south. Thompson, who was proceeding north on Ray Drive, hit part of Cook's trailer which extended into his lane of traffic, lost control of his vehicle, and hit the vehicle being driven by Ms. Vann.

Cook testified that he went through the stop sign, but that he had no alternative because his brakes did not work. He said that he had made more than one stop before the accident, and the brakes worked each time. However as he approached Ray Drive and applied the brakes, they "just did not work." He testified further that M.J. Construction is safety conscious and maintains its vehicles, and when the vehicle was repaired, the problem was that the vacuum booster on the brakes had failed. Trooper Gene Page, who investigated the accident, testified that there were no skid marks coming from James Drive.

Appellant argues on appeal that the trial court erred in failing to give her jury instruction based on AMI Civ. 3d 903, which provides a format for instructing the jury that violation of a statute may be considered evidence of negligence. The statute involved in this case is Ark. Code Ann. § 27-37-501 (Repl. 1994), which provides:

> (a)(1) Every motor vehicle, other than a motorcycle or motor-driven cycle, when operated upon a highway, shall be equipped with brakes adequate to control the movement of, and to stop and hold, the vehicle, including two (2) separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two (2) wheels.

> (2) If these two (2) separate means of applying the brakes are connected in any way, they shall be constructed so that failure of any one (1) part of the operating mechanism shall not leave the motor vehicle without brakes on at least two (2) wheels.

The model instructions permit the statute to be quoted or summarized.

This is the instruction proffered by appellant:

> AMI 903 VIOLATION OF STATUTE AS EVIDENCE OF NEGLIGENCE: There was in force in the State of Arkansas at the time of the occurrence a statute which provides: First: every motor vehicle . . . when operated on a highway, shall be equipped with brakes adequate to control the movement of, and to stop and hold, the vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be constructed so that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels.

Appellees objected to the instruction on the basis that § 27-37-501 was not applicable[1]. The trial judge responded that he believed it could have been applicable, but "it is in the transportation, and I think it's probably talking about eighteen wheelers, etc." The trial judge also said that he had read some case law that stated that a hand brake complies with the law.

Appellant alleges error because the statute is not limited to eighteen wheelers, appellees admitted that the brakes were defective, and there was no other excuse for the accident. A party is entitled to a jury instruction when it is a correct statement of the law, and there is some basis in the evidence to support the giving of the instruction. *Coca-Cola Bottling Co. v. Priddy*, 328 Ark. 666, 945 S.W.2d 355 (1997).

Here, the trial judge refused to give the instruction on the basis that it applied to eighteen wheelers and because a hand brake complied with the law. However, the statute provides that "every

[1] The instruction originally included wording regarding deceleration and stopping distance (Ark. Code Ann. § 27-37-502 (Repl. 1994)). The trial court stated that there was no testimony about decelerating and stopping distance, and appellant removed that part of the instruction with the court's permission.

motor vehicle" shall be equipped with brakes adequate to stop the vehicle. Our statute requires all vehicles to be equipped with adequate brakes, and a violation of this statute is evidence of negligence; a jury may find negligence on the part of a driver whose brakes suddenly fail. *Houston v. Adams*, 239 Ark. 346, 389 S.W.2d 872 (1965); *Brand v. Rorke*, 225 Ark. 309, 280 S.W.2d 906 (1955).

The proffered instruction was a correct statement of law, and there was evidence that appellees' brakes had failed, which constituted some evidence to support the giving of the instruction. Therefore, we find that the trial court erred in refusing to give appellant's proffered instruction, and we reverse on this point.

Reversed and remanded for a new trial.

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

Robert DOOLEY *v.* STATE of Arkansas

CA 99-1194 17 S.W.3d 503

Court of Appeals of Arkansas
Division III
Opinion delivered May 24, 2000

John W. Rife, Yell County Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Todd L. Newton*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Robert Dooley appeals from the denial of his petition for writ of habeas corpus by the Yell County Circuit Court. Dooley was detained by Yell County when it was learned during a routine traffic stop that he was wanted by Texas authorities for violating his parole by leaving Texas without permission, and Texas subsequently sought his extradition. On appeal, Dooley argues that the trial court erred in denying his petition because he was unconditionally released from prison according to Texas law, and therefore was not subject to the terms and conditions of parole. We affirm the trial court's denial of the writ.

Dooley was sentenced in Texas on July 14, 1984. He was given a conditional release on November 23, 1992, however, he refused to sign the terms and conditions of his release. One of the conditions was that he would not leave the state of Texas without permission. During a routine traffic stop, an officer from Yell County discovered that Dooley was wanted out of Texas. The Texas Parole Department had filed a warrant stating that Dooley had violated the terms and conditions of his parole by leaving the state without

permission. On May 26, 1999, an extradition-waiving hearing was held, and the court declared Dooley indigent, appointed him a public defender, and set a bond. Dooley subsequently filed a petition for a writ of habeas corpus in Yell County Circuit Court. A Governor's warrant was issued for Dooley's arrest between the filing of the petition and the setting of the hearing.

At the hearing on July 20, 1999, Dooley argued that he was not on parole under Texas law. Dooley contended that he is not subject to the condition that he not leave the state of Texas without permission, which is the basis for the Texas warrant, because he refused to sign the document regarding the terms and conditions of his release. Dooley argued that in order for the trial court to determine whether or not he was on parole, it needed to look at the parole requirements of Texas. The trial court denied Dooley's petition for writ of habeas corpus, finding that (1) he is the individual being sought; (2) there is an outstanding Governor's warrant; and (3) the Texas court system should decide whether or not he is in violation of the terms of his parole or probation. Dooley was returned to Texas. This appeal followed.

On appeal, Dooley argues that the trial court erred in denying his petition for a writ of habeas corpus. Dooley argues that the Governor's warrant was facially defective because he was not on parole under Texas law, and therefore could not flee from a charge for which he is not guilty. In support of his argument, Dooley referred to a document that was attached to the Governor's warrant entitled "Rules and General Conditions of Mandatory Supervision Release as Provided by the Texas Department of Criminal Justice Pardons and Paroles Division Article 42.18." According to this document, one of the conditions of parole is that the parolee is not allowed to leave the state of Texas without the prior, written permission of the parole officer. At the bottom of the parole document, there is a line for the inmate to sign and agree to these conditions; however, Dooley refused to sign the document. Dooley argues that he was in essence unconditionally released because he did not sign the parole document, and therefore could not flee from Texas because he was not on parole. Dooley's argument is without merit.

■ After a Governor's rendition warrant on a request for extradition has been issued, the only two issues to be addressed in a habeas corpus hearing pertaining to the extradition request are

whether the detained party is the person named in the warrant and whether he is a fugitive. *McCray v. State*, 290 Ark. 14, 715 S.W.2d 878 (1986); *Glover v. State*, 257 Ark. 241, 515 S.W.2d 641 (1974).

In *Smith v. Cauthron,* 275 Ark. 435, 631 S.W.2d 10 (1982), citing *Pierce v. Cauthron*, 266. Ark. 419, 584 S.W.2d 5 (1979), the supreme court noted that the Constitution of the United States, art. 4, § 2, cl. 2, states:

> A person charged in any State with Treason, Felony, or other Crime who shall flee from Justice and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

In *Stuart v. Johnson*, 192 Ark. 757, 94 S.W.2d 715 (1936), Stuart was arrested in Craighead County upon a warrant charging her with having committed embezzlement in the state of Oklahoma and with having fled from that State. Stuart argued that the offense charged was barred by the statute of limitations. The supreme court stated: "That may be, or she may have been a fugitive so as to prevent the statute bar from attaching. At any rate, that is a matter of defense which may be offered in defense of the charge, but not here." *Id.*

The evidence in this case established that Dooley was arrested and sentenced in Texas in July 1984 for a criminal offense committed in Texas. He was released on parole from the Texas Department of Correction on November 23, 1992. Dooley subsequently left Texas and came to Arkansas and was arrested during a routine traffic stop because of an outstanding Texas warrant. Dooley is a fugitive from justice within the meaning of the requisite laws. As in *Stuart,* the question of whether Dooley may have a defense to the Texas charge is not one that may be addressed by the Arkansas trial court. Therefore, the Arkansas trial court properly refused to discharge him. *See also Letwick v. State,* 211 Ark. 1, 198 S.W.2d 830 (1947).

Affirmed.

CRABTREE and KOONCE, JJ., agree.

Mary (Noelker) FREEMAN *v.*
CON-AGRA FROZEN FOODS

CA 99-1313 27 S.W.3d 762

Court of Appeals of Arkansas
Division IV
Opinion delivered May 31, 2000
[Substituted Opinion upon Grant of Rehearing
delivered October 4, 2000*]

[redacted]

* BIRD and STROUD, JJ., would deny. *See* decision by Arkansas Supreme Court, delivered March 29, 2001.

Mark E. Ford, for appellant.

William F. Smith, for appellee.

JOHN B. ROBBINS, Chief Judge. In our original opinion in this appeal, *Freeman v. Con-Agra Frozen Foods*, 70 Ark. App.

306, 19 S.W.3d 43 (2000), we reversed the Workers' Compensation Commission's decision that denied appellant benefits. Appellee timely filed a petition for rehearing and argues that we erroneously evaluated the evidence and came to an erroneous conclusion. In light of two supreme court cases that were decided after we issued our original opinion, we conclude that appellee's petition is well founded. We have granted the petition for rehearing and reinstate the appeal. In this substituted opinion, we affirm the Commission.

The evidence presented by the parties revealed the following facts, and we reiterate them here. Appellant testified that she began working for appellee on November 27, 1995, assembling frozen dinner trays. She generally worked more than forty hours per week. Her duty on the moving production line was to place the correct portion of food into the frozen dinner tray, making certain that there was neither too much nor too little food in each triangle portion of the tray. Two to four employees worked each line, usually with two on each side of the line. In her estimation, she was responsible for filling approximately sixty-five dinners per minute. The employees rotated the duties of putting in a vegetable, an ice-cream scoop of rice, or the frozen meat. This was a job that required extensive use of her hands, wrists, and arms.

Her symptoms began about six months prior to leaving her employment, and she described the symptoms as aching and numbness in her hands and elbows accompanied by a loss of grip strength. The aching was severe enough to wake her at night. At that time, she was in her late forties. She admitted that she did not notify her employer of these problems until she left on November 21, 1997, because she thought that aching and pain was just "part of the job." On that date, she testified that before she reported to work, she was at home and, while wiping up tea that she had spilled on the kitchen counter, she experienced a shooting pain in her wrists. When she arrived at work that day, she reported to the nurse's station and requested that they wrap her wrists. After being on the job for about an hour, she could not work any longer due to the pain. She was sent, not to the company doctor, but to her family physician.

She consulted with her physician, Dr. Jones, and his notes indicated a patient history of these problems for the past two to three months with an increase in the last week or two. Nerve

conduction studies confirmed that she had bilateral carpal tunnel syndrome, worse on the left than the right. He diagnosed her with bilateral carpal tunnel syndrome and bilateral "tennis elbow." His notes dated November 25, 1997, stated "[t]his overuse syndrome type picture is consistent with the job description she gives me."

Appellant reported to her employer that these conditions were work-related after her diagnosis by Dr. Jones. Appellee contested the claim since appellant had not initially reported that her symptoms were related to her work. Appellant completed an application for employer-sponsored disability, and in those forms she indicated that her condition was work-related but that she was receiving no benefits. Appellant testified that the insurance coordinator at Con-Agra informed her not to list the injury as work-related, or she would not receive disability insurance benefits. In her visits for medical care, she assigned benefits under her group medical plan.

She was referred to Dr. Nix, a Little Rock orthopedic surgeon, who concurred in Dr. Jones's diagnosis. After unsuccessful conservative treatment, Dr. Nix performed carpal tunnel release on January 2, 1998. She continued to experience problems with the A-1 pulley on the right thumb, and Dr. Nix performed a release of the A-1 pulley on April 21, 1998. Along with her surgeries, appellant underwent a course of physical therapy to restore the use of her hands and elbows.

In response to a letter from appellant's counsel, Dr. Nix categorized appellant's problems as "usage related type injuries, often associated with repetitive motion and are most commonly seen in women." However, "whether this particular repetitive usage is associated with production line work or other outside activities, I cannot comment on with a reasonable degree of medical certainty. I expect your investigation could help clarify this." She was released to return to work on May 21, 1998, and continued in that employment until she found other work on October 12, 1998. Appellant denied engaging in any other rapid or repetitive activity and denied that she had any other injuries to her hands or arms before she developed carpal tunnel syndrome and tennis elbow.

Appellant sought benefits asserting that these conditions arose out of and in the course of her employment with appellee Con-Agra Frozen Foods. Appellant contended that because of her

overuse syndrome that developed over her two-year tenure as an assembly line employee, she had to discontinue working on November 21, 1997, was temporarily totally disabled until May 21, 1998, and was entitled to medical benefits for treatment of her conditions. Appellee contended that appellant's injuries were not causally related to her work and that her conditions were not proven to be related within a reasonable degree of medical certainty. The administrative law judge and the Commission concluded that these conditions did not arise out of her employment.

The Commission, which adopted the opinion of the ALJ, found that appellant failed to carry her burden of proof to demonstrate a causal connection between her employment and her injury because she did not indicate that her symptoms were work-related until after she had seen her family physician and realized that her treatment might include seeing a specialist and undergoing surgery. In addition, the Commission found it significant that appellant experienced a dramatic increase in symptoms at home while wiping her kitchen countertop, and it was only after that incident that she could no longer work. The Commission also noted that Dr. Nix declined to render an opinion on the nexus between her condition and her work, and Dr. Jones's notes, while stating that her conditions were "consistent with" her job duties, were barren of any report of the kitchen-cleaning incident. Therefore, the Commission denied benefits.

When we review a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if the decision is supported by substantial evidence. *White v. Frolic Footwear*, 59 Ark. App. 12, 952 S.W.2d 190 (1997). Substantial evidence is that evidence a reasonable mind might accept as adequate to support a conclusion. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). A decision of the Commission is reversed only if we are convinced that fair-minded persons using the same facts could not reach the conclusion reached by the Commission. *Id.* In our review, we recognize that this court defers to the Commission in determining the weight of the evidence and the credibility of the witnesses. *Id.* The issue is not whether we may have reached a different conclusion or whether the evidence might have supported a contrary finding. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914

S.W.2d 776 (1996). Where the Commission's denial of relief is based on the claimant's failure to prove entitlement to benefits by a preponderance of the evidence, the substantial-evidence standard of review requires affirmance if the Commission's opinion displays a substantial basis for the denial of relief. *Morelock v. Kearney Co.*, 48 Ark. App. 227, 894 S.W.2d 603 (1995).

When a claimant requests benefits for an injury characterized by gradual onset, Ark. Code Ann. § 11-9-102(5)(A)(ii) (Repl. 1996) controls, defining "compensable injury" as follows:

> (5)(A)(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by the time and place of occurrence, if the injury is:
>
> (a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

The supreme court has interpreted this statutory language such that a claimant is not required to prove that her condition was caused by rapid repetitive motion when the diagnosis is carpal tunnel syndrome. *Kildow v. Baldwin Piano and Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998). We recognize that epicondylitis, or "tennis elbow," has not been designated as a specifically recognized injury under "rapid repetitive motion." Consequently, appellant bears the burden of proving that rapid repetitive motion caused the bilateral tennis elbow.

A claimant must also prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of her employment; (2) the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) the injury was a major cause of the disability or need for treatment; and (4) the injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(5). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B) (Repl 1996).

We hold that there is a substantial basis for the denial of relief in this case. On June 8, 2000, the supreme court decided *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000). This

decision narrowed the acceptable language that will support a causal connection between the injury and the work within a reasonable degree of medical certainty. Therein the supreme court reversed our decision, *Frances v. Gaylord Container Corp.*, 69 Ark. App. 26, 9 S.W.3d 550 (2000), and announced that:

> [E]xpert opinions based upon "could," "may," or "possibly" lack the definiteness required to meet the claimant's burden to prove *causation.* phasis added.] Accordingly, we modify and overrule the Court of Appeals' decision in *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998), to the extent that it may be read to permit expert opinion evidence under section 11-9-102(16)(B) to be satisfied by the use of terms such as "can," "could," "may," or "possibly."
>
> We also note that although *Atwood* seemingly rejects an expert's use of the word "could" when stating an opinion within a reasonable medical certainty, it validates an expert's use of the word "can." Given this inherent contradiction, ... we apply our limited overruling of *Atwood* retroactively.

The supreme court handed down yet another decision on this subject on July 7, 2000. *Crudup v. Regal Ware Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). In it the supreme court reversed our decision upon a grant of review. In *Crudup v. Regal Ware Inc.*, 69 Ark. App. 206, 11 S.W.3d 567 (2000), we had held that the following physician's opinion on causal connection had been stated within a reasonable degree of medical certainty:

> I cannot *definitively* state that the work he performs at Regal Ware is a primary cause of carpal tunnel syndrome, however ... it is *likely* this activity could precipitate, or aggravate, his symptoms.

Id., 69 Ark. App. at 209. (Emphasis added.) In reversing our decision, the supreme court stated that this physician's opinion was nothing more than a statement of theoretical possibility and therefore lacked the requisite definiteness.

■ We recognize that the supreme court rendered an earlier opinion, *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999), which supported our first opinion in this case. Ms. VanWagner suffered an injury to her chest and breast implant, and the Commission found that she had proven a causal connection between her injury and her employment. The supporting evidence

was her testimony of what happened coupled with her doctor's notes that substantiated that the right implant was displaced and ruptured. The employer, Wal-Mart Stores, Inc., appealed, arguing that medical evidence was necessary not only to establish the existence of any injury, but also to establish that a work-related accident caused the injury. Therefore, Wal-Mart contended that objective medical evidence of causation is elemental to proper proof of a compensable injury. The supreme court disagreed, holding that objective medical evidence is necessary to establish the existence and extent of an injury but is not essential to establish the causal relationship between the injury and a work-related accident. The supreme court specifically adopted our reasoning in *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997), and *Aeroquip, Inc. v. Tilley*, 59 Ark. App. 163, 954 S.W.2d 305 (1997), and stated:

> The plethora of possible causes for work-related injuries includes many that can be established by common-sense observation and deduction. To require medical proof of causation in every case appears out of line with the general policy of economy and efficiency contained within the workers' compensation law. To be sure, there will be circumstances where medical evidence will be necessary to establish that a particular injury resulted from a work-related incident but not in every case.

337 Ark. at 447. We agree with this analysis. However, we are bound to apply the most recent statement of the law as announced by our supreme court. *See, e.g., Alcoa v. Carlisle*, 67 Ark. App. 61, 992 S.W.2d 172 (1999); *Davis v. State*, 60 Ark. App. 179, 962 S.W.2d 815 (1998). Consequently, unless *Van Wagner* was overruled by implication in *Frances* and *Crudup*, it appears that the present state of the law in this area could be summed up as follows: Medical evidence is not ordinarily required to prove causation, i.e., a connection between an injury and the claimant's employment (*Van Wagner*), but if an unnecessary medical opinion is offered on that issue, the opinion must be stated within a reasonable degree of medical certainty. Qualifying words such as "could," "may," "possibly," and "likely" will cause the opinion to lack the requisite certainty and will defeat the claimant's claim.

Applying these mandates from our supreme court, we hold that appellant's family physician's opinion, wherein he opined that appellant's work was "consistent with" her injuries, does not

meet the requisite definiteness to prove a causal connection between the injury and the work. We need not address whether Ms. Freeman's testimony on the causation issue was credible.

Affirmed.

JENNINGS, GRIFFEN, and MEADS, JJ., agree.

BIRD and STROUD, JJ., dissent.

SAM BIRD, Judge, dissenting. I joined in the original decision of this court to reverse the Commission's denial of benefits to the appellant, and I respectfully dissent from the majority's decision to now grant appellee's petition for rehearing and to affirm the Commission's decision.

First, I believe that the two cases handed down by our supreme court on June 8, 2000, *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000), and July 7, 2000, *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000), are distinguishable and, therefore, are not authority for the case at bar.

In *Gaylord*, a workers' compensation claimant was seeking benefits for an injury to his back alleged to have occurred when he was struck in the left side by a scanner while he was clearing away paper from a broken paper machine. In its opinion, the supreme court noted that Frances's doctor, in a letter report relating to causation, stated that "the mechanism of the injury that [Frances] describes *could* produce a lumbar disc injury. The history given that he initially sustained back pain and then four weeks later had recurrent back and leg pain *could* be consistent with an injury to the disc initially...." The supreme court held that since the doctor opined only that Frances's work-related accident was the kind of event that "could" cause his resulting back condition, the doctor's opinion was not stated within a reasonable degree of medical certainty as required by Ark. Code Ann. § 11-9-102(16)(B)(Supp. 1999).

In *Crudup*, a claimant sought benefits for carpal tunnel injury in his right wrist, alleged to have been caused by his rapid-and-repetitive activities in packing cookware into boxes on an assembly line. A letter report from the Dr. Michael Moore stated:

> I had a long discussion with Mr. Crudup regarding his medical condition as it related to work. He reports that he performs work which requires repetitive lifting and gripping. I cannot definitively state that the work he performs at Regal Ware is a primary cause of carpal tunnel syndrome, however, if Mr. Crudup does perform repetitive work, it is likely this activity could precipitate, or aggravate, his symptoms. Finally, if I could review Mr. Crudup's work requirements, it would be easier to determine if the carpal tunnel syndrome could be related to his work activity.

The supreme court affirmed a finding by the Commission that the doctor's opinion of the likelihood of a causal connection between the claimant's work and his carpal tunnel syndrome was not stated within a reasonable degree of medical certainty as required by section 11-9-102(16)(B)(Repl. 1996).

The case at bar is distinguishable because Doctor Jones's opinion as to a causal connection between Freeman's work activities at Con-Agra and her injuries did not contain equivocal expressions like "could," "may," or "possibly" that the supreme court held in *Gaylord, supra,* (overruling *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998)), lacked the definiteness required to meet the claimant's burden to prove causation pursuant to section 11-9-102(16)(B). Unlike the doctors' opinions in *Gaylord* and *Crudup*, Dr. Jones's opinion was not that Freeman's carpal tunnel syndrome CTS *could* have been consistent, or *might* have been consistent, or *may* have been consistent, or *was possibly* consistent, or *likely could* have been consistent, with the conditions of her work. To the contrary, the clear and unequivocal opinion of Dr. Jones as to the existence of a causal connection between Freeman's injuries and her work activities, was that "[t]his overuse syndrome type picture *is consistent with* the job description she gives me."

Following the receipt of this opinion from Dr. Jones, Freeman was referred to Dr. Nix, who agreed with Dr. Jones's diagnosis of Freeman's injuries. In a letter to Freeman's lawyer, Dr. Nix described Freeman's conditions as "usage related type injuries, often associated with repetitive motion...." Dr. Nix then went on to state the obvious that, "whether this particular repetitive usage is associated with production like work or other outside activities, I cannot comment on with a reasonable degree of medical certainty. I expect your investigation could help clarify this." It is this unfortunate surplusage by Dr. Nix that the Commission has seized upon to

support its conclusion that no causal connection has been established between Freeman's injuries and the conditions of her work. This statement by Dr. Nix is not unlike Dr. Moore's suggestion in *Crudup, supra,* to the effect that he "could not definitely state that the work [Crudup] performs ... is a primary cause of carpal tunnel syndrome, [but that] if I could review Mr. Crudup's work requirements, it would be easier to determine if the carpal tunnel syndrome could be related to his work activity. These statements by Drs. Moore and Nix are exactly the type of qualified opinions one would expect to receive from an honest, objective doctor who is asked to express an opinion as to whether there is a causal connection between a medically diagnosed injury and a work activity that the doctor has not personally observed or with which he is not personally familiar. As the dissenting opinion observes in *Gaylord,* since "doctors generally are not present when an employee is injured, it is understandable that their opinions may be stated in less than certain terms." Every opinion expressed by a doctor is not a medical opinion. A doctor cannot be expected to express, to a reasonable degree of medical certainty, that there is a causal connection between an injury he has diagnosed and work conditions with which he is not personally familiar, and a doctor's refusal to do so is a credit to the ethics of his profession, not a failure to meet the burden of proof required by section 11-9-102(16)(B).

This brings me to the second reason for my dissent. With all due respect to the majority herein and to the supreme court in its *Gaylord* and *Crudup* decisions, I do not agree that section 11-9-102 can be interpreted to require that, as a condition of compensability, medical proof exists, to a reasonable degree of medical certainty, or otherwise, to establish a causal connection between one's injury and his or her employment.[1] As the majority notes, Freeman's eligibility to recover benefits under the Workers' Compensation Act for an injury alleged to be due for an injury characterized by gradual onset, section 11-9-102(5) controls. Under that section, "compensable injury" is defined as:

[1] In *Wal-Mart Stores, Inc. v. VanWagner,* 337 Ark. 443, 446, 990 S.W.2d 522, 524 (1999), the supreme court affirmed the court of appeals' holding that "the requirement that a compensable injury must be established by medical evidence supported by objective findings applies only to the existence and extent of the injury."

> An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by the time and place of occurrence, if the injury is:
>
> (a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

As we have held before[2], a claimant seeking benefits for a gradual onset injury must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment (Ark. Code Ann. § 11-9-102(5)(A)(I)(Repl. 1996)), (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death (Ark. Code Ann. § 11-9-102(5)(A)(ii)(Repl. 1996)), (3) the injury was a major cause of the disability or need for treatment (Ark. Code Ann. § 11-9-102(5)(E)(ii)(Repl. 1996)), and (4) the injury must be established by medical evidence supported by objective findings (Ark. Code Ann. § 11-9-102(5)(D)(Repl. 1996)).

Among these four requirements, the only mention of a requirement for medical evidence is contained in section 11-9-102(5)(D)(Repl. 1996), which only requires that medical evidence, supported by objective findings, be produced to establish the injury. In other words, if there is no objective medical evidence of injury, there is no injury that is compensable under the Workers' Compensation Act. This section requires medical evidence to establish the existence of an injury. It does not require that medical evidence also establish a causal connection between the work and the injury. While it is true that section 11-9-102(16)(B) requires that medical opinions addressing compensability be stated within a reasonable degree of medical certainty, there is no provision in the Workers' Compensation Act *requiring* that medical evidence be produced to establish a causal connection between the medically diagnosed injury and the employee's work activity. At the very most, section 11-9-102(16)(B) could be interpreted to mean that *when* medical opinions are relied upon to establish a causal connection between an injury and work conditions, such opinions must be stated within a reasonable degree of medical certainty. But there is nothing in the

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[2] *Steveson v. Frolic Footwear*, 70 Ark. App. 383, 20 S.W.3d 413 (2000); *Lay v. United Parcel Serv.*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

act that can be construed to mean that medical opinions addressing compensability are the *only* evidence that can establish that causal connection.

Section 11-9-102(5)(A)(i) obviously requires proof of a causal connection between the injury and the employment (i.e., that the injury *arose out of and in the course of* employment), but there is no mention of a *requirement* for medical evidence to prove it.

Section 11-9-102(5)(A)(ii), while referring to causation, requires only that a claimant prove by a preponderance of the evidence that the injury *caused* internal or external physical harm that required medical services. While medical evidence may be necessary in many cases (but certainly not all of them) to establish the existence of internal or external physical harm, there is no requirement under this section that medical evidence be produced to establish that the injury caused the harm; nor is a medical opinion necessary to prove that the physical harm required medical services.

Finally, section 11-9-102(5)(E)(ii) makes no mention of the necessity for medical evidence to prove that an injury is the major cause of disability or need for treatment. No doubt, medical evidence could provide such proof; and in some instances, but not all, medical evidence might be the only way to establish a connection between the injury and its effect. But the statute does not require medical evidence in every instance to prove a causal connection between the injury and the disability or need for treatment.

In the case at bar, Con-Agra does not dispute Freeman's testimony: that she worked for two years on a moving assembly line where she assembled frozen food trays; that she worked more than forty hours per week; that her duty on the line was to place correct portions of food items, including frozen meat, into a dinner tray; that she filled approximately sixty-five dinner trays per minute; and that the job required extensive use of her hands, wrists, and arms. Con-Agra did not deny that Freeman suffers from CTS and "tennis elbow." Rather, it contested her claim on the basis that Freeman did not complain about her symptoms at their onset and that she did not contend that her injury was work related until after it had been diagnosed by her family physician.

Freeman was not required to prove that her CTS was caused by rapid and repetitive motion. She was required to prove only that her CTS was caused by conditions of her employment. *Kildow v. Baldwin Piano and Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998). In *Kildow*, the supreme court held that CTS was, by definition, a compensable injury that falls within the definition of rapid and repetitive motion.[3] There was no evidence that Freeman had engaged in any non-work related activity that might have caused her injury. To suggest, as the Commission does, that Freeman's bilateral CTS and bilateral tennis elbow could have been caused when she wiped up spilled tea from her kitchen counter is not only absurd but it ignores voluminous evidence to the contrary, including medical evidence that her injury is consistent with the conditions of her work. In his medical report, Dr. Jones stated that Freeman's "overuse syndrome" was consistent with the job description Freeman gave to him. There is no contention by Con-Agra that Freeman did not give a complete and accurate description of her job to Dr. Jones. The Commission chose to disregard Dr. Jones's opinion because it contained no reference to the incident Freeman's experience of pain in her wrist while wiping up spilled tea. However, Dr. Jones's characterization of Freeman's condition as an "overuse syndrome" belies any notion that Freemen's bilateral CTS and bilateral tennis elbow could have been caused by a single incident of wiping spilled tea from her counter-top. On the other hand, Dr. Nix, while agreeing with Dr. Jones that Freeman's conditions were "usage related type injuries, often associated with repetitive motion ...," cautiously avoided offering an opinion on causation, deferring instead to Freeman's attorney to "clarify" that issue through his investigation, obviously recognizing that it was not a medical decision.

As noted by the dissenting opinion in *Gaylord*, even though Ark. Code Ann. § 11-9-102(16)(B) requires a doctor's opinion to be stated within a reasonable degree of medical certainty, it does

[3] Of course, *Kildow* is not applicable to Freeman's "tennis elbow" because that condition is not included in Ark. Code Ann. § 11-9-102(5)(A)(ii)(a) as an injury categorized as a compensable injury falling within the definition of rapid and repetitive motion. However, since the majority affirms the Commission's decision that there was no medical opinion stated to a reasonable degree of medical certainty to establish a causal connection between any of Freeman's injuries and the conditions of her employment, and makes no distinction between the elements of proof required to prove compensability for Freeman's CTS and her bilateral "tennis elbow," that distinction will not be addressed in this dissenting opinion.

not require that the doctor's opinion must be stated in unequivocal terms. A doctor who has not personally witnessed the occurrence of an injury or personally viewed the work conditions that are claimed to have resulted in an injury cannot possibly be expected to express with absolute certainty whether an injury was caused by his patient's work. All doctors can be expected to do is express an opinion as to whether the injury he has diagnosed is consistent with the work history that has been provided to him. That opinion then becomes merely some of the evidence that is to be considered in determining whether there is a causal connection between the injury and the work.

The majority herein, and the supreme court in *Gaylord* and *Crudup*, *supra*, have imposed a requirement for establishing compensability under the Workers' Compensation Act that is not contained in the Act. It is an unreasonable requirement, if not an insurmountable one, to require workers' compensation claimants to induce a medical doctor to express, in reasonably certain medical terms, his opinion that there is a causal connection between a medically diagnosed injury and non-medical work conditions when the doctor is unqualified and, therefore, unwilling to express such an opinion. The reluctance of doctors to express opinions as to causation is exemplified by Dr. Nix's letter suggesting that Freeman's lawyer should develop evidence of such causation through his investigation, and Dr. Michael Moore's report in *Crudup* to the effect that further information about an injured employee's work conditions should be provided as a prerequisite to the expression of such an opinion. What these doctors are trying to say is that an opinion as to whether a particular work condition caused a particular injury is simply not a medical opinion.

I would deny the petition for rehearing, and I am authorized to state that Judge STROUD joins me in this dissenting opinion.

FIRST COMMUNITY BANK OF SOUTHEAST ARKANSAS *v.* Donald R. PACCIO and Betty D. Paccio

CA 99-1473 17 S.W.3d 510

Court of Appeals of Arkansas
Division IV
Opinion delivered May 31, 2000

Joseph P. Mazzanti, III, for appellant.

James W. Haddock, for appellees.

SAM BIRD, Judge. Appellant First Community Bank of Southeast Arkansas brings this appeal from the Circuit Court of Bradley County, which denied it a deficiency judgment against appellees Donald R. and Betty Darlene Paccio. We affirm.

In August 1994 and 1995, Donald Paccio purchased certain furniture from Carpenter Home Supply and entered into a retail installment contract and a security agreement with Daylight Finance Company. First Community Bank subsequently purchased the account from Daylight Finance Company. In March 1996, the Paccios filed for Chapter 13 bankruptcy but, thereafter, entered into a "Reaffirmation Agreement and Contract Modification Agreement" with the bank. After the Paccios defaulted on the loan, First Community Bank filed a complaint for replevin on July 24, 1998. The Paccios answered with a general denial. The court entered an order of delivery allowing First Community Bank to take possession of the items in dispute and an order allowing the property to be sold at a public sale.

After the sale, the bank filed an amended complaint for replevin praying for judgment against the Paccios, jointly and severally, for $9,511.82, representing the principal and interest on their debt as of February 17, 1998, less any proceeds received from the sale of the personal property. The Paccios answered the bank's amended complaint, denying any liability for any deficiency result-

ing from the sale because the sale of the property was not held in a commercially reasonable manner.

A hearing on the issue of a deficiency judgment was held on July 12, 1999, and Jerry Starnes, vice president and loan officer for First Community Bank, testified that his bank had acquired the Paccios' account from Daylight Finance through a foreclosure action. He stated that after the Paccios defaulted on the loan and the bank obtained possession of the furniture, the principal balance of the loan was $9,105.12.

Starnes testified that the first scheduled sale of the Paccios' furniture was canceled because the bank felt "uncomfortable that we had given Ms. Paccio adequate time to respond." Two to three weeks prior to the second sale, the bank notified the Paccios of the sale by certified mail and by regular mail, and sent a copy of the notice to their attorney, James Haddock. Starnes admitted that the Paccios did not sign for the certified letter, and that the certified letters were returned to the bank unclaimed. He stated that he sent the notices of the sale to their last known address. However, he stated that he knew the couple was separated at the time he sent the certified letters and that he knew that Ms. Paccio was teaching school in Louisiana. The bank also advertised the sale in two of the local newspapers. Starnes testified that the furniture sold for a total of $2,670, and that the balance of the Paccios' debt, plus expenses of the sale, less the amount garnered from the sale, was $10,746.94. He stated that the day after the sale of the property, the Paccios' attorney phoned him and made an offer to purchase the furniture for $2,000, but that he could not accept the offer because the furniture had already been sold.

Darlene Paccio testified that she was married to Don Paccio and that she had an apartment in Louisiana while she was teaching school at Pine Grove Elementary. She and her husband had separated in March, and she returned home at the end of May. She stated that she did not receive notice from the bank about the sale of the property or her right to redeem the property. She confirmed that James Haddock is her attorney.

The court denied the bank's request for a deficiency judgment, finding that the bank had failed to prove that notice of the time and place of the sale was given to the Paccios. It noted that Starnes had testified that he had sent notice to the Paccios, but that Starnes did not testify as to whether the notice included the time and place of the public sale. The judge stated that when the creditor fails to provide the time and place of the sale of repossessed collateral, the creditor is not entitled to a deficiency judgment, relying on *First State Bank of Morrilton v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

■ The sale of the debtors' collateral must be commercially reasonable as to method, time, place, and terms. *Walker v. Grant County Sav. & Loan Ass'n*, 304 Ark. 571, 803 S.W.2d 913 (1991); *G.W. Clark v. First Nat'l Bank of Mena*, 24 Ark. App. 52, 748 S.W.2d 42 (1988); Ark. Code Ann. § 4-9-504(3) (Repl. 1991). The secured party must send the debtors reasonable notice of the time and place of public sale of collateral and reasonable notice of the time after which private sales will be made, unless the debtor has signed a statement renouncing or modifying that right. *Walker v. Grant County Savings & Loan Ass'n, supra*; *G.W. Clark v. First National Bank of Mena, supra*; Ark. Code Ann. § 4-9-504(3). The debtor is entitled to notification of a specific date after which the creditor intends to dispose of the property. This provides the debtor a fixed period within which to protect himself from an inadequate sale price in any manner he sees fit. *Walker v. Grant County Savings & Loan Ass'n, supra* (citing *Wheeless v. Eudora Bank*, 256 Ark. 644, 509 S.W.2d 532 (1974)). The court has also held that the notice requirements must be consistently adhered to. *Walker v. Grant County Saving & Loan Ass'n, supra* (citing *First State Bank of Morrilton v. Hallet*, 291 Ark. 37, 722 S.W.2d 555 (1987)).

■ When a creditor repossesses chattels and sells them without sending the debtor notice as to the time and date of sale, or as to a date after which the collateral will be sold, he is not entitled to a deficiency judgment, unless the debtor has specifically waived his rights to such notice. *Walker v. Grant County Sav. & Loan Ass'n, supra; Rhodes v. Oaklawn Bank*, 279 Ark. 51, 648 S.W.2d 470 (1983).

The bank brings this appeal, contending that the trial court erred in its finding that the Paccios had contended that they were not notified of the sale. Essentially, the bank argues that the trial court decided the case on a basis that had not been argued by the Paccios. The bank states that Darlene Paccio testified that she did not receive the notice because she was separated from her husband, not because the notice was not sent to her by the bank. The bank also notes that Don Paccio did not testify at all, and that no witness testified that the notice was inadequate. The bank argues that it is not required by law to prove that the Paccios actually received the notice, only that the notice was sent. We do not agree.

The Paccios raised the issue of the adequacy of the bank's notice of the sale in their answer to the bank's amended complaint for replevin by specifically asserting as a defense to the bank's claim to a deficiency judgment that the sale of collateral was not held in a commercially reasonable manner. The requirement set forth in Ark. Code Ann. § 4-9-504(3) that the secured party give to the debtor reasonable notification of the time and place of the sale or other intended disposition of the collateral is a consideration in determining whether the sale is commercially reasonable. *See Cheshire v. Walt Bennett Ford, Inc.*, 31 Ark. App. 90, 788 S.W.2d 490 (1990). The burden is on the creditor to prove that a notice was sent that conforms to the requirements of that section. *Id.*

In *Walker*, it was alleged that the creditor had delivered to the debtor a handwritten note stating that the property would be sold. A copy of the note was introduced into evidence. However, the court held that this was insufficient notice because:

> there is no reference in the message to time of sale, or to specific location of sale, or to the method, manner, and terms of the sale other than the fact it was to be an auction. Any reference to private sales to be held after the auction was also omitted, and no subsequent written notice was given to ... Walker about private sales.

Walker v. Grant County Savings & Loan Ass'n, 304 Ark. at 571, 803 S.W.2d at 916.

The bank did not introduce the notice into evidence, so we are not aware whether it included the time and the place of the sale. Although Starnes testified that notices were sent to Mr. and Mrs. Paccio by certified mail, he offered no testimony as to the content of the notices. Because no evidence was presented as to the content of the notice of sale, we cannot say that the court erred in its conclusion that the bank failed to prove that it gave notice of the time and place of the sale to the Paccios. Accordingly, the court did not err in denying the bank a deficiency judgment against the Paccios.

Affirmed.

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

Wilburn L. DANIELS *v.* AFFILIATED FOODS SOUTHWEST

CA 99-1149 17 S.W.3d 817

Court of Appeals of Arkansas
Divisions I, III, and IV
Opinion delivered May 31, 2000

Ivory Law Firm, by: *Chantel Mullen* and *George S. Ivory, Jr.*, for appellant.

Dover & Dixon, P.A., by: *Joseph H. Purvis*, for appellee.

OLLY NEAL, Judge. Appellant Wilburn Daniels appeals from a decision of the Workers' Compensation Commission finding that he failed to prove by a preponderance of the evidence that he suffered a compensable hernia while employed by appellee, Affiliated Foods Southwest. On appeal, appellant argues that the Commission erred in finding his testimony suspect when the administrative law judge specifically found that his testimony was credible, that the Commission erred in finding that he did not report his injury to appellee within forty-eight hours as required by Ark. Code Ann. § 11-9-523(a)(4) (Repl. 1996), and that the Commission's reading of Ark. Code Ann. § 11-9-523(a)(4) contravenes the case law's construction of how that section is to be read and applied.

Appellant was employed with appellee through a work-release program. On December 4, 1997, appellant sustained a compensable hernia to his right groin area. As a result, appellee paid all reasonable medical benefits associated with that injury. On April 16,1998, appellant testified that he felt a sharp pain in his groin area after taking a box off of a conveyer belt. He stated that he already had a scheduled doctor's appointment at 1:30 p.m. on that day and that he thought he had reinjured his right-side hernia. Appellant testified

that he soon realized that pain was coming from his left side. He stated that he stopped working at 12:30 or 12:45 p.m., and that he mentioned the pain to his supervisor and asked to go to the company nurse's office to wait for a ride to his doctor's appointment. As appellant sat in the nurse's office, he did not mention to the nurse that he had injured himself.

When appellant went to his scheduled visit with Dr. Steven Williamson, he informed the doctor that he felt a pain in his left side. After conducting an examination, Dr. Williamson diagnosed appellant with a new hernia on the left side. Appellant, however, never stated to Dr. Williamson that he had injured himself at work, and medical records taken that day did not indicate that appellant had suffered his left hernia condition from his employment with appellee. Appellant testified that when he returned to work, he delivered a medical form to the company nurse, which stated that he could not work and perform heavy lifting. At that point, he testified that the company nurse informed him that he would need his own private insurance to cover the medical costs of the new hernia injury. Appellant further testified that when he was injured on the job in December of 1997, he reported the injury to his supervisor and filled out the necessary paperwork to establish a workers' compensation claim. Appellant did not report that his new left hernia condition was work-related until April 21, 1998, which was five days after the new injury.

Butch Atwood, dry shipment supervisor for appellee, testified that he was appellant's supervisor in April of 1998. He testified that appellee had a certain procedure that employees must follow if they are hurt at work and that new employees are instructed about the procedure during an orientation session. Atwood testified that appellant was aware of the procedure, and that appellant did not report a new hernia condition to him on April 16, 1998.

Jana Martin, industrial nurse for appellee, testified that she was responsible for handling paperwork associated with injured employees. Ms. Martin testified that on April 16, 1998, appellant came into her office before going to his doctor's appointment. She stated, however, that appellant did not indicate that he had sustained a new injury or that he was in any pain. Ms. Martin testified that after appellant returned with a medical form from his visit with Dr. Williamson, the form revealed that appellant had a left hernia, but

did not indicate that the left hernia occurred during appellant's employment with appellee.

At a hearing before the administrative law judge, appellant contended that his April 16, 1998, injury was compensable, and that he was entitled to all reasonable and necessary medical treatment related to his injury, temporary total disability, and attorney's fees. Appellee contended that appellant's new hernia condition on the left side of his body was not related to his employment. In finding that the new hernia condition was compensable, the ALJ found that appellant was a credible witness and that although appellant did not give proper notice of his new injury, he did give reasons for not properly reporting the new injury. In noting these reasons, the ALJ made the following assessment:

> [Appellant] is suffering from a prior compensable hernia injury with residual symptoms, and was scheduled for a doctor's appointment on the very day that he experienced additional pain and difficulties in his groin area. He has little or no medical knowledge, therefore he defers to his doctor whom he has already scheduled to see that afternoon at 1:30, to tell him what is going on.

The ALJ found that appellee was given notice of the new injury on the same afternoon after appellant's doctor's appointment and that appellant had established a compensable left hernia condition. The full Commission reversed the ALJ's opinion, finding upon *de novo* review, that appellant failed to prove that he suffered a new compensable injury. The Commission found that appellant was aware of the procedures to follow if a person is injured on the job, and that appellant failed to mention to his supervisor, the company nurse, and his physician that he had injured himself at work. The company nurse testified that appellant spent time in her office before his scheduled doctor's appointment and that he did not report any new injury to her. She testified that she was the person who completed the necessary paperwork for appellant's compensable right hernia condition in December of 1997. The Commission further found that it was significant that appellant's physician did not indicate that appellant had reported the event that caused his left hernia condition, and that appellant's testimony was suspect because he failed to tell anyone that he had suffered a work-related injury before and after being diagnosed with a new hernia condition.

On appellate review of workers' compensation cases, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Workers' Compensation Commission and will affirm the Commission's ruling if there is any substantial evidence to support the findings made. *Beaver v. Benton County*, 66 Ark. App. 153, 991 S.W.2d 618 (1999). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Patterson v. Frito Lay, Inc.*, 66 Ark. App. 159, 992 S.W.2d 130 (1999). If reasonable minds could reach the Commission's conclusion, its decision must be affirmed. *Min-Ark Pallet Co. v. Lindsey*, 58 Ark. App. 309, 950 S.W.2d 468 (1997).

Appellant first argues that the Commission erred in finding that his testimony was suspect when the administrative law judge found his testimony to be credible.

In this case, the Commission found that appellant's testimony was suspect because the only evidence supporting appellant's contention that he suffered a new compensable injury on April 16, 1998, was appellant's own testimony. The Commission found that appellant failed to inform his employer and physician that he had injured himself on April 16, 1998, despite the fact that appellant knew the proper procedures for reporting injuries to his employer and the fact that the medical evidence diagnosing him with a left hernia condition did not indicate any statement made by appellant revealing the event that caused the condition. Appellant's supervisor at the time of his injury and the company nurse testified that appellant did not notify them of a new injury on April 16, 1998. Ms. Martin even stated that she was confused when appellant came back from his doctor's appointment with a medical release from work. Although appellant informed Ms. Martin that his doctor had diagnosed him with a left inguinal hernia, Ms. Martin testified that there was nothing in the medical records that indicated that appellant's injury was work-related. It is the exclusive function of the Workers' Compensation Commission to determine the credibility of witnesses and the weight to be given their testimony. *Williams v. Prostaff Temporaries*, 64 Ark. App. 128, 979 S.W.2d 911 (1998). Once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Express Human Resources III v. Terry*, 61 Ark. App. 258, 968 S.W.2d 630 (1998). It is well-settled that the Commission reviews an ALJ's

decision *de novo*, and it is the duty of the Commission to conduct its own factfinding independent of that done by the ALJ. *Crawford v. Pace*, 55 Ark. App. 60, 929 S.W.2d 727 (1996). Further, the appellate court reviews the decision of the Commission and not that of the administrative law judge. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998).

Appellant next argues that the Commission erred in finding that he did not report his injury to appellee within forty-eight hours as required by Ark. Code Ann. § 11-9-523(a)(4). Arkansas Code Annotated section 11-9-523 (Repl. 1996) states in pertinent part: "(a) In all cases of claims for hernia, it shall be shown to the satisfaction of the Workers' Compensation Commission ... (4) that notice of the occurrence was given to the employer within forty-eight (48) hours thereafter...."

Here, appellant argues that "given that he had suffered the same injury in the recent past, coupled with the fact that he was not fully recovered from that injury, he reasonably concluded that it was understood that the second injury was caused just like the first." However, appellant admitted that the only statement he gave to his employer on April 16, 1998, was that he was hurting. He further testified that when he went to the nurse's office to wait for his ride to the doctor's office, he did not "say anything to Ms. Martin about my hurting myself again," and that he only informed his doctor that he felt a sharp pain in his left groin area. On these facts, we conclude that there was substantial evidence to show that appellant did not meet the statutory notice requirements in relation to his new hernia condition.

Lastly, appellant argues that the Commission erred in its reading of Ark. Code Ann. § 11-9-523(a)(4). He argues that upon discovering that he had developed a new hernia, one could reasonably conclude that he was probably injured in the same manner as his compensable right hernia condition. In support of his argument, appellant relies on *Min-Ark, supra*, for the proposition that the claimant need not state with precision the precipitating event leading to his hernia. However, appellant's argument has no merit. In *Min-Ark*, the claimant informed his employer that he was in pain shortly after the onset of his hernia condition and the employer was aware that the claimant had been lifting heavy pallets. In this case, appellant simply informed his immediate supervisor that he was in

pain, without stating that his new hernia condition occurred at work. Further, he did not indicate to his physician or the company nurse that he had suffered a new work-related injury.

Based on these facts, we cannot say that there was no substantial evidence to support the Commission's findings that appellant failed to prove by a preponderance of the evidence that he sustained a compensable injury on April 16, 1998.

Affirmed.

PITTMAN, JENNINGS, BIRD, and CRABTREE, JJ., agree.

ROBBINS, C.J., HART, STROUD, and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse and remand for benefits because I believe this case is controlled by the decisions in *Siders v. Southern Mattress Co.*, 240 Ark. 267 (1966), *Price v. Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993), and *Min-Ark. Pallet Co. v. Lindsey*, 58 Ark. App. 309, 950 S.W.2d 468 (1997).

Wilburn Daniels sustained a compensable hernia in his right groin area on December 17, 1997, while working for Affiliated Foods Southwest (Affiliated) in a work-release program. Affiliated accepted this injury as compensable and paid all appropriate benefits related to it. On April 16, 1998, Daniels was scheduled to make a 1:30 p.m. follow-up visit with Dr. Steven Williamson, the physician who performed the hernia surgery. He testified that while working for Affiliated between 12:30 and 12:45 p.m. that day, he experienced a sharp pain in his *left* groin area while stacking and removing boxes from a conveyor belt. He assumed that the pain was related to his old injury. He stopped work when he felt the pain, informed Butch Atwood, his supervisor, that he was experiencing pain in his groin area, but failed to tell Atwood that the pain arose from stacking and removing boxes. Daniels then reported to Jana Martin, the company nurse, to obtain the necessary paperwork for his doctor's appointment with Dr. Williamson. Dr. Williamson discovered that Daniels had sustained a new hernia on his left side. Daniels returned to Martin's office and told her that he had a new hernia, but failed to mention that his pain arose out of the work earlier that day. He did not file a report of injury related to the April 16 work episode until April 21.

The employer controverted the left hernia claim based on testimony from Martin and Butch Atwood, the supervisor, that Daniels failed to tell them that he hurt himself at work or sustained a new hernia on April 16. Charles Dean Keterson, the lead man over the module where Daniels worked, testified that Daniels did not inform him that he injured himself at work on April 16. Keterson, Atwood, and Martin testified that they thought Daniels doctor's appointment was merely for regular follow-up of the December 17, 1997 hernia because Daniels had not reported a new injury. Daniels testified that he assumed his pain was related to the December 17, 1997, hernia, so he did not report a new injury. Dr. Williamson testified by deposition that Daniels did not report a new injury on April 16, 1998, and that the left side hernia occurred sometime between December 1997, and April 1998; he had examined Daniels in December 1997 and specifically mentioned in his history that Daniels did not have a hernia on the left. Dr. Williamson's April 16, 1998 office note indicated that Daniels was having no symptoms in the right groin area, but complained of pain in the left groin with cough, straining, and with bending.

Although Dr. Williamson recommended that the left hernia be repaired, Affiliated did not authorize hernia repair because Daniels failed to report that he had sustained a hernia on April 16, 1998. Affiliated contended before the Commission and in response to this appeal that Daniels failed to comply with the statutory requirement in Ark. Code Ann. § 11-9-523(a)(4) that notice of the occurrence be given to the employer within forty-eight (48) hours after the occurrence.

In *Min-Ark. Pallet Co. v. Lindsey, supra*, our court squarely declared that the word "occurrence" in the phrase "notice of the occurrence" requires that the claimant provide notice of "the happening of the hernia itself, not necessarily the work event resulting in the hernia." In that case the claimant suffered a hernia while lifting and stacking wooden pallets. He phoned his mother in the presence of the business owner and told his mother that his side "grabbed" him and "almost dropped me to my knees" and he told the owner that he had some really bad pains but did not know what was wrong. The Commission awarded benefits. On appeal, the employer argued that § 11-9-523(a)(4) should be interpreted to mean that the legislature intended the word "occurrence" to describe a work event that causes a hernia. We rejected that argu-

ment, citing *Siders* and *Price* where the appellate courts reversed the Commission's denial of benefits to employees who suffered hernias. Responding to the argument that the legislature intended for the word "occurrence" to describe a work event that caused the hernia, Judge Stroud's opinion in *Min-Ark. Pallet Co.* states:

> We disagree. Even when statutes are strictly construed, they must be construed in their entirety, harmonizing each subsection where possible. The word "occurrence" appears four times within section 11-9-523, two of which are within the phrase "occurrence of the hernia." Ark. Code Ann. § 11-9-523(a)(1), (4) & (5). Clearly, when used within this phrase, "occurrence" means the happening of the hernia itself, not necessarily the work event resulting in the hernia. Our construction is buttressed by the fact that subsection (a)(1) addresses the work event causing the hernia: "(t)hat the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall[.]" Appellant's argument would have us give two different meanings to the same word, "occurrence," within the same statute, totally ignoring its use in the phrase "occurrence of the hernia." Rules of strict construction do not require such a strained application of the words of the statute.

Id., 58 Ark. App. at 314-15 (citations omitted). The *Min-Ark. Pallet* opinion also quoted from the supreme court's opinion in *Siders v. Southern Mattress Co., supra,* where the supreme court observed that the employee is not "required to give notice that he has a hernia — he is not a doctor — the statute merely requires that appellant give notice of the occurrence which results in a hernia," and that on the case as a whole "if the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award." *Hall v. Pittman Constr. Co.*, 235 Ark. 104, 105, 357 S.W.2d 263, 264 (1962).

The workers' compensation hernia statute does not require that an employee report that he has sustained a hernia or recite the magic words, "I suffered an injury while performing my job duties." The fact that Daniels did not tell Keterson, Atwood, Martin, or Dr. Williamson that his April 16, 1998 pain was work-related is not controlling. Daniels mistakenly believed that his pain was related to the December 1997 hernia for which he was sched-

uled to see Dr. Williamson in follow-up the afternoon of April 16, 1998. Like the employee in *Price v. Little Rock Packaging Co., supra*, who mistakenly believed that the "awful pain" experienced while lifting loads of paper on April 26, 1990 stemmed from a fall at work in February 1990, Daniels did not complain to his physician or report to his employer that he sustained an injury on April 26, 1990. Yet, we reversed the Commission's denial of benefits in line with the holding in *Siders*.

Likewise, we should reverse the Commission in this case. Affiliated does not dispute that Daniels stopped working early on April 17, 1998. While emphasizing that Daniels never told his supervisors, the industrial nurse, or Dr. Williamson that he had been injured that day, Affiliated ignores the fact that it allowed Daniels to stop working for forty-five minutes to an hour before his doctor's appointment, that Dr. Williamson clearly diagnosed a new hernia on the left side, and that when Daniels presented Nurse Martin with documentation from Dr. Williamson to that effect following the April 16, 1998 doctor's appointment when the hernia was discovered, there was no evidence indicating that Daniels had been injured at any other time or place than at the workplace.

This is not a question of Daniels being credible. All the proof supports his assertion that he thought his pain on April 16, 1998 was related to the December 17, 1997 right side hernia. The Commission has not found that Daniels lacks credibility; he was merely mistaken. That mistaken belief about the origin of his pain should not disqualify Daniels from recovering workers' compensation benefits in the face of the decisions in *Min-Ark. Pallet Co.*,*Price v. Little Rock Packaging*, and *Siders*.

I respectfully dissent.

ROBBINS, C.J., HART and STROUD, JJ., join in this dissent.

Jerry Shelton DYE *v.* STATE of Arkansas

CA CR 99-1023 17 S.W.3d 505

Court of Appeals of Arkansas
Division IV
Opinion delivered May 31, 2000

Ben Beland, Public Defender, for appellant.

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

MARGARET MEADS, Judge. Jerry Dye was convicted by a Sebastian County jury of stalking in the second degree and sentenced to 120 months in the Arkansas Department of Correction. On appeal, he argues that the trial court erred (1) in denying his motion for directed verdict; (2) in denying his motion for a continuance; and (3) in admitting evidence of guns and ammunition which was irrelevant to the crime charged and was more prejudicial than probative. We affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence, which we consider before any other points on appeal. *Smith v. State*, 68 Ark. App. 106, 3 S.W.3d 712 (1999). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* 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 that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resort to speculation or conjecture. *Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000).

At trial, the victim, Mary Komp, testified that she and appellant began a sexual relationship in 1992 while they were co-workers at St. Edward's Hospital. Komp was married at the time to Fred Komp. After six or eight months, Komp attempted to discontinue the relationship, but appellant resisted. Appellant continued to pursue Komp to the point that she reported his actions to their employer, and in July 1993 he was terminated as a result of his conduct. Appellant continued to call Komp both at work and at home, any time of day or night, and she continued to talk to him, although she claimed she asked him to stop calling her and did not want an intimate relationship with him. Appellant continued to follow Komp, and she testified that a couple of times, when it got

more intense, appellant told her that he "would find Fred on whatever job he was on and he would kill him."

On February 5, 1998, appellant called Komp at work, and they began to argue about whether she would visit him on his birthday. Komp terminated that conversation and refused to take his subsequent calls, and she spoke to her supervisor about the problems she was having with appellant. Her supervisor allowed her to leave work to file an incident report with the police. Officers Bill Hollenbeck and Chris Johnson followed Komp back to work, and they set up surveillance and recorded appellant's conversations with Komp. After several conversations with appellant, Komp told him that if he did not leave her alone she would have him arrested, to which he replied, "you don't want to do that 'cause eventually I'll get out." Komp told him that his threats would not hurt her anymore, to which appellant replied, "you ain't doin' nothing like that. You can get me arrested but that'll be the last thing you do." Komp testified that she understood the latter statement to mean that appellant would hurt her or her family.

In his motion for directed verdict, appellant argued that the stalking statute required an express threat of physical injury and that the threat he made to appellant on February 5, 1998, was ambiguous, vague, and inadequate to prove that he intended physical injury. On appeal, appellant argues not only that he did not threaten physical injury but also that the State failed to prove that the victim felt imminent fear as a result of his actions or that he had engaged in a course of conduct. We will not consider an argument raised for the first time on appeal; a party cannot change the grounds for an objection or motion on appeal but is bound by the scope and nature of the arguments made at trial. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998). Therefore, the only argument we will consider is whether the State failed to prove appellant had threatened physical injury to the victim or her immediate family.

A person commits stalking in the second degree if he purposely engages in a course of conduct that harasses another person and makes a terroristic threat with the intent of placing that person in imminent fear of death or serious bodily injury or placing that person in imminent fear of the death or serious bodily injury of his or her immediate family. Ark. Code Ann. § 5-71-229(b)(1) (Repl. 1997). A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in

conduct of that nature or cause such a result. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). Because of the obvious difficulty in ascertaining the actor's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his acts, and the factfinder may draw upon common knowledge and experience to infer the defendant's intent from the circumstances. *Id.*

Mary Komp testified that appellant called her repeatedly and persistently after she tried to terminate the relationship, and threatened at one point to find her husband and kill him. Moreover, after arguing on February 5, appellant told her, "You can get me arrested but that'll be the last thing you do." While appellant claims the latter statement was an "implied" threat, we disagree. We believe appellant expressly threatened to harm both Mary Komp and her husband, and that there was substantial evidence that appellant placed Komp in imminent fear of death or serious bodily injury both to herself and to a member of her immediate family. *See Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995). Therefore, the trial court did not err in denying appellant's motion for directed verdict.

Appellant next contends that the trial court erred in denying his motion for a continuance when the State withdrew an agreement concerning the admission of evidence on the day of the trial. After hearing the February 5, 1998, taped telephone conversations between Komp and appellant, Officers Hollenbeck and Johnson set up surveillance of appellant. Officer Johnson observed appellant entering Wal-Mart and exiting a short time later with a small bag. After leaving Wal-Mart, appellant drove toward Komp's house; a short distance from her home, officers arrested appellant for stalking. When his vehicle was searched, officers found that the Wal-Mart bag contained a box of .223 caliber ammunition. Appellant then consented to a search of his home, and the officers found an AR-15 assault rifle, which uses .223 caliber ammunition. In a taped interview, appellant told the police that he had purchased the rifle two days before and was preparing to go shooting with some friends that weekend, so he had purchased the ammunition. Appellant averred that he never had an intention of using the gun on either Komp or himself and that he had no intention of hurting Komp.

Appellant filed a motion in limine to exclude all evidence of the use or possession of guns or ammunition on the basis that such evidence was irrelevant. Three days before trial, the State agreed to redact all references to guns and ammunition from appellant's taped interview. However, the State also redacted the statement that appellant had no intention of hurting Komp. On the morning of trial, appellant argued that statement was exculpatory and should not have been redacted. The State contended that if appellant objected to the redacted statement, then the entire statement should be played; the trial court agreed. Appellant moved for a continuance, claiming prejudice due to the State's late withdrawal of its agreement. He said he had prepared for trial believing there would be no mention of guns and ammunition and had decided not to call certain witnesses because their testimony would not be needed. The trial court denied the motion.

[redacted] The grant or denial of a motion for continuance is within the sound discretion of the trial court, and that court's decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *Anthony v. State*, 339 Ark. 20, 2 S.W.3d 780 (1999). Under our rules the court may grant a continuance only upon a showing of good cause and only for so long as necessary. *Godbold v. State*, 336 Ark. 251, 983 S.W.2d 939 (1999). When a motion for continuance is based on a lack of time to prepare, the appellate court will consider the totality of the circumstances. *Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994). The burden of showing prejudice is on appellant. *Id.* When a request for continuance is predicated on an alleged lack of time to prepare, the appellant must specify, other than in general terms, what was not done at trial that could have been done if the continuance had been granted. *See Anthony v. State, supra.*

[redacted] Here, appellant contends that he was prejudiced because the State withdrew its agreement on the day of trial, and he had prepared his witness list relying on the State's agreement to not introduce the guns and ammunition. While it is true that the State agreed not to introduce such evidence, it did so only three days before trial. Moreover, appellant did not specify what was not done at trial that could have been done if the continuance had been granted. We further note that each of the three witnesses called by appellant testified to the fact that they had made plans with appellant to go shooting together the weekend of February 7. Thus, appellant presented testimony on the very subject about which he

claimed surprise and for which he was unprepared to present testimony. Although we recognize that the agreement was withdrawn moments before trial, on the facts of this case, we cannot say that the trial judge abused his discretion in denying the continuance.

Appellant also argues that the trial court erred in admitting the evidence regarding his possession of guns and ammunition because they were irrelevant to the crime charged and were more prejudicial than probative. Evidence is relevant if it tends to make the existence of any consequential fact more or less probable than it would be without the evidence. Ark. R. Evid. 401. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. The trial court has wide discretion on rulings concerning the admissibility of evidence, and the appellate court will not reverse such a ruling absent an abuse of discretion. *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000).

In the present case, we cannot say that the trial judge abused his discretion in admitting evidence of the ammunition found in appellant's car and the assault rifle found at his residence. Appellant had previously told Komp that he would find her husband and kill him, and he told her on the day of his arrest that if she had him arrested that would be the last thing she did. Appellant had purchased the assault rifle two days before his February 5 conversation with Komp, and he purchased the ammunition shortly after telling Komp that if she went to the police, that would be the "last thing" she did. This evidence indicates both that appellant intended to place Komp in imminent fear of the death or serious physical injury of herself or a member of her immediate family and that he had the means to carry out his threats. The fact that appellant purchased ammunition for his newly acquired assault rifle soon after making the threat was not only relevant, but we believe any prejudice was outweighed by its probative value.

Affirmed.

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

BEAL BANK, S.S.B. *v.* Larry THORNTON, a/k/a
Larry Johnson Thornton, Jr., *et al.*

CA 99-435 19 S.W.3d 48

Court of Appeals of Arkansas
Division IV
Opinion delivered June 7, 2000
[Petition for rehearing denied July 26, 2000.]

Wilson & Associates, P.L.L.C., by: *Daniel L. Parker*, for appellant.

Kirk D. Johnson, for appellees.

JOHN MAUZY PITTMAN, Judge. This is an appeal from an order of the Miller County Chancery Court denying appellant Beal Bank's petition to foreclose on a deed of trust securing a promissory note on which appellees Larry Thornton and Edwina Thornton defaulted in 1988. We find merit in one of appellant's points for appeal, and we affirm in part and reverse in part.

On May 9, 1986, appellees signed a promissory note to Texana Savings and Loan Association and gave a deed of trust to secure the debt. Appellees made their last payment on the note in

May 1988, and later that summer, the bank accelerated the unpaid balance. On July 8, 1996, appellant filed suit against appellees to foreclose on the deed of trust, claiming that the note and deed of trust had been assigned to it by its subsidiary, Loan Acceptance Corporation ("LAC"), on November 3, 1995. According to appellant, LAC had received an assignment of the documents from the Resolution Trust Corporation ("RTC") while acting as conservator and receiver of Sunbelt Federal Savings, F.S.B. ("Sunbelt"). Appellant could not produce the note but did have a copy of the deed of trust.

Appellant sought to introduce exhibits demonstrating the assignments through the testimony of Mark Bauer, a loan officer for appellant. Mr. Bauer was appellant's only witness at trial. Appellees did not deny signing the note and defaulting on it in 1988 but asserted that the statute of limitations had run and resisted appellant's attempted introduction of documents relating to the assignments on the grounds that they were not authenticated and were hearsay. Appellant was successful in getting its assignment from LAC into evidence under the business records exception to the hearsay rule set forth in Arkansas Rule of Evidence 803(6) but could not get into evidence a copy of the assignment from the RTC to LAC (Plaintiff's Exhibit F), a copy of a letter from the Office of Thrift Supervision ("OTS") to Sunbelt notifying it that the RTC had been appointed as its conservator, or a copy of the April 25, 1991, order of the OTS relating to the appointment of the RTC as Sunbelt's receiver and conservator (Plaintiff's Exhibit D). Appellant proffered Plaintiff's Exhibits D and F, and the chancellor kept the record open for appellant to supplement it with a certified copy of Plaintiff's Exhibit D. With its posttrial brief, appellant filed additional OTS documents.

In his order denying foreclosure to appellant, the chancellor found that appellant had "failed to sustain its burden of proof that it is the legal owner to the property that is the subject of this suit"; that appellant had wholly failed to establish that it is a proper party to this litigation; that the statute of limitations began to run in May 1988; that, because no admissible evidence was introduced that the RTC ever had ownership of the property, Arkansas's five-year statute-of-limitations controlled; that appellees had established adverse possession of the property; and that the documents filed with appel-

lant's posttrial brief and Plaintiff's Exhibit F were not admissible into evidence. It is from this order that appellant brings this appeal.

Appellant argues that the federal six-year statute of limitations set forth in 12 U.S.C. § 1821(d)(14) of the Financial Institutions Reform Recovery and Enforcement Act (FIRREA), enacted in 1989, applies to this case. Appellant also asserts that the documents filed with its posttrial brief, Addendum Exhibits 3, 4, 5, and 6, should have been admitted into evidence. Because, as explained below, the chancellor's finding that appellant failed to prove that it is the owner of this note and deed of trust is not clearly erroneous, we need not decide the statute-of-limitations and evidentiary arguments.

Appellant argues that the chancellor erred as a matter of law in finding that appellees adversely possessed the property covered by the deed of trust. We agree. As appellant points out, appellees are the legal owners of this property and, even after default, appellant had no automatic right of entry to it. One must have the right of entry before another can hold adversely to him. *Smith v. Kappler,* 220 Ark. 10, 245 S.W.2d 809 (1952).

In its fourth point on appeal, appellant contends that, because appellees' responses to its requests for admissions were untimely, the matters of which it requested admission should have been deemed admitted and the chancellor should have granted it foreclosure. However, appellant did not make this argument to the chancellor. We do not address an issue that is raised the first time on appeal. *Giles v. Sparkman Residential Care Home, Inc.,* 68 Ark. App. 263, 6 S.W.3d 140 (1999).

Appellant also contends that, in their responses to appellant's interrogatories, appellees admitted all facts that would entitle appellant to relief, or that the trial should at least have been limited to the statute-of-limitations and adverse-possession issues. After presenting its case-in-chief, appellant moved, without objection, for appellees' answers to interrogatories to be admitted into evidence. After appellees called Mr. Thornton as a witness, appellant argued that appellees' responses to Interrogatory Number 2 should bar any testimony "put on as a defense of foreclosure...." Appellees responded that they had never waived any issue and that, should there be any question about their position, they would request an

amendment at that time. The chancellor then asked appellant's counsel if his objection was premised on the idea that the statute of limitations was waived by that response. Appellant's counsel answered that it was. The chancellor replied: "[S]ince the same document clearly indicates the other intent, I will note it, but I will overrule it."

Thus, without citation to authority, appellant is asking us to hold that a response to an interrogatory has the same legal effect as an answer to a request for admission. We do not address an argument in the absence of citation to authority or convincing argument. *Presley v. Presley*, 66 Ark. App. 316, 989 S.W.2d 938 (1999). Additionally, appellant failed to obtain a ruling on this question at trial; the only ruling made by the chancellor in this regard was whether appellees had waived the statute-of-limitations defense. Without such a ruling, we will not address an issue on appeal. *Robinson v. Winston*, 64 Ark. App. 170, 984 S.W.2d 38 (1998). Even had appellant preserved this issue, we would not need to interpret the Rules of Civil Procedure, as it asks us to do, to decide the question presented in this case. The trial judge essentially decided that appellees' answers to the interrogatories were conflicting and therefore, ambiguous, and that, in light of this ambiguity, appellees did not waive their defenses to this suit. Whether a waiver occurred is a question of intent, which is usually a question of fact. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 66 Ark. App. 22, 988 S.W.2d 25 (1999). We do not reverse the chancellor's finding of fact unless it is clearly erroneous. *Id.* Here, considering appellees' answer to appellant's complaint, all of their responses to interrogatories, and their evidence and argument at trial, we cannot say that the chancellor clearly erred in finding that they had not waived their defenses to this suit.

We now turn to the chancellor's finding that appellant failed to provide ownership of the note and mortgage. With the exhibits admitted at trial, appellant proved that (1) appellees signed a note and gave a deed of trust to Texana in 1986; (2) that the note has been lost; (3) and that LAC assigned whatever rights it held under the lost note and the deed of trust to appellant on November 3, 1995. Appellees stipulated to the note's essential terms and that they have not made a payment since May 1988. If the documents denied admission into evidence had been admitted, appellant would have proven that the RTC was appointed as receiver for Sunbelt on April

25, 1991, and that the RTC assigned its rights under the lost note and the deed of trust to LAC on August 10, 1995. However, appellant introduced no evidence of any assignment of the note and deed of trust from Texana to Sunbelt. Therefore, it would make no difference what statute of limitations might have applied or whether the chancellor should have admitted the proffered documents into evidence, because appellant did not establish a Texana-to-Sunbelt link in the chain of successive assignments.

Unless the defendant admits the assignment under which the plaintiff claims, the plaintiff has the burden of proving that there was a valid assignment in order to show that he or she has a cause of action. 6 AM. JUR. 2D *Assignments* § 191 (1999). "Whether an assignment of contract rights has occurred is determined by the intent of the parties; the assignor must intend to transfer a present interest in the subject matter of the contract." *Id.* at section 135. The intent of parties to an assignment is a question of fact derived from the instruments and the surrounding circumstances; therefore, whether an assignment occurred is a question of fact for the trial court. *Id.* at sections 136 and 190.

> The assignee's burden of proving the existence of the assignment is met by evidence that is satisfactory in character to protect the defendant from another action by the alleged assignor, and which shows that there was a full and complete assignment of the claim from an assignor who was the real party in interest with respect to the claim.

Id. at section 193. A trial court's finding as to whether an assignment occurred will not be reversed unless it is clearly erroneous. *See Northwest Nat'l Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 25 Ark. App. 279, 757 S.W.2d 182 (1988).

We note that Ark. Code Ann. § 4-58-109 (Repl. 1996) provides:

> The assignee of any instrument in writing made assignable by law, on bringing suit on any assigned paper, shall not be required to prove the assignment, unless the defendant annexes to his answer an affidavit denying the assignment and stating in the affidavit that he verily believes that one (1) or more of the assignments on the instrument of writing was forged.

This statute, however, only applies if *written* documentation of an assignment has been produced by the plaintiff. Here, there is no such documentation of any assignment from Texana to Sunbelt or of Sunbelt's acquisition of Texana's assets.

At trial, appellant attempted to introduce into evidence an affidavit by Charles S. Blaylock, attorney-in-fact for the RTC, stating that the note had been lost or misplaced. Appellees successfully objected to this affidavit's admission into evidence, but did stipulate as to the note's terms and that it had been lost. The loss of the note, along with appellant's failure to introduce evidence of the purported assignment of Texana's rights in the note and deed of trust to Sunbelt, require us to hold that the chancellor's finding that appellant failed to prove that it owns the note and deed of trust is not clearly erroneous.

Reversed as to the adverse possession issue; affirmed in all other respects.

CRABTREE and MEADS, JJ., agree.

Chon Lonell JOHNSON *v.* STATE of Arkansas

CA CR 99-1220 19 S.W.3d 66

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 7, 2000
[Petition for rehearing denied July 26, 2000.*]

William R. Simpson, Jr., Public Defender; *Andy O. Shaw*, 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.

* NEAL and GRIFFEN, JJ., would grant.

SAM BIRD, Judge. Chon Lonell Johnson was convicted in Little Rock Municipal Court of misdemeanor terroristic threatening, resisting arrest, disorderly conduct, and public intoxication. He appealed to circuit court and was convicted of failure to submit to arrest and disorderly conduct, for which he was given probation and fines. On appeal he argues that the evidence was insufficient to support the conviction of disorderly conduct. We affirm.

Two Jacksonville police officers testified at the trial. Officer Mark Swagerty testified that he was patrolling May 1, 1998, about 11:30 p.m., when he saw Johnson standing on the corner. As the police car approached him, Johnson became more and more nervous, started pacing, and looking back at the patrol unit. When the police car stopped and Swagerty asked Johnson's name, he said Johnson yelled, "Why are you f_____ harassing me?" Officer Swagerty said he did not know Johnson but he had heard of him, and for that reason he called for backup. Swagerty said Johnson smelled of alcohol and was standing in the roadway shouting, cursing, and gesturing in a violent manner.

Officer Thomas Mayberry testified that he knew Johnson and, when he arrived, he immediately began to try to talk Johnson down, hoping to calm him. He said Johnson was flailing his arms around, yelling, and cursing. At one point Johnson took an aggressive stance toward Officer Swagerty, stripped off his shirt, and clenched his fists. Officer Mayberry said he maintained his distance from Johnson because of his prior experiences with him. Two other officers were called to assist.

Mayberry said he was still trying to talk Johnson down, with little success, when Johnson began walking toward a house. Johnson was told to come back to the street, but he kept going. The officers followed, and as soon as Mayberry got close enough, he sprayed Johnson with pepper spray. Johnson then wrapped his arms around a post on the porch, and it took all four officers and hitting Johnson in particularly fleshy-tissue pressure-control spots to make him loosen his grip. The officers finally got Johnson on the ground and handcuffed him.

Johnson testified that he had been visiting his aunt when he got a page from his girlfriend who told him she was stranded on Valentine Road. He said that he had called a taxi, and that when Officer Swagerty first encountered him, he was simply waiting outside his aunt's house for the taxi. Johnson denied that he was

violent, unruly, cursing, belligerent, or that he had tried to flee. He insisted that he spoke calmly to the officers and explained to them that he had an emergency situation with his daughter (earlier he had said his girlfriend) and that he was trying to get to her and help her. During cross-examination, he admitted that he had been convicted during the past ten years of aggravated assault on a police officer.

Johnson's great-aunt testified that it was her house to which Johnson had retreated, that he had been visiting her when he was paged, and that he had immediately called a taxi. She testified that Johnson is partially paralyzed from a previous gunshot wound, and that she tried to get the officers to stop hitting him and let her talk to him, but they would not. They told her to go back inside the house.

The trial court found Johnson guilty of disorderly conduct for cursing the officers in a public place, standing in the street shouting, flailing his arms around, cursing, and yelling, and stripping off his shirt and making a fist while taking an aggressive stance against Officer Swagerty. Arkansas Code Annotated section 5-71-207 (Repl. 1997) provides in pertinent part:

> (a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof, he:
>
> (1) Engages in fighting or in violent, threatening, or tumultuous behavior; or
>
> (2) Makes unreasonable or excessive noise; or
>
> (3) In a public place, uses abusive or obscene language, or makes an obscene gesture, in a manner likely to provoke a violent or disorderly response or....

On appeal, Johnson argues that the evidence was insufficient to support his conviction for disorderly conduct. We find that the evidence is sufficient to support the conviction, and we affirm.

[redacted] When the sufficiency of the evidence is being challenged on appeal, we review the evidence in the light most favorable to the appellee, considering only that evidence that tends to support the verdict. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997); *Wilson v. State*, 320 Ark. 707, 898 S.W.2d 469 (1995); *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). The evidence, whether direct or circumstantial, must be of sufficient force

that it will, with reasonable and material certainty and precision, compel a conclusion one way or another. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995). We do not weigh the evidence on one side against the other; we simply determine whether the evidence in support of the verdict is substantial. *Tisdale v. State*, 311 Ark. 220, 843 S.W.2d 803 (1992); *Salley v. State*, 303 Ark. 278, 796 S.W.2d 335 (1990). Neither do we pass on the credibility of witnesses. That duty is left to the trier of fact. *Mann v. State*, 291 Ark. 4, 722 S.W.2d 268 (1987).

The dissenting opinion strains in its attempt to suggest that the trial court's only basis for finding Johnson guilty on the charge of disorderly conduct was that Johnson cursed the police officers. This suggestion is simply not supported by the record. While it is true that Mayberry testified that the "cursing out loud in the street was the basis of this disorderly conduct charge," in determining Johnson's innocence or guilt on that charge, the court was not obligated to limit its inquiry to only the evidence that, in Officer Mayberry's opinion, was sufficient to charge Johnson with that offense. It is clear from the record that Johnson's crude inquiry to Officer Swagerty during their initial encounter was only a small part of the conduct on Johnson's part that the court considered in determining whether Johnson had committed disorderly conduct. Officer Mayberry testified that when he arrived on the scene, Johnson was "flailing his arms around, yelling, cursing,..." and that while he tried to talk to Johnson in an effort to calm him down, Johnson took off his shirt and clenched his fists, action that he recognized as "preassaultive cues" on Johnson's part. All of this conduct by Johnson can be fairly characterized as conduct that is prohibited by Ark. Code Ann. § 5-71-207 (a)(1), (2), and (3).

■ When the evidence is considered in the light most favorable to the State, as we are required to do, the officers' testimony supports the trial court's finding that Johnson violated sections one, two, and three, of the disorderly conduct statute, because he engaged in threatening or tumultuous behavior, because he made unreasonable or excessive noise, and because he, in a public place, used abusive or obscene language in a manner likely to provoke a violent or disorderly response.

Affirmed.

KOONCE and STROUD, JJ., agree.

ROBBINS, C.J., concurs.

NEAL and GRIFFEN, JJ., dissent.

JOHN B. ROBBINS, Judge, concurring. I also would affirm appellant's conviction. I believe that the proof recited in the majority opinion, which describes the yelling, cursing, and actions of the appellant, constitutes substantial evidence to support appellant's conviction for disorderly conduct. However, I feel compelled to write this concurring opinion to give some additional response to the dissenting opinion.

While the dissent addresses the merits of the sole issue raised by appellant on appeal and agrees with appellant's argument that the evidence was insufficient to support his conviction, it appears that the major portion of the dissenting opinion advances the proposition that the initial contact by police with appellant, the appellant's arrest, and the charges filed were racist, *i.e.*, that they occurred as the result of racist judgment on the part of the law enforcement officers involved. If I am correct in this observation, I note that the dissent raises an issue not raised by appellant, proceeds to argue the issue for the appellant, and concludes by suggesting surprise and disappointment that the majority of the judges deciding this case will not address the issue raised by the dissenting judges and agree with their presumptions. It would be contrary to well-established rules of appellate review for this court to engage in such a procedure.

Furthermore, in order to create the issue, it was necessary for the dissent to presume that the police officers involved in this incident were white. There is nothing in the record that supports this presumption. While I do not know that the officers were not white, neither do the dissenting judges know that they were. Then, based on this presumption, the dissent presumes that the actions of the police officers were not reasonably responsive or justified by the conduct of appellant, and would not have occurred but for the fact that appellant is black. I submit that a white man who yells and curses at a police officer, and who jerks his shirt off, clenches his fists, and assumes a fighting stance toward the police officer would likely be arrested and charged just as quickly as appellant was.

I do not condone discriminatory conduct by anyone, especially by officers charged with the responsibility of enforcing our laws. While I respect the dissenting judges' sensitivity and zeal, and do not for a moment question that racial equality is a noble cause, I do not believe the thesis they advance is relevant to the argument

advanced by appellant or to the facts presented by the record in this case.

> [A judge] is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness.
>
> —BENJAMIN N. CARDOZO,
> *The Nature of the Judicial Process* 141 (1921)

Courts stand ... as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or ... non-conforming victims of prejudice and public excitement. Chambers v. Florida, 309 U.S. 227 (1940)

WENDELL L. GRIFFIN, Judge, dissenting. By affirming appellant's conviction for disorderly conduct because he used profanity in questioning the validity of a police officer's actions, the majority turns its back on this vision of the judicial function that Justice Hugo Black of the Supreme Court of the United States asserted more than fifty years ago. The majority does so despite a long line of decisions holding that anyone is free to verbally challenge police action. Although the majority properly rejects the State's transparent assertion that appellant's challenge to the sufficiency of the evidence is procedurally barred, its decision to affirm appellant's conviction is reached by what is plainly a *de novo* exercise aimed at upholding a trial court result that cannot be justified according to the proper standard of appellate review. And the majority decision comes in the face of overwhelming evidence that the police based their contact with appellant on a racist judgment that he, a black man, did not belong where a police officer saw him and was not entitled to assert his right to be left alone using profane, yet not incendiary, language. I will not support a result that legitimates double standards in our criminal justice system and adds judicial endorsement to occupation-force police conduct in poor and minority communities. Instead, I would reverse and dismiss the disorderly conduct conviction and hold that the record is insufficient to support it.

The Facts

On the evening of May 1, 1998, appellant, who is partially paralyzed, visited his great-aunt and uncle who lived at 511 Ray Road in Jacksonville, Arkansas. While there, appellant received a message that his girlfriend was stranded on Valentine Road. So he phoned for a cab, talked with his aunt while he watched the news until sometime between 10:00 and 10:30 p.m., and then stepped

outside his aunt's house to await the cab. Officer Mark Swagerty of the Jacksonville Police Department was patrolling the south end of town and driving in the 500 block of Ray Road when, according to his trial testimony, he

> *noticed a black male standing on the corner of the road, and as I approached him, he was getting real nervous, and started pacing, and looking back and forth at the patrol unit. I got out and asked him his name. He immediately became hostile. The first words out of his mouth were, "Why are you f_ _ _ing harassing me?"* I could smell alcohol on him. He began to walk away. Due to his violent behavior, I called for another officer to come over there, Officer Mayberry. Other than his cursing, just the way his actions were indicated that he had a violent demeanor. The way he was yelling, cursing, his look and attitude toward me. This conduct lasted the whole time during the whole event. Just the smell of alcohol about him and the way he was acting indicated he'd been drinking.

(Emphasis added.)

Officer Thomas Mayberry of the Jacksonville Police Department testified that he responded to assist Swagerty with a

> belligerent individual that he was in contact within the 500 block of Ray Road. As I arrived on the scene, pulled and exited my vehicle, I observed Swagerty's vehicle parked approximately 100 yards away in the roadway. Mr. Johnson and Officer Swagerty were walking towards me with Mr. Johnson in the lead, and Officer Swagerty trailing by about fifteen to twenty feet. Mr. Johnson was flailing his arms around, yelling, cursing, and I identified him by name by calling out to him. I established contact with Mr. Johnson. He was walking towards my unit. I attempted to calm him and find out what the problem was. *His response was that he was being harassed by Officer Swagerty....* Mr. Johnson, during the next few moments, alternately became agitated and calm as I used persuasion talk to try and calm him, talk to him, find out what was going on from his perspective. By persuasive talk, I mean I was simply trying to calm him down, get him to walk to me, explain to me what was going on from his perspective. Basically to quell the disturbance that I was seeing. During the course of our conversation, Mr. Johnson informed me that he was trying to wait for a taxi that he had summoned. I got on the radio to my dispatcher, called them to contact the taxi company and verify Mr. Johnson's account.

(Emphasis added.)

Mayberry testified that the "cursing out loud in the street was the basis of this disorderly conduct charge." And he testified that two other officers also responded "to assist."

> They stood by while I maintained primary contact with Mr. Johnson. At one point Mr. Johnson turned, took a belated stance towards Officer Swagerty, clenched his fist, and then subsequently pulled his shirt off. All of these based upon my training and my prior experience, I recognized as preassaultive cues on Mr. Johnson's part. It is my understanding that that is the basis for the terroristic threatening charge."

Mayberry testified that he continued trying to

> calm Mr. Johnson down while I awaited some verification from our dispatcher and also just to get him to reduce what I perceived as a very agitated state on his part. Mr. Johnson began walking towards the driveway towards the front of the residence at 511 Ray Road. I asked Mr. Johnson to step back down to the side of the street with me and continue talking with me. He continued moving towards the residence and walked up into the carport of the residence. At that time I directed him to come back down to the street, rejoin and talk to me. He did not do so, remained in the carport area ... Once at the carport, although Mr. Johnson does have somewhat limited mobility, he began sprinting across the front porch area, which is a concrete pad about three feet wide and extends across from the carport to the front door of the residence. My concern at that time was that he was fleeing from my presence, and as I was concerned that he might force his way through the door of the residence. In all my dealing with him I've not ever known of him to have any connection to that particular residence. As he came by me, I administered a short burst of OC pepper spray to his face. He continued across the porch to a wrought iron porch post, which is in front of the front door of the residence. Other officers and I converged on him. I grabbed his left arm in an attempt to remove his arm from the post and effect an apprehension. I was not able to pull his hand or his arm loose from the post. Another officer took a position on his right side and was attempting to accomplish the same thing. I felt at that time that it was necessary that I escalate my level of force to gain his compliance and place him in custody. At that time I removed my expandable baton from my belt, extended it, and began using it, making strikes against his left forearm in the fleshy tissue consistent with my training in pressure point control techniques. The purpose of those strikes was to induce a temporary motor dysfunction of the left hand to where he would reduce his grip strength, and I'd be able to remove his hand from the post. After approximately four strikes, that was accomplished. I was able to remove his hand from the

> post, and we were able to take Mr. Johnson to the ground and place him in custody. At that point we de-escalated our force, stood him up, noted that his legs were trembling quite a bit. I obtained a patrol vehicle, and rather than forcing him to walk down to the street, I backed a patrol vehicle up into the yard, and we placed him in the patrol vehicle. At that time or shortly after he was placed in custody, two residents of 511 Ray Road stepped out the front door of the house, and I made contact with them. I apologized for the disturbance and explained to them what had taken place. These people were the Thomases. They were the residents of that address, have been for quite some time. No cab driver ever came up to there.

Despite the fact that the Thomases (appellant's great-aunt and uncle) verified that they knew appellant, confirmed that he had visited them that evening, and that he was waiting for a cab, appellant was arrested, charged with disorderly conduct, terroristic threatening, fleeing, resisting arrest, and public intoxication. The charges were tried to the court. At the close of the State's case, appellant's counsel moved for directed verdict on all charges. The State responded by arguing, as to the disorderly conduct charge, that "the Defendant cursed from the outset in public, in the street, late at night." The trial judge ruled, "I'm going to deny the Motion on Disorderly Conduct. Obviously he's cussing." After appellant presented his case, he renewed his motions for directed verdict and argued that the evidence was legally insufficient to support the disorderly conduct charge. The trial judge denied the motions, found appellant guilty of disorderly conduct, and reduced the resisting arrest charge to refusal to submit to arrest. He found appellant not guilty of public intoxication, not guilty of terroristic threatening, and not guilty of fleeing. In announcing his decision finding appellant guilty of disorderly conduct, the trial judge stated that while it was a close case whether the police had probable cause to stop and confront appellant, "even if that's a close issue, I don't believe at that point in time he has the right to cuss the police officer, and it kind of escalated from there." Appellant's challenge to the sufficiency of the evidence to support the disorderly conduct conviction presents a fundamental question: whether the use of profanity in a question to a police officer is enough to establish the crime of disorderly conduct. I would emphatically hold that it is not.

Appellant's Challenge to the Sufficiency of the Evidence

The State's proof, the arguments advanced by the prosecutor in response to the directed-verdict motions, and the trial judge's comments in announcing his decision show that appellant's use of profanity was the basis for the disorderly conduct conviction. While there was testimony that appellant clenched his fist and removed his shirt during the encounter with Officers Swagerty and Mayberry, Mayberry testified this conduct was the basis for the terroristic threatening charge. Swagerty testified, however, that appellant's profanity was the basis for the disorderly conduct charge. It is particularly relevant that the only statement that the prosecution proved that appellant made came through Swagerty's testimony that appellant asked, "Why are you f_ _ _ing harassing me?"

Arkansas Code Annotated Section 5-71-207(a)(3) (Repl. 1997) states that a person commits disorderly conduct when he, for "the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof, in a public place, uses abusive or obscene language, ... in a manner likely to provoke a violent or disorderly response." In *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998), our supreme court held that this statute is not overly broad because it only prohibits fighting words. In that case, the supreme court affirmed Bailey's conviction for disorderly conduct and observed that his use of profanity and racial epithets towards police officers, combined with the threatening behavior of grabbing an officer's arm, was sufficient to sustain his conviction. Bailey was arrested when an officer went to his residence to investigate a one-vehicle accident involving Bailey and his girlfriend near his apartment. When the officer arrived, Bailey began to curse, calling the officer MF or SB when the officer brought Bailey's girlfriend from the residence. At one point during that encounter, Bailey said "F_ _k you, nigger, and f_ _k you, too" to a black state trooper who was assisting with the encounter. The supreme court affirmed Bailey's disorderly conduct conviction based on this record, concluding:

> [n]ot only did Mr. Bailey's [*sic*] direct various fighting words to the officers, when considering his surrounding conduct, such as standing up and grabbing Officer Randle's arm, we conclude that he used these words "in a manner likely to provoke a violent or disorderly response" under § 5-71-207(a)(3). Moreover, his act of standing up and grabbing Officer Randle's arm in and of itself

> supported a conviction under subsection (a)(1), as this conduct constituted "threatening behavior."

Id. at 54, 972 S.W.2d at 245.

Appellant's case clearly presents no similar conduct or fighting words. The testimony from the State's witnesses, Swagerty and Mayberry, was that appellant was cursing and *walking away* from Swagerty when Mayberry first encountered him. Swagerty testified that Mayberry *asked*, "Why are you f_ _ _ing harassing me?" Aside from the fact that the question appears to have been warranted, albeit crudely posed, neither the question nor the crude language employed in posing it constituted "fighting words." As defined by the United States Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), fighting words are those which "by their every utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. There was nothing threatening, insulting, or incendiary about the question so as to suggest that it was posed "in a manner likely to provoke a violent or disorderly response." The State never even presented proof to that effect.

The Supreme Court has unequivocally stated that the First Amendment protects a substantial amount of verbal criticism directed toward law enforcement officers. *See City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). The Court also stated that the freedom to verbally criticize actions by the police without the risk of arrest is one of the primary distinctions between a free nation and a police state. *See id.* The *Hill* Court noted that the freedom to criticize police conduct is rooted in common law, and quoted two cases in support. *See Hill* at n. 12, *citing The King v. Cook*, 11 Ca. Crim. Cas. Ann. 32, 33 (B.C. County Ct. 1906) (stating "in a free country like this citizens are entitled to express their opinions without thereby rendering themselves liable to arrest unless they are inciting others to break the law; and policemen are not exempt from criticism any more than Cabinet Members"); *Ruthenbeck v. First Criminal Judicial Court of Bergen Cty.*, 7 N. J. Misc. 969, 147 A. 625 (1929) (vacating conviction for defendant saying to police officer, "You big muttonhead, do you think you are a czar around here?").

The *Hill* court also noted a *Pennsylvania Law Review* note in which the author stated:

> [C]onduct involving only verbal challenge of an officer's authority or criticism of his actions ... operates, of course, to impair the

> working efficiency of government agents.... Yet the countervailing danger that would lie in the stifling of all individual power to resist — the danger of an omnipotent, unquestionable officialdom — demands some sacrifice of efficiency ... to the forces of private opposition.... [T]he strongest case for allowing challenge is simply the imponderable risk of abuse — to what extent realized it would never be possible to ascertain — that lies in the state in which no challenge is allowed."

See Hill, n. 12 *citing* Note, *Obstructing a Public Police Officer*, 108 U. PA. L. REV. 288, 390-92, 406-07 (1960).

Our supreme court has also recognized that an officer's authority or conduct is not unfettered, as reflected by Arkansas Rules of Criminal Procedure 2.2 and 3.1. Under Rule 2.2, a law enforcement officer may *request* that any person furnish information or otherwise corroborate an investigation or prevention of a crime. However, the rule also states that "no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists." Ark. R. Crim. P. 2.2. In a free society, the right to not cooperate with an unreasonable police request is worthless if exercising that right is a crime.

In addition, Rule 3.1 provides that a law enforcement officer present in any place may, in the performance of his duties, stop and detain a person whom he "reasonably suspects" is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. The rule plainly states that "an officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained *shall be released without further restraint, or arrested and charged with an offense.*" *See* Ark. R. Crim. P. 3.1 (emphasis added). For purposes of this rule, "reasonable suspicion" means a suspicion based upon facts or circumstances which give rise to more than bare, imaginary, or purely conjectural suspicion. *See Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997).

This court has held that the testimony of an arresting officer that he had nothing more than "feelings" that a defendant "might"

be engaged in drug trafficking was not enough to support a reasonable suspicion under the rule. *See Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997). The supreme court affirmed our decision. *See Stewart, supra,* at 332 Ark. 138 (1998). Furthermore, our supreme court held in *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980), that the fact that two men looked back at airport police officers and quickened their pace upon being followed did not meet the "reasonable suspicion" standard of Rule 3.1. The record in the case at hand lacks even the proof that we held inadequate in *Stewart* and *Meadows*. Absolutely nothing in the record shows that Officer Swaggerty reasonably suspected that appellant had committed, was committing, or was about to commit the conduct countenanced by Rule 3.1.

Although appellant did not challenge whether Officer Swagerty's conduct was proper under Rules 2.2 or 3.1, the trial court *sua sponte* raised the issue. The court stated:

> The Court finds that it's a real issue with regard to starting with the probable cause to stop and confront. However, even if that's a close issue, I don't believe at that point in time he has the right to cuss the police officer, and it kind of escalated from there.

To its credit, the trial court recognized that the initial stop may have been improper. Yet it failed to apply fundamental Fourth Amendment principles, governing precedent, and relevant rules of criminal procedure to the stop and hold that the police had no legitimate reason to question appellant, let alone detain him, beat him, and arrest him for exercising the right to be left alone. In addition, even if the police had a legitimate reason to question appellant, the trial court failed to recognize that appellant's question, even laced with profanity, did not constitute disorderly conduct.

At the close of the State's case in chief, the following exchange occurred between trial counsel and the trial judge:

> MR. SHAW (*Appellant's counsel*): As to disorderly conduct, Your Honor, we feel the State has not met its burden of proof in this matter. Officer Mayberry testified that when he got to the scene, Mr. Johnson alternatively was getting agitated, and would calm down and apparently cycled back and forth as the course of the conversation took place. . . . Therefore, we would ask the Court to grant motions of directed verdict in all of these matters.
>
> THE COURT: ... Let's go back a little further from there. Let's go back to Swagerty's testimony. What probable cause did Swag-

erty have? As I understand it from Swagerty, he had stated that he was pacing back and forth, looking very nervous, but he was not in the street. He was on a sidewalk at the time ...

MR. ROBERTSON (*counsel for the State*): In addition to that, though, *you do have his belligerent, extremely belligerent attitude that's been consistent throughout the testimony.*

THE COURT: Which occurred afterwards, though. We're talking about probable cause to stop and approach him in the first place. Because he wasn't cussing at the time. He wasn't staggering. He was just standing on the sidewalk pacing back and forth.

MR. ROBERTSON: Under Rule 2.2 a law enforcement officer may request that any person furnish information or otherwise corroborate [*sic*] an investigation or prevention of a crime. The officer testified here that it was late at night, high crime area. He's basically making sure that everything's okay. *He sees an individual out of place*, and he just goes to ask him what's going on. The State submits that under Rule 2.2, approaching him was simply permissible.

THE COURT: Doesn't it also say that he has to tell the person that he has no duty to cooperate with the officer if he doesn't want to?

MR. ROBERTSON: The rule does require that, but under the facts of this case its clear that once Swagerty even stopped and approached him, he didn't have an opportunity to do anything at that point *because of the Defendant's belligerent attitude. He just blew up at that point, so yes, the rule is that he has the obligation to explain that to the Defendant, but he did not have that opportunity in this case . . . With respect to the disorderly conduct, the Defendant cursed from the outset in public, in the street, late at night.*

THE COURT: *I'm going to deny the Motion on Disorderly Conduct. Obviously he's cussing.*

(Emphasis supplied.)

After both sides had rested, the following exchange occurred:

MR. SHAW: Defense rests, Your Honor. I'd like to renew my motion for dismissal on the remainder of the charges before Mr. Johnson ... They've not shown that Mr. Johnson was disorderly at the time that Officer Swagerty came to the scene. The testimony of Officer Swagerty was that apparently Mr. Johnson was immediately abusive in his presence. Mr. Johnson refutes that, and as the Court noted, there was no showing of probable cause for Officer

> Swagerty to visit with Mr. Johnson on that evening. If he had a reason, under the Arkansas rules on detainer, that reason would have been dissipated with the arrival of Officer Mayberry who knew this individual, and there was a determination that Mr. Johnson was not a suspect of any illicit activity at that time. There's not testimony as to that ...
>
> THE COURT: That's going to be denied. Basically what you made was your closing argument. I'll give the State a chance to respond to what you made in your close.
>
> MR. ROBERTSON: The only thing I really have in response to what Mr. Shaw just said is ultimately it really is just a matter of credibility. The approach was proper, residential neighborhood, late at night, high crime ... *Once the Defendant started uttering curse words and in the middle of that residential neighborhood, the crime of disorderly conduct was complete.* At that point the officer would have had probable cause to arrest him had been able to do so....
>
> THE COURT: *The Court finds that it's a real issue with regard to starting with the probable cause to stop and confront. However, even if that's a close issue, I don't believe at that point in time he has the right to cuss the police officer, and it kind of escalated from there.* The Court's going to find that there's a conflict in the testimony on the public intoxication and find him not guilty on that. I find him guilty of disorderly conduct.... I find him not guilty of fleeing and find him guilty of the reduced charge of refusal to submit to arrest ... [Emphasis added.]

Appellant plainly contended that his conduct did not constitute disorderly conduct. It is equally clear that appellant was prosecuted on that charge because he cursed the police. The only way that his words could constitute the crime would have been if they were "fighting words" as our supreme court held in *Bailey v. State, supra.* The vast difference between appellant's words and the kind of language found sufficient in *Bailey v. State* is obvious.

A motion for directed verdict at the close of the State's case has as its purpose a procedure for determining, *as a matter of law*, whether the State has met the burden of establishing a *prima facie* case. *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992). Appellant argued at trial that the State failed to produce proof sufficient to establish the crime of disorderly conduct. The State's sole basis for that charge was appellant's profanity in asserting his right to be left alone. The trial judge denied appellant's motions for directed verdict knowing these positions. The majority and concurring opinions now affirm that the "trial court was not barred by the arresting

officer's opinion as to what evidence may or may not be sufficient to make an arrest on that charge, much less what evidence is necessary for the court to convict." This observation is irrelevant; neither the prosecution nor the trial judge referred to anything other than appellant's profanity with respect to the disorderly conduct charge. Neither the prosecution nor the trial judge referred to anything else that would support a charge of disorderly conduct under the statute aside from appellant's profanity. The majority is building a case on appeal that the State never alleged below and the trial judge never found.

By employing an extraordinary reasoning process aided, at least in part, by the State's distortion of the record, the majority has engaged in what amounts to a *de novo* conviction while appearing to conduct appellate review. Thus, the majority opinion concludes that Johnson's conduct of removing his shirt and clenching his fist, acts that Mayberry termed "preassaultive cues," can be "fairly characterized as conduct that is prohibited by Ark. Code Ann. section 5-71-207(a)(1)-(3)." The majority cites no case authority for its conclusion or the analytical process used in reaching it. Furthermore, this bizarre conclusion cannot withstand reasoned scrutiny when one examines the record and the statute in question.

Arkansas Code Annotated section 5-71-207 (Repl. 1977) states, in pertinent part:

> (a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof, he:
>
> (1) Engages in fighting or in violent, threatening, or tumultuous behavior; or
>
> (2) Makes unreasonable or excessive noise; or
>
> (3) In a public place, uses abusive or obscene language, or makes an obscene gesture, in a manner likely to provoke a violent or disorderly response . . .

The prosecution never proved and the trial court never found that appellant did anything "with the purpose of causing public inconvenience, annoyance, or alarm" or that appellant recklessly created a risk of a fight, violence, threat, or tumultuous behavior. No witness testified that appellant threatened anyone. In fact, the record shows that appellant either walked away from Swagerty, Mayberry, and the other officers, or that he turned and remained

stationary when he removed his shirt and clenched his fist. There is no proof that appellant engaged in unreasonable or excessive noise. While Swagerty and Mayberry testified that appellant spewed a stream of profane invectives, the only proof in the record of any profanity that appellant uttered was his initial question to Swagerty, "Why are you f_ _ _ing harassing me?" No one has suggested how this question either purposely or recklessly created a risk of a violent or disorderly response.

Again, the supreme court's decision in *Bailey v. State* shows the kind of behavior deemed sufficient to sustain a disorderly conduct conviction. Not only did the appellant in that case direct various "fighting words" consisting of racial epithets to police officers, the supreme court held that his action in grabbing an officer's arm, in and of itself, supported a conviction under subsection (a)(1) of the statute because this conduct constituted "threatening behavior." The majority can point to no such conduct in this record. Instead, the State conjured a scenario that never happened, which the majority now has embraced as a judicial fig leaf to cover the naked fact that appellant was prosecuted and convicted of disorderly conduct because he used profanity in challenging the police. Despite Mayberry's characterization of appellant's action of removing his shirt and clenching his fists as "preassaultive cues," the record plainly shows that appellant assaulted no one. Appellant threatened no one. None of the police officers claimed that appellant threatened them, assaulted them, reached for them, gestured toward them, swung at them, lunged toward them, or did anything else that threatened them.

Disorderly conduct also can be found where an actor purposely or recklessly engages in "violent" behavior. *See* Ark. Code Ann. § 5-71-207(a)(1). Removing one's shirt may be socially inappropriate or even unsightly; it is not violent. Appellant's action in clenching his fist after he removed his shirt certainly did not constitute "violent behavior" or "threatening behavior," especially given the undisputed testimony from the police officers that appellant had been walking away from them beforehand and the fact that appellant did not advance toward the officers or otherwise threaten them after removing his shirt and clenching his fist.

Making "unreasonable or excessive noise" is also included within the range of behavior covered by the disorderly conduct statute. *See* Ark. Code Ann. § 5-71-207(a)(2). The prosecution witnesses testified that appellant was agitated about what he consid-

ered to be harassment by Swagerty. There is no proof that anyone accused appellant of disturbing the peace by what the prosecution termed his "belligerent" attitude.

The State's brief concludes with the following statement:

> Here, the appellant, upon being confronted by Officer Swagerty, used obscene language and displayed a violent demeanor. Indeed, during the confrontation, the appellant removed his shirt, clinched his fist, *and advanced toward Officer Swagerty in a "preassaultive" manner. Such activity constituted "threatening" behavior which recklessly created a risk of public inconvenience, annoyance or alarm as proscribed by the statute.* Thus, viewing the evidence in the light most favorable to the State, substantial evidence support's the appellant's conviction.

(Emphasis added.) This statement is an flagrant distortion of the record. The only testimony about appellant's conduct in this context came from Mayberry, who testified as follows:

> ... I maintained primary contact with Mr. Johnson. At one point Mr. Johnson turned, took a belated stance towards Officer Swagerty, clenched his fist, and then subsequently pulled his shirt off. All of these based upon my training and my prior experience, I recognized as preassaultive cues on Mr. Johnson's part. It is my understanding that that is the basis for the terroristic threatening charge. I was in the area with Officer Swagerty. However, it appeared that he was primarily targeting Officer Swagerty. He clenched his fist and pulled his shirt off. He didn't rip his shirt off. He didn't rip and tear the shirt. He just took and pulled his shirt up over his head and threw it to the ground.

Mayberry never testified that appellant "advanced toward Officer Swagerty" or anyone else. Mayberry testified, instead, that appellant "took a belated *stance* towards Officer Swagerty" (emphasis added), and added that such conduct was the basis for the terroristic threatening charge. The trial court found appellant not guilty of terroristic threatening and never suggested that appellant's behavior in removing his shirt and clenching his fist constituted disorderly conduct. Neither the State nor majority cite any authority holding disorderly conduct to constitute a lesser-included offense of terroristic threatening. Swagerty never mentioned that appellant removed his shirt and clenched his fist, let alone alleged that appellant advanced toward him after doing so. Rather than declaring its disapproval of the State's blatant distortion of the record, the majority has strangely embraced the distortion and made it the cornerstone of its rationale for affirming the conviction.

That the majority does so in the name of appellate review despite the fact that the trial court acquitted appellant of the terroristic threatening charge and refused to base the disorderly conduct conviction on the proof that the State now distorts, speaks volumes.

This court does not engage in *de novo* review of the record in criminal cases, be it for disorderly conduct or any other offense. It is not our function to invent possible new grounds for conviction. Our duty to examine the record and analyze the evidence in the light most favorable to the State does not obligate us to condone transparent distortion of the record, no matter who does it. The majority and concurring opinions do not explain why this perverse notion of judicial review is warranted in this case or under what conditions it will be employed in future criminal appeals. Whatever else the majority decision may be, it is plainly an unprecedented and unexplained departure from the standard of appellate review previously announced and followed in Arkansas.

Racism, Law Enforcement, and Judicial Abdication

This case stands as stark proof about continuing racism and inequality in the American criminal justice system and the failure of police departments, prosecutors, and the courts to address the conclusion of the 1968 Kerner Commission Report on Civil Disorders that "many disturbances studied by the Commission began with a police incident." *See Report of the National Advisory Commission on Civil Disorders* 158. It is unmistakably clear that appellant was approached by Officer Swagerty because he was a black man standing on a public street at night in what the police termed a "high crime area." The "high crime area" where appellant stood happened to be where his relatives lived. He had a right to visit his relatives and stand on the street outside their home while awaiting the arrival of a taxi without being accosted by the police. The police had no basis whatsoever for suspecting that he was engaged in, had committed, or was about to commit a crime. Our supreme court clearly indicated as much when it decided *Stewart v. State*, 332 Ark. 138 (1998), and reversed a conviction for drug possession that was based on a police encounter with a woman who was standing along a street in a "high crime area" at night.

Although I disapprove of appellant's profanity, I denounce Swagerty's initial engagement with appellant, the way that appellant was treated by four police officers after he disapproved of Swagerty's approach, and appellant's prosecution and conviction for disorderly

conduct as racist. Swagerty's testimony proves that appellant's race, presence at night, and desire to be left alone — also known as SWB (standing while black or brown) — caused Swagerty to view him with suspicion. That racist judgment triggered this case. Somehow the police deemed appellant's obvious and understandable irritation about being deemed suspicious due to merely being present and unwilling to interact with them as justification to require him to submit to detention while they attempted to "verify" his account. The fact that the majority avoid even addressing this egregious proof signals police and prosecutors that, in the mind of some judges on this court, the police can act as if black men have no right to be in public unless the police approve of their presence and the way they behave even absent *prima facie* evidence of criminal conduct and not be censured. Some observers would deem that a tacit concession to the idea of a police state.

Courts and judges should forever bear in mind that the history of black people and police conduct has never been good. After the colonists were unable to enslave the indigenous Native Americans, they turned to enslaving and importing Africans. This system was established and maintained through a curious blend of law, religion, and commerce that depended, at bottom, on the enforcement efforts of government agents for its maintenance and growth. Thus, the police became the enforcers of deliberate commercial transactions, religious ideologies, and legal codes aimed at ensuring the subordination of black people in the United States of America.

Eventually the issue of African slavery would propel our nation into the last war fought on our soil, and our bloodiest war ever. Following the defeat of the Confederate States, the Thirteenth Amendment to the federal constitution was ratified in December 1865. In his opinion in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), Justice Samuel Miller noted:

> Among the first Acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal Government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property, to such an extent that their freedom was of little value ... They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a

> white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

Id. at 70. As had been the case with slavery, post-Civil War race discrimination received governmental mandate as the police remained the chief enforcement agents of a system of peonage aimed at re-enslaving black people as sharecroppers and other menial laborers.

Judge A. Leon Higginbotham, Jr., in his book, *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process*, has recounted "a particularly egregious civil rights violation" in his discussion of *Brown v. Mississippi*, 297 U.S. 278 (1936):

> In 1934, three impoverished and "ignorant" African Americans in Kempner County, Mississippi, were suspected of murdering a white man. A deputy sheriff and several of his white cronies brutalized the defendants with some of the most extreme torture ever revealed in a reported American case. One defendant, Yank Ellington, so enraged a mob of twenty white men with his professions of innocence that they whipped him and twice hung him from a tree before finally releasing him to return home in agony. Two days later, the deputy again seized Ellington and took him to jail by a circuitous route that led into the State of Alabama. While in Alabama, the deputy again severely whipped the defendant until he "agreed to confess to such a statement as the deputy would dictate, ... after which he was delivered to jail."
>
> The same deputy then arrested two other African-American men, Ed Brown and Henry Shields. One night, the deputy, the jailer, and several other white men made the defendants strip. The two men were then "laid over on chairs and their backs were cut to pieces with a leather strap with buckles on it." They were repeatedly whipped and told that the whipping would continue until they admitted "in every manner of detail" a confession "in the exact form and contents as desired by the mob." During a two-day trial, the rope burns on Ellington's neck were clearly visible, and the deputy sheriff and others freely admitted to beating all three defendants. The deputy testified that Ellington's whipping by the mob was " [n]ot too much for a negro; not as much as I would have done if it was left to me." Despite the clear evidence that the defendants' pretrial statements were coerced, the trial court denied the defendants' motion to suppress the "confessions." The three men were convicted and sentenced to death. The aggressive young attorney prosecuting the case was John Stennis, and he did not deny the severe police brutality. This case was one of the first steps

> in a political career that would later lead Stennis into becoming an "esteemed" member of the United States Senate.

See Higginbotham, *supra*, at 162, (notes omitted).

The hard truth from which the State and majority cannot hide is that for racial minorities in this society, the police have often been the foot soldiers in a longstanding effort to deny equal access to life, liberty, and property. Although the Supreme Court declared racial segregation in education unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954), local police and the state militia were used by city officials and Governor Orval Faubus to resist the attempt of black children to attend Little Rock Central High School, thereby leading to the decision in *Cooper v. Aaron*, 358 U.S. 1 (1958). Congress outlawed race discrimination in public accommodations through enactment of the Civil Rights Act of 1964, but the police arrested blacks who attempted to eat at lunch counters in virtually every southern state, including Arkansas. Two of the most searing images of all time will forever be the image of police beating black people as they crossed the Edmund G. Pettus Bridge outside Selma, Alabama, in a march to protest the systematic denial of the voting right guaranteed them by the Fifteenth Amendment, coupled with the image of police dogs and fire hoses turned on peaceful black adults and children under the direction of Eugene "Bull" Connor, chief of the Birmingham, Alabama, police. In these and countless other situations, state courts and judges turned blind and deaf to the injustices aimed at people who, in the words of Justice Black, suffered "because they are helpless, weak, outnumbered, or ... are non-conforming victims of prejudice and public excitement."

Judges should strongly denounce the racist police conduct that this appellant suffered and should not hesitate to do so. In the first place, such conduct violates the very notions of liberty that the United States purports to hold dear. Beyond that, only the most morally and socially unobservant or insensitive among us can deny the tremendous racial disparity in the way the police deal with people of color, and especially black and brown men. The police do not customarily stop white people for walking away from them. The police do not customarily deem white people as criminal suspects when they walk. But the presence of a black person is commonly used by the police as a basis for performing what they deem an "investigatory stop." A black person subjected to that exercise has no recourse when approached. He cannot decline to

talk with the police. If he talks with the police he consents to being investigated as a criminal even absent reasonable suspicion. If he tries to walk away from the police, as appellant did in this instance, he risks being charged with fleeing and other charges. If he protests being approached, the police can charge him with disorderly conduct whether he uses fighting words or not. If he challenges the sufficiency of the evidence to support that charge, this decision shows that judges have neither the sensitivity nor the will to stand, in the words of Justice Black, as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or ... are non-conforming victims of prejudice and public excitement."

The concurring opinion wrongly asserts that one must presume that the police were white in order to challenge their conduct as racist. The racist aspect of the initial encounter by Swagerty arose from a presumption about appellant based on *appellant's* race. Any police officer, regardless of his race, who presumes that another person is likely to be engaged in criminal conduct merely because of that other person's race is indulging in a racist stereotype. Regardless of Swagerty's race, he was not entitled to surmise that appellant was a criminal suspect based on appellant's race and mere presence. It is undeniable that the police proceeded from that stereotype, as shown by the prosecutor's statements that Swagerty "sees an individual out of place," in a "residential neighborhood, late at night, high crime [area]...." Moreover, no person should be guilty of disorderly conduct merely because he uses profanity in challenging police conduct, regardless of the officer's race or the race of the person challenging the officer.

The concurring opinion proceeds from yet another flawed premise in asserting that the issue of racism and racially disparate police conduct is not "relevant to the argument advanced by appellant in this case." Justice Cardozo certainly declared in *The Nature of the Judicial Process* that "[t]he judge ... is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness." Yet in the following sentence, Cardozo declared: "He is to draw his inspiration from consecrated principles." *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). And before that, the learned Justice wrote:

> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. *Ethical considerations can no more be excluded from the administration of justice ... than one can exclude the vital air from his room and live.*

(Emphasis added.) Another disquieting flaw in the majority and concurring opinions is that ethical considerations surrounding the police behavior in this case somehow can or should be disregarded or excluded from our decision. As Justice Cardozo observed almost a century ago, any legal ruling that fails or refuses to consider its ethical effect on the society in which it operates "cannot permanently justify its existence."

The right to move through society without having to obtain police permission and to challenge unreasonable police conduct is not a private "ideal of beauty or of goodness." It is one of the "consecrated principles" of our republic dating back to the Declaration of Independence and guaranteed by the First and Fourth Amendments. Thus, a judge does not act as "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness" by denouncing police conduct based on the oppressive notion that freedom to move through society depends on such arbitrary factors as one's race or whether government agents approve of the way one challenges what the agents do. Rather, denouncing such oppressive police conduct affirms a full-bodied and living sense of justice and rejects slavish deference to officious officialdom.

The 1968 *Report of the National Advisory Commission on Civil Disorders* contains this profound statement:

> We have cited deep hostility between police and ghetto communities as a primary cause of the disorders surveyed by the Commission. In Newark, Detroit, Watts, and Harlem — in practically every city that has experienced racial disruption since the summer of 1964, abrasive relationships between police and Negroes and other minority groups have been a major source of grievance, tension, and, ultimately, disorder.
>
> In a fundamental sense, however, it is wrong to define the problem solely as hostility to police. In many ways, the policeman only symbolizes much deeper problems. The policeman in the ghetto is a symbol not only of law, but of the entire system of law enforcement and criminal justice. As such, he becomes the tangible target for grievances against shortcomings throughout that system: against assembly-line justice in teeming lower courts; against wide disparities in sentences; against antiquated correctional facilities; against the basic inequities imposed by the system on the poor ... The policeman in the ghetto is the most visible symbol, finally, of a society from which many ghetto Negroes are increasingly alienated.

. . .

> Alone, the policeman in the ghetto cannot solve these problems. His role is already one of the most difficult in our society. He must deal daily with a range of problems and people that test his patience, ingenuity, character, and courage in ways that few of us are ever tested. Without positive leadership, goals, operational guidance, and public support, the individual policeman can only feel victimized. Nor are these problems the responsibility only of police administrators; they are deep enough to tax the courage, intelligence, and leadership of mayors, city officials, and community leaders....
>
> And yet, precisely because the policeman in the ghetto is a symbol — precisely because he symbolizes so much — it is of critical importance that the police and society take every possible step to allay grievances that flow from a sense of injustice and increased tension and turmoil. In this work, the police bear a major responsibility for making needed changes. In the first instance, they have the prime responsibility for safeguarding the minimum goal of any civilized society: security of life and property. To do so, they are given society's maximum power: discretion in the use of force. Second, *it is axiomatic that effective law enforcement requires the support of the community. Such support will not be present when a substantial segment of the community feels threatened by the police and regards the police as an occupying force.*

See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 157-58 (emphasis added).

David Cole, a professor at Georgetown University Law Center, more recently addressed this deplorable situation in his 1999 book titled *No Equal Justice: Race and Class in the American Criminal Justice System*. Although Cole's observations about inequality in the criminal justice system focus largely on the threat to Fourth Amendment freedom posed by police conduct and federal court insensitivity, the following passage fits this case and the majority decision.

> In effect, then, the [judiciary] has immunized a wide range of law enforcement ... tactics ... disproportionately directed at persons of color. [This] allows the police to rely on unparticularized discretion, unsubstantiated hunches, and nonindividualized suspicision. Racial prejudice and stereotypes linking racial minorities to crime rush to fill the void. As a result, many innocent minorities are stopped, questioned, and searched on a routine basis, reinforcing a sense among members of minority communities that the police are

> their enemy, and that they have been singled out for suspicion because of the color of their skin.
>
> None of this is necessary. Were [judges] so inclined, [they] could adopt rules that would demand equal protection rather than rules that invite racial targeting and discrimination. ... [Judges] should be particularly skeptical of bases for suspicion that seem to be manufactured by police conduct — such as "location plus evasion" ... which often do little more than legitimate generalized prejudices.
>
> . . .
>
> If we restored equality to the policing process, it would become more "self-policing." If well-to-do white people were routinely stopped, questioned, and searched, there would likely be more community pressure on the police to regulate themselves. We would likely find more sympathy within the legislative, executive, and judicial branches for protecting those subjected to such tactics. Restrictions on police behavior would soon develop. If those restrictions turned out to impede law enforcement too greatly, we would be forced as a community to reach a consensus on where the appropriate line should be drawn — *for everyone* — between crime control and privacy interests.
>
> But under the law as it stands, wealthy white people are not subject to such treatment; black and Hispanic people are, and especially poor black and Hispanic people living in the inner city. These groups are underrepresented in all branches of government. The fact that these tactics are for the most part targeted along race and class lines means that coalitions between the powerful and powerless are unlikely. The association of blacks and Hispanics with crime that appears to pervade much of the white community makes it likely that whites will perceive their interests to be at odds with those of minority groups on these issues. Because they do not [equally] bear the costs of law enforcement, white people have less reason to be concerned about discretionary law enforcement.

See David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, 53-55 (1999) (emphasis in original).

Cole also documented reasons that black and brown people are uncomfortable during encounters with the police:

> Stories of black men being stopped by the police for no apparent reason other than the color of their skin are so common that they are not even considered news, and often get reported only when the victims happen to be celebrities or the confrontation is captured on film. In 1988, Joe Morgan, former All-Star second base-

man of the Cincinnati Reds, was at Los Angeles International Airport waiting for a flight to Tucson. According to Morgan and an eye witness, a police officer approached Morgan while he was making a phone call, said he was conducting a drug investigation, asked for his identification, and accused him of traveling with another person suspected of dealing drugs. Morgan objected, and turned to get his identification from his luggage, forty feet away. The officer grabbed him from behind, forced him to the floor, handcuffed him, put his hand over Morgan's mouth and nose, and led him off to a small room, where the police ascertained that Morgan was not traveling with the suspected drug dealer after all. The police maintained that Morgan had been hostile throughout the encounter, and that he had been forced to the floor only after he started swinging his arms. Even by the police officer's own account, however, the only basis for approaching Morgan in the first place was that another black man, stopped as a suspected drug dealer, had told the officers that he was traveling with a man that "looked like himself." As a result, the officers were on the lookout for a black man, and Joe Morgan fit that description.

In 1989, former police officer Don Jackson was doing a news story about police abuse against black men in Long Beach, California, when he was pulled over by the police on Martin Luther King, Jr., Boulevard, allegedly for straddling lanes. When he asked why he was being stopped, an officer pushed him through a plate glass store window. NBC captured the incident on film. In 1992, the ABC news magazine "20/20" conducted an experiment, sending out two groups of young men — one white, the other black — on successive evenings in Los Angeles. They drove in identical cars and took identical routes at identical times. The black group was stopped and questioned by police on several occasions in one evening, while the white group saw police cars pass them by sixteen times without showing any interest.

In 1990, the Massachusetts Attorney General's Civil Rights Division issued a report condemning the Boston Police Department for a practice of subjecting black citizens to unconstitutional stops and searches. The report recounted more than fifty such incidents in 1989 and 1990. ... The report also discussed widespread complaints that the Boston Police Department had responded to the killing of a white woman, Carol Stuart, by engaging in unconstitutional stops, searches, and interrogations of young black men. Carol Stuart was in fact killed by her husband, Charles Stuart, a white man, who then falsely claimed that a black man had killed his wife.

As a result of such experiences, and the recounting of these and countless similar tales within the black community, black citizens, and particularly young black men, are likely to feel considerably

> less comfortable than members of other demographic groups in their encounters with police officers ... As Judge Julia Cooper Mack of the District of Columbia Court of Appeals put it in another case, "no reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away from a drug interdiction team...."

Id., supra, at 25-26 (citations omitted).

Conclusion

Years ago, Justice Felix Frankfurter declared that "there comes a point where this Court should not be ignorant as judges of what we know as men." *See Watts v. Indiana*, 338 U.S. 49, 52 (1952) (citing Taft, C.J., *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922) (Child Labor Tax case)). Were we to reverse appellant's conviction and denounce the way he was treated, Swagerty, Mayberry, the Jacksonville Police Department, other law enforcement agencies, prosecutors, racial minority group members, and the rest of society, would receive a powerful and long overdue message that occupation-force tactics such as those manifested in this record will not be tolerated. Affirming the conviction, on the other hand, simply adds more fuel to the ever-present hostility and simmering rage of many persons from poor and minority communities about unjust police conduct.

Eventually people subjected to such police misconduct, and the failure of judges to denounce it, lose faith in the notion of equal treatment and with it, lose faith in the notion of being part of the "community." That alienation largely accounts for the difficulty police have in getting cooperation as they investigate reports of crime and locating witnesses. It contributes to why persons in poor and minority neighborhoods often are unwilling to respond when summoned for jury service. People victimized by a criminal justice system that purports to stand for equal justice under law while relegating them to second-class treatment by agents of government holding ultimate discretion in the use of force eventually become alienated from that system and the society that sponsors it. As their alienation increases, support for law enforcement will decrease. At worst, more people will become outlaws, as David Cole has observed.

> When significant sectors of a community view the system as unjust, law enforcement is compromised in at least two ways. First,

> people feel less willing to cooperate with the system, whether by offering leads to police officers, testifying as witnesses for the prosecution, or entering guilty verdicts as jurors. Second, and more importantly, people are more likely to commit crimes, precisely because the laws forbidding such behavior have lost much of their moral force. When the law loses its moral force, the only deterrents that remain are the strong-arm methods of conviction and imprisonment. We should not be surprised, then, that the United States has the second highest incarceration rate of all developed nations. And it should be no wonder that black America, which has been most victimized by the inequalities built into the criminal justice system, is simultaneously most plagued by crime and most distrustful of criminal law enforcement.

See *Cole*, *supra* at 11-12.

Affirming the result of abusive, racist, and disparate police conduct sends the wrong message: that the courts will not protect the rights of poor, disfavored, and helpless people. No one should be surprised, then, when members of that group express outrage against police misconduct even if one disagrees with the way that rage is vented. The greater surprise and disappointment is that judges and other officials responsible for administering criminal justice refuse to acknowledge obvious inequities and do anything about them.

I dissent from today's decision. Judge NEAL has authorized me to state that he joins this opinion.

Diane M. RAYMOND *v.* Daniel A. RAYMOND

CA 99-1232 19 S.W.3d 52

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 7, 2000

[redacted]

Mashburn & Taylor, by: *Scott E. Smith*, for appellant.

Matthews, Campbell, Rhoads, McClure, Thompson, & Fryauf, P.A., by: *David R. Matthews*, for appellee.

SAM BIRD, Judge. The issue in this divorce case is whether Diane Raymond effectively entered her appearance by signing a "Conditional Reconciliation Agreement." We hold that the chancellor's decision was not clearly erroneous, and we affirm.

The Raymonds were married in 1988. During the course of the marriage, Diane became an alcoholic and drug abuser. On December 30, 1996, Daniel Raymond filed for divorce. A decree of divorce was entered on May 12, 1997. No appeal was taken. On March 5, 1999, Diane filed a petition to set aside the divorce decree on the grounds that she was not served with process within 120 days as required by Ark. R. Civ. P. 4(i).

On March 11, 1999, Daniel filed a response to Diane's petition, and on April 28, 1999, he filed a motion for summary judgment, contending that Diane had entered her appearance in the divorce action when she signed the conditional-reconciliation agreement. Summary judgment was granted to Daniel on July 7, 1999.

The record contains copies of a "Conditional Reconciliation Agreement on Abstinence from Alcoholic Beverages and Illegal Drugs," filed on April 2, 1997; a "Property Settlement Agreement," filed on May 12, 1997; and a "Waiver and Entry of Appearance," filed May 12, 1997.

The conditional-reconciliation agreement is in the form of a legal pleading, styled, "In the Chancery Court of Washington County, Arkansas," bearing the names of Daniel and Diane, identified as "Plaintiff" and "Defendant," respectively, and a docket number. It was signed and dated by Diane on March 6, 1997. Significant portions of the reconciliation agreement state:

> C. As a result of disputes and unhappy differences between the parties, they separated on or about October 11, 1996, and had agreed to an immediate separation.
>
> D. In order to insure the full information and advice of both husband and wife, each has had the opportunity to be represented by independent legal counsel in connection with the negotiations for and drafting of this agreement in consideration of the respective rights, duties and obligations of the parties.
>
> E. This Post-Nuptial Agreement will shortly be filed by Daniel A. Raymond *in the Chancery Court of Washington County, Arkansas, as an attachment to the Complaint for Divorce.*
>
> ...
>
> [T]he parties agree as follows:
>
> ...
>
> 2. Should the wife fail in her program of abstinence and use alcohol during the six month trial reconciliation then *she agrees to accept a divorce* and leave the house with her car, her personal belongings, and $20,000, and will not make claims to any and all real and personal properties, whether marital or nonmarital.
>
> 3. Further, the wife ratifies the previous deeds and transfer of all her right, title and interest, including but not limited to the right of dower and curtesy, if any, in and to certain real and personal property identified as Exhibits B, C, D, and E, and incorporated by reference herein.

> Wife agrees to execute any and all documents necessary for transfer of property rights called for should the period of abstinence be breached during the time periods set forth in this agreement, and that this is a ratification of the agreement dated October 24, 1996, marked as Exhibit A, and incorporated by reference herein.

(Emphasis added.)

The "Property Settlement Agreement," is styled as a legal pleading in the same manner as the conditional-reconciliation agreement, bears the notarized signatures of both Daniel and Diane Raymond, and is dated May 8, 1997. It divided the parties' possessions, including the real property, automobiles, personal effects, bank accounts and investment plans, and debts, and it provided for the execution of documents. It contained the following paragraphs of significance:

> (L) *VOLUNTARY AGREEMENT*: This agreement is made and entered into freely and voluntarily by both parties, each having had counsel and advice of his or her own attorney, or having had the opportunity to obtain such advice, and being free from any duress or influence on the part of the other and having full disclosure of the assets and income of the other.
>
> (M) *BINDING EFFECT*: This agreement shall be binding upon the parties and their respective heirs, executors, administrators, and assigns.
>
> WHEREAS, this is the entire and complete agreement that settles any and all matters of real and personal property between the parties.

The "Waiver and Entry of Appearance," also styled as a legal pleading, was signed by Diane and filed May 12, 1997. It provides, *"The undersigned hereby acknowledges receipt of a copy of the property Settlement and Decree of Divorce on May 7, 1997, and hereby waive [sic] my right to appear and consents that the same may be heard and decided without further notice to said undersigned."* (Emphasis added.)

The chancellor granted Daniel's motion for summary judgment and denied Diane's motion to set aside the divorce decree. His order stated:

> This Court specifically finds that Paragraph E of this [Conditional Reconciliation] Agreement stated that, "this post-nuptial agreement will shortly be filed by Daniel A. Raymond in Chancery Court in Washington County, Arkansas as an attachment to the Complaint For Divorce." The Agreement further provided in Paragraph 1 on Page 3 that, "should the program of alcohol rehabilitation be successful and the wife abstains from the use of alcohol for the six month period then the husband agrees to dismiss the pending Divorce Complaint in Washington County Chancery Court." *This Court specifically finds that the Defendant's signature on said Agreement constituted an entry of appearance in this cause and that by signing it the Defendant submitted herself to the jurisdiction of this Court.* (Emphasis added.)

The chancellor's order also stated that Diane's entry of appearance was timely filed within the 120 days specified by Rule 4(i) of the Arkansas Rules of Civil Procedure.

■ Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Ark. R. Civ. P. 52(a); *Blocker v. Blocker*, 57 Ark. App. 218, 944 S.W.2d 551 (1997); *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996); *Elerson v. Elerson*, 6 Ark. App. 255, 640 S.W.2d 460 (1982). We cannot say that the chancellor's finding is clearly against a preponderance of the evidence.

On appeal, Diane argues that because she was not formally served with summons within 120 days of the filing of the complaint for divorce, the divorce decree entered was void. She contends that the chancellor erred in finding that her signature on the reconciliation agreement constituted an entry of appearance.

■ Any action of a defendant that amounts to an intention to enter his appearance in court is a voluntary appearance, which may be by formal writing or informal parol action but, in either case, if it is manifestly the intention by the formal writing to enter his appearance, he will be held bound by his act. *Kirk v. Bonner*, 186 Ark. 1063, 57 S.W.2d 802 (1933). In *Robinson v. Bossinger*, 195 Ark. 445, 112 S.W.2d 637 (1938), the court referred to *Spratley v. Louisiana & Arkansas Ry. Co.*, 77 Ark. 412, 95 S.W. 776 (1906), and specifically stated that it was *not overruling* the following statement:

> There is no doubt but that where a party, who has not been served with summons, answers, consents to a continuance, goes to trial, takes an appeal, or does any other substantial act in a cause, such party by such act will be deemed to have entered his appearance. But this rule of practice does not apply in cases where the party on the threshold objects to the jurisdiction of his person, and maintains his objection in every pleading he may thereafter file in the case. Where he thus preserves his protest, he cannot be said to have waived his objection to the jurisdiction of his person.

Robinson v. Bossinger, 195 Ark. at 451, 112 S.W.2d at 640. Although these cases were decided long before the Arkansas Rules of Civil Procedure were adopted, the rules do not conflict with this long-standing case law.

We are not unmindful of *Farm Bureau Mut. Ins. Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993), in which our supreme court held that Farm Bureau had not waived its rights and entered its appearance because it had filed an answer. Farm Bureau had filed an answer in the case, but had specifically reserved the objection to the jurisdiction of the person and insufficiency of service of process in its original responsive pleading, its answer. In the case at bar, at no time during the pendency of the divorce action did Diane object to the jurisdiction of the person or court because of insufficiency of service of process, notwithstanding that she knew of its pendency and signed several documents obviously intended as pleadings in the case.

■ We agree with appellee that it is the law of Arkansas that one's mere knowledge of the pendency of a lawsuit does not validate defective service of process. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982). However, we do not find *Tucker* to be applicable to the case at bar. In *Tucker* the defendant had been served with process by the use of a summons form that was defective. Thereafter, the defendant took no action in the suit, and a default judgment was entered against him. The supreme court set aside the default judgment based on the defective form of the summons.

The dissenting opinion cites *Thompson v. Potlatch Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996), for the proposition that "a summons is necessary to satisfy due process requirements." This statement is, no doubt, an accurate statement of the law, but its applicability must be considered within the context of the *Thompson*

case. In that case, Thompson's attorney undertook to institute an action against Potlatch in chancery court by merely filing a complaint that contained a certificate of service signed by Thompson's attorney stating that he had hand-delivered a copy of the complaint to Potlatch's attorney. Twenty eight days later, Potlatch filed a motion to dismiss Thompson's complaint for failure to state facts upon which relief could be granted, and Thompson responded with a motion for default judgment, claiming that Potlatch had missed the twenty-day deadline for filing a responsive pleading. The chancellor denied Thompson's motion for default judgment on grounds that no complaint and summons were served on Potlatch or any person authorized to accept service for it.[1]

In affirming the chancellor, the supreme court held that a default judgment can not be entered upon defective service of process, stating that "since the appellants failed to issue an appropriate summons, the chancellor was correct in denying their motion to strike and motion for a default judgment." *Thompson,* 326 Ark. at 249, 930 S.W.2d at 358.

Obviously the issue in *Thompson* bears no similarity to the issue in the case at bar. The issue before us is whether the Washington County Chancery Court acquired jurisdiction over the person of Diane Raymond by her voluntary execution of the reconciliation agreement in the divorce case. In *Thompson*, Potlatch did not contend that it had not entered its appearance by filing a motion to dismiss. To the contrary, Potlatch obviously entered its appearance for the purpose of challenging the sufficiency of Thompson's complaint, and it did not question that the court acquired jurisdiction over it. The court obviously deemed itself to have jurisdiction over both Thompson and Potlatch when it heard their motions and entered its order denying Thompson's motion for default judgment. If anything, the *Thompson case* supports the principle that jurisdiction is acquired over a party who voluntarily enters his appearance in an action, even in the absence of service of process.

In the case at bar, Diane took a substantial step in the divorce suit against her by signing the reconciliation agreement, thereby

[1] The chancellor also held that the twenty-day deadline for filing responsive pleadings did not apply to foreign corporations doing business in Arkansas, but our supreme court found it unnecessary to consider that issue because of the lack of effective service of process.

delaying any further proceedings in the divorce action pending the attempted reconciliation. Unlike the defendant in *Farm Bureau Mutual Mut. Ins. Co. v. Campbell, supra,* Diane made no attempt to reserve an objection to the court's jurisdiction over her. Having knowingly entered her appearance without reserving her objection to the court's jurisdiction over her, she submitted herself to the jurisdiction of the court. The language in the reconciliation agreement is unequivocal; it was an agreement to delay the pending divorce case while the parties attempted a reconciliation. Unfortunately, the attempt failed, but that fact does not alter the effect of Diane's signature on the document.

Additionally, Diane signed a Waiver and Entry of Appearance, dated May 7, 1997, and it was filed of record on May 12, 1997. This is additional evidence that she was fully cognizant of the divorce action and that it was nearing a judgment. The execution of the Waiver and Entry of Appearance belies any argument on her part that she had not understood or known the purpose of the reconciliation agreement or that it was related to a pending divorce action against her. The documents in the record bearing the signature of Diane clearly establish that she had full knowledge of the pending divorce action, and her argument that she signed those documents without knowing a divorce had been filed is disingenuous.

For the reasons stated, we find the chancellor's action in refusing to set aside the divorce decree entered more than two years earlier was not clearly against the preponderance of the evidence.

Affirmed.

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

KOONCE and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent. Rule 4(a) of the Arkansas Rules of Civil Procedure prescribes that upon the filing of a complaint, the clerk "shall forthwith issue a summons and cause it to be delivered for service to a sheriff or to a person appointed by the court or authorized by law to serve process." Rule 4(b) provides that the summons "shall," among other things, "require the defendant to appear, file a pleading, and defend and shall notify him that in case of his failure to do so, judgment by

default may be entered against him for the relief demanded in the complaint." Rule 4(d), pertaining to personal service inside Arkansas, states that a copy of the summons and complaint "shall be served together." Rule 4(g) provides that the person effecting service "shall make proof thereof to the clerk within the time during which the person served must respond to the summons." And Rule 4(i) states:

> If service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion *or upon the court's initiative.* If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court *upon a showing of good cause.*

(Emphasis added.)

Appellee undisputedly failed to effect service within 120 days pursuant to Rule 4(i). No motion was made to extend the time for accomplishing service during the 120-day time period. Rather than endorse this end run of the rule of procedure aimed at protecting the due process rights of defendants to receive fair notice of pending litigation and their obligation to defend, I would reverse the trial court's decision granting summary judgment to appellee and remand so that summary judgment can be entered in favor of appellant to set aside the decree of divorce that was improperly issued. It has long been recognized in Arkansas that service of process requirements, being in derogation of common law rights, must be strictly construed and compliance with them must be exact. *See Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996). Our supreme court has held that under ARCP 4(i), dismissal of a case for failure to make service of summons is mandatory. *See Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 785 S.W.2d 220 (1990). Given this clear line of authority, I do not understand how the chancellor was authorized to enter a divorce decree where the record contains no evidence that summons had been served on appellant within 120 days from the date the complaint was filed.

Our supreme court has held that Rule 4(b) sets out the technical requirements of a summons, and that compliance with those requirements must be exact. *See Thompson v. Potlatch Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996). Although the appellee relies

upon appellant's signature and receipt of the reconciliation agreement, I find that reliance unsound. After all, the supreme court stated in *Thompson v. Potlatch, supra,* that a certificate of service is no substitute for a summons and that a summons is necessary to satisfy due process requirements.

The appellee argues that laches should prevent the appellant from asserting the divorce decree should be overturned; he also asserts that a decision reversing the chancellor and directing that the divorce decree be set aside would result in bigamatizing him because he remarried after the chancellor entered the divorce decree. That argument is unpersuasive. In the first place, appellant was represented by counsel at all relevant times. He filed for divorce from appellant on December 30, 1996, and knew that he was obligated to serve appellee with summons. He deliberately drafted the "reconciliation agreement" and obtained her signature to it on March 16, 1997, without serving the summons. The 120-day period for completing service ended on April 29, 1997. Although appellee had not moved to dismiss the complaint by May 8, 1997 (when the parties entered into a property settlement agreement), or on May 12, 1997 (when the divorce decree was entered), appellee is fairly charged with the knowledge that his complaint was supposed to be dismissed after April 29, 1997, either on appellee's motion or upon the trial court's initiative. He should be estopped to now argue that he was prejudiced by appellee's failure to challenge his total failure to comply with our due process requirements when he plainly never intended to meet them in the first instance. Reversing and remanding the summary judgment in appellee's favor would certainly complicate his domestic situation, but this is a complication brought on by his own machination.

Beyond that, I do not understand how we can read Rule 4(i) to allow the trial court to enter a decree of divorce in this case where the fact of the appellant's impaired condition was directly before the trial court. I take appellee's reliance on the "reconciliation agreement" and contention that appellant's execution of that agreement constituted a substantial act tantamount to an answer, consent to a continuance, or proceeding to trial, to mean that appellant's chemical dependency was before the trial court. After all, the chemical dependency was why appellee sought a divorce. Thus, I cannot conceive how appellee can be deemed to have clean hands so as to assert the equitable defense of laches when he

deliberately used appellant's impaired condition to deny her right to due process.

In addition, the policy ramifications of this decision are very troubling. If receipt of a "reconciliation agreement" after a divorce complaint has been filed but before summons has been served is an exception to the requirement that summons be served in order for a lawsuit to proceed, does that mean that mere receipt of the "reconciliation agreement" waives the defendant spouse's right to object to the jurisdiction of the chancery court? Is our decision applicable outside the context of divorce proceedings? Does our decision mean that a trial judge now has no duty "*upon the court's initiative*" to dismiss, without prejudice, an action where summons is not served upon a defendant within 120 days after the complaint is filed despite the plain language of a rule prescribed by our supreme court to that effect? If due process requires that summons be served upon a defendant and Rule 4(i) prescribes that failure to serve that summons within 120 days mandates that "*the action shall be dismissed as to that defendant...*," how is due process satisfied where summons is not served and the action is not dismissed?

The result reached today has far-reaching and profoundly troublesome implications. I do not think it is judicially sound, fair, or wise. Therefore, I respectfully dissent. Judge KOONCE has authorized me to state that he joins this opinion.

Carol STEVESON *v.* FROLIC FOOTWEAR and Travelers

CA 99-895 20 S.W.3d 413

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 7, 2000

Riffel and King, by: *V. James King, Jr.*, for appellant.

No response.

K. MAX KOONCE, II, Judge. This is an appeal from the Arkansas Workers' Compensation Commission. Appellant sought medical benefits for treatment of carpal tunnel syndrome and de Quervain's tenosynovitis. The Commission reversed the decision of the administrative law judge and held that appellant's injury was not compensable because she had failed to prove that her carpal tunnel syndrome was the major cause of the need for treatment and because there were no objective findings in the record to support the diagnosis of de Quervain's tenosynovitis. We affirm in part and reverse and remand in part.

Appellant began working for Frolic Footwear in 1996. For her first year at Frolic, appellant performed the job of "cement[ing] vamps and quarters of shoes together." She developed problems in her forearm, which the company nurse treated with an ace bandage. That problem disappeared. Appellant was transferred to a new position after approximately a year. At her new position, appellant "used a hot glue gun to glue the insole to" house shoes on a "woodpecker beater" machine. After about two weeks on the woodpecker beater, appellant began experiencing problems with her right hand. She informed her employer and kept working. Her supervisor told her that she just needed to get used to her new job. Appellant described the difficulties as cramping in her right hand similar to a charley horse, popping in her wrist when rotated, and sometimes feeling as if she had hit her funny bone. The symptoms continued to worsen and she eventually sought treatment. The company doctor placed appellant on steroids, but once

she was taken off the steroids, her condition returned. Appellant went to her family doctor, Dr. Barré, and was later sent to Dr. Mahon by the Commission for an independent medical examination. Appellant sought no further treatment for her hand stating she could not afford it.

In a prehearing conference, the parties stipulated to the employer/employee relationship and agreed that the only issue to be litigated was "compensability regarding a carpal tunnel syndrome caused by rapid and repetitive motion." Only two medical reports were introduced into evidence and no medical testimony was offered.

The report of Dr. Hal S. Barré stated that he saw appellant on July 21, 1997, complaining of pain in her right hand and wrist. Appellant informed Dr. Barré that she had undergone a nerve conduction study, which she claimed revealed carpal tunnel syndrome. The nerve conduction study was not entered into evidence and Dr. Barré made no independent diagnosis of carpal tunnel syndrome. Dr. Barré did note that appellant had a painful wrist, a positive Finkelstein test, and tendonitis at the base of her thumb. He refused to speculate as to whether the injury was work related because he was not Frolic's workers' compensation physician and had not initially seen appellant on the matter. Although appellant's abstract of Dr. Barré's report indicates his belief that her wrist condition appeared to have been caused by and continued to be caused by her present job, this is a misstatement. Dr. Barré actually refused to speculate as to whether the injury was work related. He simply agreed to do appellant a favor and write a note to Frolic requesting that appellant be transferred to her previous position.

The second medical report entered into evidence was a letter by Dr. Mahon noting that appellant was seen in his office on July 29, 1997, for an independent medical evaluation. She complained of a painful "pop" of the right wrist with certain motions, a "strained" feeling of the right forearm, and a tingling and stinging sensation of the wrist and hand. She also complained of her right hand and forearm "going to sleep." Dr. Mahon described previous treatment which appellant had received in regard to this complaint. First, he noted that Dr. Carpenter described a swelling with a feeling of hardness in appellant's right hand on April 15. Second, he noted that appellant was given EMG/NCV studies on May 19. Appellant informed Dr. Mahon that Dr. Kumar diagnosed her with carpal tunnel syndrome based upon the EMG/NCV. However, no

records or reports by Dr. Carpenter or Dr. Kumar were introduced into evidence at the hearing.

Dr. Mahon performed various tests on appellant and reviewed the studies conducted by Dr. Kumar. These led him to a dual diagnosis: de Quervain's tenosynovitis and carpal tunnel syndrome. Specifically, Dr. Mahon stated:

> Although some of Ms. Steveson's symptoms are compatible with carpal tunnel syndrome and mild electrical changes have confirmed that, her primary complaint in my office was in regard to the thumb and the first ray, with symptoms compatible with de Quervain's tenosynovitis.

The carpal tunnel syndrome was substantiated by the electromyogram; however, the tenosynovitis was supported only by the complaints of the appellant and subjective tests done by Dr. Mahon in his office. Dr. Mahon recommended cortisone injections of both the carpal tunnel and the dorsal area. The administrative law judge granted compensation for appellant's injuries. The Commission reversed, holding that appellant failed to prove that the carpal tunnel syndrome was the major cause of the need for treatment and that there were no objective findings in the record to support the diagnosis of de Quervain's tenosynovitis.

For reversal, appellant argues that she should not be punished for the failure to provide additional objective medical evidence when the purpose of the hearing is to determine her eligibility to receive funds to obtain that medical evidence. She also argues that the Commission erred in finding that her carpal tunnel syndrome is not the major cause of her need for treatment.

In order to receive benefits for appellant's alleged cumulative trauma injury of de Quervain's tenosynovitis, appellant must satisfy all of the following requirements: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of her employment; (2) proof by a preponderance of the evidence that the injury caused external or internal physical harm to the body; (3) medical evidence supported by objective findings as defined in Ark. Code. Ann. § 11-9-102(16); (4) proof by a preponderance of the evidence that the injury was caused by rapid repetitive motion; and (5) proof by a preponderance of the evidence that the injury was the major cause of disability or need for treatment. *Lay v. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997). We affirm that part of the Commission's decision holding that there

were no objective findings in the record to support the diagnosis of de Quervain's tenosynovitis as required by Ark. Code. Ann. § 11-9-102(5)(A)(ii)(a), thereby denying claimant's entitlement to benefits for this diagnosis.

For appellant's alleged cumulative trauma injury diagnosed as carpal tunnel syndrome, appellant must again establish the above requirements except for rapid repetitive motion, which is construed to be present with a diagnosis of carpal tunnel syndrome. *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998). The Commission erred in finding that appellant's carpal tunnel syndrome was not the major cause of her need for treatment. The carpal tunnel injury was not only the major cause, but the only cause of appellant's need for treatment for *carpal tunnel syndrome.* The fact that she also has a de Quervain's injury that is not compensable does not affect the compensability of her carpal tunnel syndrome. As we stated in *Tyson Foods, Inc. v. Griffin*, 61 Ark. App. 222, 966 S.W.2d 914 (1998), in affirming the Commission's award of benefits for carpal tunnel syndrome and aggravation of a claimant's arthritis and denial of benefits for tendinitis,

> We do not view Arkansas Code Annotated section 11-9-102(5)(E)(ii)(Supp. 1997), as precluding a finding that separate injuries or conditions that occur simultaneously or near in time to each other can be compensable. This is true even though the statute requires that both compensable injuries or conditions are the major cause of the disability or need for treatment. Neither does the fact that injuries are located in the same body member, as here, act to disqualify an award of benefits when a claimant meets the statutory requirements of the need for treatment.

Tyson Foods, Inc., 61 Ark. at 230, 966 S.W.2d at 918. Nonetheless, we must still remand this case to the Commission for further proceedings. In denying benefits to appellant, the Commission did not reach the issue of whether her carpal tunnel syndrome was causally related to her employment. We therefore reverse and remand to the Commission to determine whether appellant's carpal tunnel syndrome arose out of and in the course of her employment with the appellee.

Affirmed in part; reversed and remanded in part.

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

STROUD and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse the Commission and remand the case as to the de Quervain's tenosynovitis condition, and would order that Steveson be paid compensation benefits for carpal tunnel syndrome as well. Medical exams confirm that Steveson has what the Commission described as a mild case of carpal tunnel syndrome. However, the Commission held that it was Steveson's complaints about the thumb and "first ray" of her right hand, which Dr. Larry Mahon diagnosed as de Quervain's tenosynovitis, which is responsible for her disability and need for medical treatment. The Commission purportedly relied on Dr. Mahon's opinion regarding the de Quervain's tenosynovitis in finding that condition to constitute the major cause of Steveson's need for treatment, but denied her benefits to treat her carpal tunnel syndrome condition after finding that she failed to prove that it was work-related. Yet it refused to award benefits for the de Quervain's tenosynovitis condition based on a finding that the record lacked objective findings to prove that condition to be compensable.

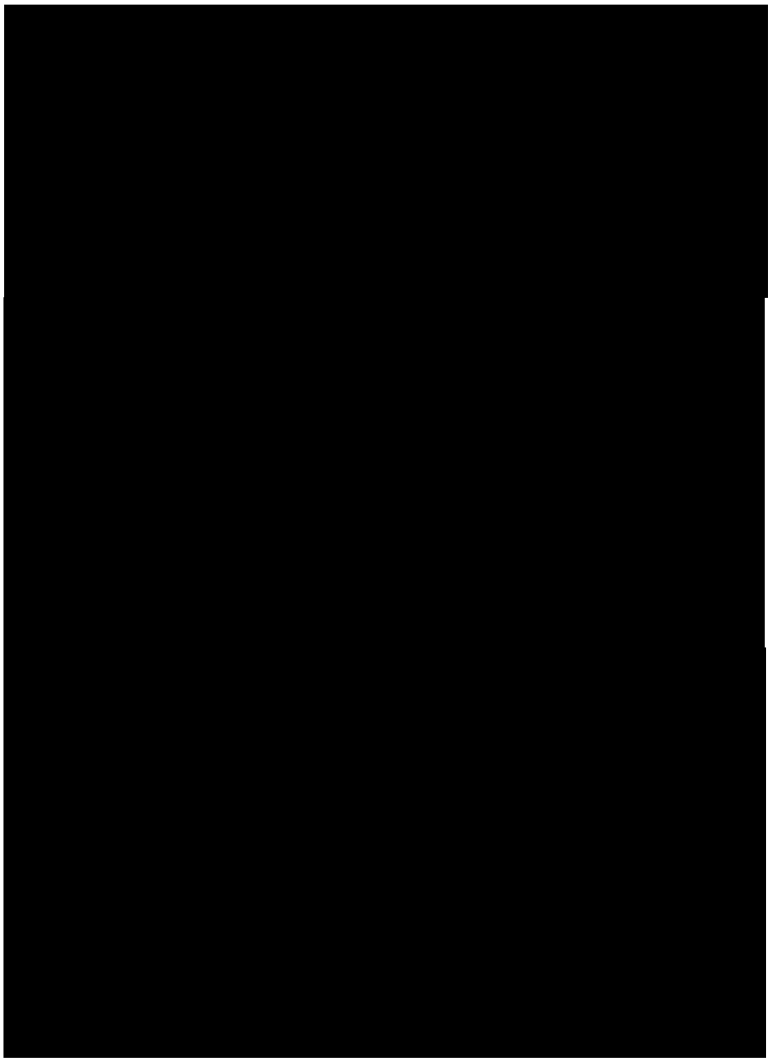
The Commission's analysis is as self-contradictory regarding the carpal tunnel syndrome condition as it is concerning the de Quervain's tenosynovitis. Dr. Mahon flatly opined that Steveson's job duties were the cause of her de Quervain's tenosynovitis which he also related to the carpal tunnel syndrome. Addressing the causation issue, Dr. Mahon indicated: "It would appear ... that the job on which [Steveson] was placed in March 1997 involved a great deal of pulling on shoe material to stretch it, was the cause of her present difficulty." There is no different opinion in the record to contradict this assessment. Given this reality, I would reverse and remand with directions to the Commission to pay Steveson benefits for both deQuervain's tenosynovitis and carpal tunnel syndrome.

I am authorized to state that Judge STROUD joins this opinion.

Rebecca B. GUEST *v.* Gerry S. SAN PEDRO

CA 99-1001 19 S.W.3d 62

Court of Appeals of Arkansas
Division I
Opinion delivered June 7, 2000



David R. Hogue, for appellant.

Gregory E. Bryant, for appellee.

JOHN F. STROUD, JR. Judge. Rebecca B. Guest appeals a March 31, 1999, order of the Pulaski County Chancery Court that modified the child-support obligation of appellee, Gerry S. San Pedro, and granted him specific visitation. An order of September 26, 1995, reveals that the parties had agreed to entry of the following: appellee admitted paternity of a male child born to appellant on May 17, 1995; appellant was awarded custody, subject to reasonable visitation by appellee; appellee was to pay monthly child support of $737.50; and appellee, by April 15 of each year, was to furnish appellant proof of his income for the preceding year. The March 1999 order was issued after a hearing on a motion by appellant for increased child support and a motion by appellee for specific visitation. Appellant's motion was based in part upon the changed circumstance that appellee was earning more money than at the time of the initial agreement.

Although granting an increase in child support, the chancery court deviated downward from the amount set forth by Administrative Order No. 10—Arkansas Child Support Guidelines upon finding that appellee had overcome the rebuttable presumption and that the chart amount in the guidelines was inappropriate under the facts of this case. The court set appellee's monthly child-support obligation at $970.75, granted appellee eight weeks of summer visitation, abated child support during the eight weeks, and prorated ten months of child support over a twelve-month period. Appellant raises two points on appeal: that the court's decision fails to comply with Section I of Administrative Order No. 10, and that it violates Section VI of the order. For the reasons set forth below, we affirm as modified.

Under the first point, appellant argues that the chancery order does not comply with Section I of Administrative Order No. 10 in that it fails to mention the child's best interest, appellee's income, or

the amount of child support that would be required by the family-support chart. These three requirements are addressed by our statutes and case law as well as by administrative order.

Section I of Administrative Order No. 10 sets forth the rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the family-support chart, promulgated by the Arkansas Supreme Court, is the amount of child support to be awarded in a judicial proceeding for child support. Although the amount of child support a chancery court awards lies within the sound discretion of the chancellor and will not be disturbed on appeal absent an abuse of discretion, reference to the family-support chart is mandatory. *Schumacher v. Schumaher*, 66 Ark. App. 9, 986 S.W.2d 883 (1999); *see* Ark. Code Ann. § 19-14-106(a)(1)(A) (Repl. 1998). The most recent revision of the child-support chart is found at *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. 581, 582 (1998). Section I addresses the rebuttable presumption created by the chart:

> The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support.
>
> 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. Findings that rebut the guidelines shall state the payor's income, recite the amount of support required under the guidelines, recite whether or not the Court deviated from the Family Support Chart and include a justification of why the order varies from the guidelines as may be permitted under SECTION V. . . .

Id. at 582.

Section V, to which Section I directs us, is entitled "deviation considerations" and sets forth two lists of factors. There are twelve relevant factors to be considered in determining appropriate amounts of child support, and there are seven additional factors that may warrant adjustments to the support obligations. Relevant factors *shall include* food, shelter and utilities, clothing, medical expenses, educational expenses, dental expenses, child care,

accustomed standard of living, recreation, insurance, transportation expenses, and *other income or assets available to support the child.* 331 Ark. at 585-86 (emphasis added). Additional factors that may warrant adjustments to child-support obligations include *the support required and given by a payor for dependent children, even in the absence of a court order.* 331 Ark. at 586 (emphasis added).

Arkansas Code Ann. § 9-12-312(a)(2) (Supp. 1999) also sets forth guidelines to be followed in setting the amount of child support:

> In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. *Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall the presumption be rebutted.*

(Emphasis added.)

In the present case, a letter opinion supporting the March 1999 order includes the language of section 9-12-312(a)(2) as well as language from Section V of Administrative Order Number 10. The letter includes a finding that a change of circumstances had occurred, but that the chart amount would be unjust considering appellee's finances and all his dependents. Calculation of the original child support and the increased amount was addressed as follows:

> In the September [26], 1995 order, child support was set at $737.50 per month by agreement of the parties. Both parties were represented by different attorneys than current counsel. After reviewing the record and the settlement offered, this Court could not establish how the parties had arrived at the figure of $737.50 per month. A financial affidavit prepared by the defendant and signed on June 29, 1995 indicated a weekly take home pay of $1405.44. If that figure had been used in 1995, the chart amount would have been $906.23 per month. Both parties were given time to supplement the record to present testimony as to how the figure of $737.50 was established. However no evidence was presented.

> The plaintiff's argument as to a change in circumstances is that defendant is now earning more money. The defendant, Dr. Gerry San Pedro, moved from Little Rock and is now employed by the Louisiana Medical Center in Shreveport, Louisiana. The testimony of the defendant, his affidavit of financial means and his previous tax returns indicate an average weekly take home income of $1811.04 as compared to $1,405.44 in 1995. The sum of $1,811.04 weekly would place the child support amount at $271.65 per week or $1,168.00 per month according to the child support chart.

Appellant argues that neither the March 1999 order nor the letter opinion states appellee's income or the amount required by the chart; that although the letter opinion seems to recognize the best interests of appellee's other four children, the March 1999 order fails to mention the best interest of the child whose best interest was before the court; and that the record "just barely" supports the reasons given in the letter opinion that the amount would be unjust. Recognizing that the judge's letter opinion is drafted by the judge, whereas the order is usually drafted by the prevailing attorney,[1] we hold that in this case the letter opinion and the order can both be considered by this court.

Here, the letter opinion states that "[appellee's] affidavit of financial means and his previous tax returns indicate an average weekly take home income of $1,811.04," and that the chart amount for this pay is $271.65 weekly or $1,168.00 monthly; it concludes with a finding that the child-support amount was unjust considering appellee's finances and all his dependents, and it notes that the newly-set amount of $970.75 is a monthly increase of $323.25. This increased amount clearly was awarded in the child's best interest, as was further shown by the chancellor's careful questioning of the parties, her recitation of the administrative order and relevant statutes, and her review of case law. We think the chancellor exhibited thorough knowledge of the requirements of the applicable rule and statute, and we will not require use of the words "best interest of the child" when it is obvious to us that the chancellor considered the child's best interest in finding the guidelines to be unjust as applied to the facts of this case. *Cf. Fitzgerald v. Fitzgerald*, 63 Ark. App. 254, 976 S.W.2d 956 (1998) (reversing and

[1] Counsel for appellee acknowledges in his brief that "the better approach would have been to re-write the chancellor's letter opinion."

remanding custody determination where neither the letter opinion, the order, nor the chancellor's comments from the bench included a finding of what was in the child's best interest). The fact that the chancellor mentioned some, but not all factors that are to be considered, reflects that those mentioned were out of the ordinary and were central to the pivotal issue, which was appellee's ability to pay as a circumstance that had changed since entry of the earlier order. Finally, regarding the "unjustness" of the chart amount, it is clearly permissible to consider financial obligations of the payor spouse, including support of other children. *Department of Human Services v. Forte*, 46 Ark. App. 115, 877 S.W.2d 949 (1994); Administrative Order No. 10—Arkansas Child Support Guidelines, Section V.

Appellant's second point of appeal is that the court violated Section VI of Administrative Order No. 10. This section states in part:

> Excluding weekend visitation with the custodial parent, in those situations where a child spends in excess of 14 consecutive days with the noncustodial parent, the court should consider whether an adjustment in child support is appropriate. . . .*Any partial abatement or reduction of child support should not exceed 50% of the child-support obligation during the extended visitation period of more than 14 consecutive days.*

581 Ark. at 331 (emphasis added). Appellant contends that total abatement of child support during appellee's eight weeks of summer visitation is prohibited under Section VI. She requests this court to modify the chancery order and to provide for no more than a 50% abatement.

The interpretation of this section, which appears to be a question of first impression, turns upon the meaning of the word "should" in the phrase "[a]ny partial abatement or reduction of child support should not exceed 50% of the child-support obligation during the extended visitation period." In *Little v. State*, 261 Ark. 859, 554 S.W.2d 312 (1977), the supreme court ruled that the trial court, giving an instruction on circumstantial evidence, had not misled the jury by using the word "should" instead of "must" in stating that circumstances should point to and be consistent with guilt but should be inconsistent with any other reasonable hypothesis. The *Little* court opined that use of the word "must" would have been preferable to the use of "should," but the court noted that the

words are often synonymous. 261 Ark. at 884, 554 S.W.2d at 324, citing Rodale, *The Synonym Finder* 780 (Special Deluxe Ed.).

Similarly, we hold that the word "should" is equivalent to the word "must" as used in the phrase "any partial abatement or reduction of child support should not exceed 50% of the child-support obligation during the extended visitation period." We hold that the 50% limitation in Administrative Order No. 10 is mandatory: abatement or reduction of child support during an extended visitation period cannot exceed 50% of the child-support obligation during the extended visitation period.

The chancery court erred in abating the child support entirely for the eight-week period of summer visitation. Accordingly, we modify the abatement of child support for the period of summer visitation by setting it at 50%. The court may continue to prorate the child-support payments over a twelve-month year. We remand for entry of an order in keeping with this directive.

Affirmed as modified, and remanded.

JENNINGS and GRIFFEN, JJ., agree.

Harvey JONES *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 99-1015 19 S.W.3d 58

Court of Appeals of Arkansas
Division III
Opinion delivered June 7, 2000
[Petition for rehearing denied July 5, 2000.]

[redacted]

Sullivan Law Firm, P.L.L.C., by: *Kelly J. Adkins*, for appellant.

Kathy L. Hall, for appellee.

Merry Alice Hesselbein, attorney *ad litem* for the minor child.

ANDREE LAYTON ROAF Judge. Harvey Jones, who is incarcerated at the Calico Rock Unit of the Arkansas Department of Correction, is the putative father of three-and-a-half-year-old R.J. Jones appeals from an order of the Pulaski County Chancery Court terminating his parental rights to R.J., arguing that the evidence is insufficient to support the termination order. We affirm.

R.J. was born on November 1, 1996. Her mother, Torshanda Stephenson, was seventeen years old when R.J. was born. Stephenson, along with a different child who is not involved in this appeal, had been declared dependent/neglected on January 5, 1996. Stephenson, however, disrupted her foster-care placement and was a runaway until August 16, 1996, and again from September 9, 1996, to October 23, 1996, when she was admitted to a hospital for observation. Upon her discharge two days later, she was again ordered into foster care; however, she walked away from her caseworker when the worker stopped to fill some prescriptions for her. On December 6, 1996, appellee Arkansas Department of Human Services (DHS) obtained an *ex parte* order to take R.J. into custody.

Stephenson attended the December 13, 1996, emergency hearing on the dependency-neglect petition, however, Jones did not appear. At the January 17, 1997, adjudication hearing, however, Jones did appear, represented by counsel. Jones testified that he had three felony convictions, two for aggravated robbery and one for assault and battery on another inmate while he was in prison.

According to Jones, he served twelve-and-a-half years of his thirty-year sentence for his second aggravated robbery conviction before being released on parole. He got married soon after his release, but was separated and a divorce was pending. He admitted that he moved in with Stephenson after he separated from his wife, but before filing for divorce. He also admitted that he met and impregnated Stephenson when she was only sixteen years old and that he was thirty-one at the time, but claimed that Stephenson told him she was nineteen. Jones also stated that he was a certified nursing assistant and was working approximately two days per week at a nursing home on an as-needed basis. Although R.J. was continued in DHS custody, Jones was allowed supervised visitation at DHS's offices. It was noted that Jones signed the birth certificate, and he was ordered to pursue paternity.

At the first review hearing on May 19, 1997, Jones and Stephenson seemed to be making progress on the case plan, however, Jones had still not established paternity and was once again ordered to do so. Although R.J. continued in DHS custody, the goal of reunification was affirmed. At a September 22, 1997, review hearing, however, it was brought to the court's attention that Jones had been incarcerated. At the first of two permanency placement hearings on January 16, 1998, Jones testified that his parole was revoked on July 25, 1997, because he was involved in a hit-and-run accident. Nonetheless, he expected to be released in May. The hearing was continued to July 13, 1998, and it was learned that Jones had not been released. At that time, DHS recommended termination of parental rights of both Stephenson and Jones.

At a December 7, 1998, hearing on the termination petition, adoption specialist Brenda Keith testified that R.J. was adoptable and that there were nineteen families on the adoption list that matched the characteristics needed for the child. Most of the other testimony concerned Stephenson's failure to follow the case plan and inability to provide for the needs of R.J. Almost all of the evidence concerning Jones came from his own testimony. He stated that he was unsure as to how long it would be before he was eligible for parole, but stated that his release date was 2007. Jones admitted that he had five major disciplinary write-ups during his current term of imprisonment and was currently in Class 4 status due to these infractions, meaning that he could not receive visitors, send or receive letters, or use a telephone. Nonetheless, he claimed that his

poor disciplinary record would not imperil his chances for parole. Jones also admitted that he never took any steps to establish paternity.

After the hearing, the trial court terminated the parental rights of both Stephenson and Jones. The court noted that while Jones claimed that he would be eligible for release in 2007, the "usual practice" was to require that he serve the balance of his sentence, which was scheduled to run until at least 2012. It also noted that Jones had failed to take steps to establish his paternity, that he had used "extremely poor judgment" in his relationship with Stephenson, that Jones had a history of violating the law, and given his history, there was no indication that after his release Jones would not "reoffend and be re-incarcerated." As a basis for termination, the court found that Jones had been sentenced in a criminal proceeding for a period of time that would constitute a substantial period of R.J.'s life and that the child's need for permanency and stability weighed in favor of termination.

On appeal, Jones argues that the trial court erred in finding that there was sufficient evidence to terminate his parental rights to his minor child, citing *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992), for the proposition that termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. He concedes that he only lived with R.J. for a few months before she was taken into DHS custody, but he asserts that he bonded with the child and "he had every intention of taking care of his family," as shown by the fact that he continued to live with Stephenson until he was incarcerated. Further, he contends that even if it cannot be found that he had significant contact with R.J., he wanted to establish paternity before he was reincarcerated. He claims that the allegations of neglect were directed at Stephenson, not him, and DHS failed to determine whether he would be a suitable father. Furthermore, he argues that he complied with the court orders "for the most part" and visited R.J. when he was not working or incarcerated. Citing *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984), he contends that his failure to support and visit R.J. after he was sent to prison should not count against him. Jones blames DHS for not helping him arrange visitation, and he asserts that he could not call, have visitors, or send and receive personal mail because he was in Class 4 prisoner status. Finally, he claims that he was sentenced to an amount of time that does not reach the

"substantial" period required by Ark. Code Ann. § 9-27-341 (Repl.1998), when a parent is incarcerated. This argument is without merit.

■ ■ Under Arkansas Code Annotated § 9-27-341 (Repl. 1998), termination of parental rights is permissible if there is an "appropriate permanency placement plan for the juvenile," and the trial court finds by clear and convincing evidence:

> (1) That it is in the best interest of the juvenile, including consideration of the following factors:
>
> (A) The likelihood that the juvenile will be adopted if the termination petition is granted, and
>
> (B) The potential harm caused by continuing contact with the parent, parents, or putative parent;
>
> (2) Of one (1) or more of the following grounds:
>
> . . .
>
> (B) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile. To find willful failure to maintain meaningful contact, it must be shown that the parent was not prevented from visiting or having contact with the juvenile by the juvenile's custodian or any other person, taking into consideration the distance of the juvenile's placement from the parent's home. Material support consists of either financial contributions or food, shelter, clothing, or other necessities where such contribution has been requested by the juvenile's custodian or ordered by a court of competent jurisdiction. It is not necessary that the twelve-month period referenced in this subdivision (b)(2)(B) immediately precede the filing of the petition for termination of parental rights, or that it be for twelve (12) consecutive months;
>
> . . .
>
> (H)(i) The parent is sentenced in a criminal proceeding for a period of time which would constitute a substantial period of the juvenile's life and the conditions in subdivision (b)(2)(A) or (B)) of this section have also been established.

> (ii) For purposes of this subsection, "substantial period" means a sentence, and not time actually served, of no less than fifteen (15) years, none of which has been suspended;

The stated intent of Arkansas Code Annotated § 9-27-341 is "to provide permanency in a juvenile's life in all instances where return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and it appears from the evidence that return to the family home cannot be accomplished in a reasonable period of time." When the burden of proving a disputed fact in chancery court is by clear and convincing evidence, the inquiry on appeal is whether the chancery court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *Anderson v. Douglas, supra.* Clear and convincing evidence is defined as "that degree of proof which will produce in the fact finder a firm conviction as to the allegation sought to be established." *Id.* In making such determination, we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.*

Contrary to Jones's assertions, he did not maintain meaningful contact with R.J. First, R.J. lived with him and Stephenson for only a month before one-month-old R.J. was taken into DHS custody on December 6, 1996. Less than eight months later, his parole was revoked and his contact with R.J. ceased. While he was incarcerated, contact still would have been possible had he not engaged in activities that resulted in his loss of privileges. Furthermore, by virtue of his parole revocation, he was effectively "sentenced" to the remainder of his thirty-year sentence and either has a new fifteen-and-a-half-year sentence or has been "sentenced" to thirty years, of which he has already served fourteen and a half years. Arkansas Code Annotated § 9-27-341(2)(H)(ii) requires only that the sentence exceed fifteen years, not that fifteen years actually be served. Accordingly, we affirm the trial court's termination of Jones's parental rights.

Affirmed.

CRABTREE and KOONCE, JJ., agree.

Virginia H. OLIVER v. Thomas E. OLIVER

CA 99-862 19 S.W.3d 630

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 21, 2000
[Petition for rehearing denied July 26, 2000.*]

* ROBBINS, C.J., and ROAF, J., would grant.

Linda D. Shepherd, P.A., by: *Linda D. Shepherd* and *Allison R. Wooten*, for appellant.

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

K. MAX KOONCE, II Judge. This is an appeal from the chancery court's order refusing to require appellee to pay appellant any portion of the pass-through dividends or other earnings accrued in appellee's 401K plan subsequent to the divorce decree and prior to the division of the plan by the Qualified Domestic Relations Order. We affirm.

Appellant, Virginia H. Oliver, and appellee, Thomas E. Oliver, were divorced pursuant to a divorce decree entered on July 23, 1997. The divorce decree and property-settlement agreement provided for the division of several retirement and pension plans. Appellee, an employee of Entergy, participated in the Employee Stock Ownership Plan, Employee Stock Investment Plan ("ESIP"), Savings Plan of Entergy Corporation ("401K plan"), and the Entergy Corporation Retirement Plan. Appellant participated in the TIAA-CREF Retirement Plan. The parties agreed to equally divide the value of the plans as of the date of the divorce decree and property-settlement agreement by means of a Qualified Domestic Relations Order ("QDRO").

The QDROs were not filed of record until November 5, 1998, over one year after the divorce decree was entered. During this time, appellee received pass-through dividends from his 401K plan in June, September, and December 1997. Although the prop-

erty-settlement agreement specifically addresses pass-through dividends of the 401K plan received by appellee while the divorce was pending but prior to the entry of the divorce decree, the agreement does not address pass-through dividends received after entry of the decree but prior to the division pursuant to the QDROs. The property-settlement agreement does address stock dividends received from the ESIP after the date of the decree but before the stock was divided.

Appellant paid taxes in 1997, on one-half of the pass-through dividends paid to appellee between the entry of the decree and the division of the 401K plan pursuant to the QDRO. Appellant contends she paid the taxes based on appellee's oral and written acknowledgments of liability to appellant for the dividends. After appellant paid the taxes, appellee informed appellant that she was not entitled to the dividends pursuant to the property-settlement agreement.

On May 28, 1999, appellant filed a motion for contempt requesting, *inter alia*, that the court order appellee to pay her one half of the pass-through dividends or other earnings from the 401K plan prior to the division of the plan pursuant to the QDRO. After a hearing on the motion, the court entered an order refusing to compel appellee to pay appellant any portion of the pass-through dividends or other earnings from the 410K plan pursuant to the provisions of the property-settlement agreement. The court found that the language of the property-settlement agreement was unambiguous and did not require appellee to pay appellant any portion of the pass-through dividends or other earnings from the 401K plan subsequent to the date of the divorce decree but prior to division. This appeal arises from that portion of the court's order.

The standards governing our review of a chancery court decision are well established. Although we review 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). 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). However, we do not defer to a chancery court's conclusion on a question of law. *City of Lowell v. M & N Mobile Home Park,* Inc, 323 Ark. 332, 916 S.W.2d 95 (1996). If the chancery court erroneously applied the law and the appellant suffered prejudice as a result, we will reverse the chancery court's erroneous ruling on the legal issue. *Id.*

In the present case, appellant contends the trial court clearly erred in finding the provision of the property-settlement agreement pertaining to the 401K plan unambiguous and refusing to consider parol evidence as to the parties' intentions with respect to the pass-through dividends. The provision at issue is as follows:

> (19) That Husband stipulates and agrees that during the pendency of this action Husband has received dividend "pass-through" from Husband's 401K plan in the separate amounts of $1,199.75 and $1,202.03. Husband covenants and agrees that upon entry of this decree and property settlement agreement, Husband shall pay to Wife the cash sum of $1,200.89 representing Wife's one-half of the[] dividend "pass-through" received by Husband. Husband covenants and agrees that Husband shall furnish an authorization allowing Wife or her attorney to verify all 401K Plan activity, including but not limited to inquiry concerning loans and/or dividends. This authorization shall expire 30 days from its issuance.

Appellant contends that the above provision is ambiguous and susceptible to more than one interpretation. She argues that this provision is latently ambiguous because the only dividend checks addressed are the ones appellee received between the filing of the divorce action and the date of the decree. However, one provision of the property-settlement agreement does address dividends received after the divorce decree but prior to division of the stock. This provision is as follows:

> (18) That Husband stipulates that during the pendency of this action Husband has received "ESIP" stock dividends in the amount of $90.00. Husband covenants and agrees that upon entry of this decree and property settlement agreement, Husband shall pay to Wife the cash sum of $45.00 representing Wife's one-half of dividends. That until such time as the ESIP stock is divided pursuant to his property settlement agreement, Husband shall

divide equally with Wife any dividends he may receive prior to division of this stock with Wife.

When a contract is unambiguous, its construction is a question of law for the court, and the intent of the parties is not relevant. *Kennedy v. Kennedy*, 53 Ark. App. 22, 918 S.W.2d 197 (1996). Where a contract is ambiguous, parol evidence may be introduced to assist the fact finder to determine the intent of parties to a contract. *Minerva Enterprises, Inc. v. Bituminous Casualty Corp.*, 312 Ark. 128, 851 S.W.2d 403 (1993). An ambiguity can be patent or latent. *Norman v. Norman*, 333 Ark. 644, 970 S.W.2d 270 (1998). A latent ambiguity arises when the contract on its face appears clear and unambiguous, but collateral facts exist that make the contract's meaning uncertain. *Id.* A latent ambiguity may be one in which the description of the property is clear upon the face of the instrument, but it turns out that there is more than one estate to which the description applies; or it may be one where the property is imperfectly or in some respects erroneously described, so as not to refer with precision to any particular object. *Williams v. Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982). Parol evidence is admissible not only to bring out the latent ambiguity but also to explain the true intention of the parties. *Id.*

We find that provision (19) of the divorce decree and property-settlement agreement is unambiguous, containing no patent or latent ambiguity. The divorce decree and property-settlement agreement explicitly provided that the appellee's retirement plans, including the 401k plan, "shall be divided equally as of the date of the decree." Provision (19) does not address the pass-through dividends received after the date of the decree but prior to the division pursuant to the QDRO. Provision (18) addresses stock dividends of the ESIP received after the settlement agreement but prior to the division, although no other provisions for post-decree dividends were made in the decree. If the parties had intended to divide the pass-though dividends of the 401K plan received after the decree but prior to the division pursuant to the QDRO, such a provision could have been provided as was the case for the ESIP dividends. Because the divorce decree and property-settlement agreement contains no ambiguity, parol evidence was inadmissible. Therefore, we affirm.

Affirmed.

BIRD, CRABTREE, and MEADS, JJ., agree.

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

ANDREE LAYTON ROAF Judge, dissenting. I would reverse and remand this case with instructions that the trial court divide appellee Thomas Oliver's 401k retirement plan as provided by the clear and explicit language in paragraph nine of the parties' property settlement agreement, that this plan be divided "equally as of the date of the divorce."

The chancellor found that the language of the property-settlement agreement is unambiguous. If that be the case, equally means equally, and to allow the appellee to retain all of the earnings and dividends accrued to the plan between the July 1997 date of the divorce decree and the entry of the Qualified Domestic Relations Order (QDRO) some sixteen months later does not provide for equal division. It is illogical to employ the language found in a separate provision dealing with interim division of profits from stocks to interpret the clear directives in paragraph nine. Moreover, the QDRO is simply the mechanism that allows retirement-plan administrators to implement court-ordered division of retirement plans, and is in no way analogous to a one-time division of stocks.

Conversely, if the absence of specific language in the settlement agreement providing for division of the retirement-plan earnings pending the entry of the QDRO creates a latent ambiguity, parol testimony about the intent of the parties should therefore be admissible. *See Dodson v. Dodson,* 37 Ark. App. 86, 825 S.W.2d 608 (1992). This testimony clearly established that appellee understood that he was supposed to pay one-half of the accrued 401k dividends to appellant, agreed to do so in writing, advised her to pay income taxes on her one-half share, and then reneged on his agreement after his attorney suggested that the decree did not specifically require him to share this money.

The appellant is entitled to one-half of the profits earned by the retirement plan after the date of the divorce decree, no matter how you cut it. I would reverse and remand.

ROBBINS, C.J., joins.

Don ACORD *v.* Elbridge A.J. ACORD and Merle Acord

CA 99-1145 19 S.W.3d 644

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 21, 2000

Woolsey & Wilson, by: *Bruce R. Wilson*, for appellant.

Len W. Bradley, for appellees.

WENDELL L. GRIFFEN, Judge. Don Acord appeals the judgment of the Johnson County Chancery Court in which the court found that Mark Acord had a life tenancy in certain real property located in Johnson County and that appellant had a remainder interest in the property. The judgment also awarded appellee Merle Acord $41,433.28 as reimbursement for monies spent to improve and pay property taxes on the property

that her deceased husband, appellee Elbridge Acord, held in joint life tenancy with Mark Acord. For appeal, appellant argues that the chancellor erroneously awarded appellee the value of the improvements she made as a life tenant and property taxes that were paid. Also appellant contends that the chancellor erred in applying the betterment statute. We hold that the chancellor's award to appellee for reimbursement of taxes and the value of improvements was clearly erroneous. Therefore, we reverse and remand for entry of an order consistent with our decision.

Facts and Procedural History

On May 17, 1986, Joe Acord conveyed land situated in Johnson County, Arkansas, hereinafter referred to as the "Workman Place," to two of his sons, Harold Wayne Acord and Charley Don Acord.[1] The deed contained a reservation that the conveyance was "subject to life estates in favor of Elbridge A.J. Acord and Mark Elbridge Acord, joint tenants with right of survivorship."[2] The deed was filed for record on May 27, 1986. Joe Acord executed another warranty deed in May 1986 conveying a life estate to Elbridge A.J. Acord and Mark Acord for the same property. Subsequent to the May 1986 conveyance, Joe Acord executed a Correction Warranty Deed recorded May 31, 1988, to Elbridge and Mark

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[1] The conveyance was for the following:

> The East Half of the Northeast Quarter of the Southeast Quarter (E1/2 NE1/4) of Section Sixteen (16), Township Twelve (12) North, Range Twenty-five (25) West, containing 20 acres, more or less.
>
> The East Half of the Southwest Quarter of the Southeast Quarter (W1/2 NE1/4 SE1/4) of Section Sixteen (16), Township Twelve (12) North, Range Twenty-five (25) West, containing 20 acres, more or less.
>
> The East Half of the Southwest Quarter of the Southeast Quarter of Section Sixteen (16), Township Twelve (12) North, Range Twenty-five (25) West, containing 20 acres more or less.
>
> The Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section Sixteen (16), Township Twelve (12) North, Range Twenty-five (25) West, containing 40 acres more or less.

[2] Charley Don Acord and Elbridge Acord were brothers. Mark Acord is the son of Elbridge and Merle Acord. Harold Wayne Acord died, and his interest passed to appellant, Charley Don Acord.

Acord, as joint tenants with the right of survivorship, that covered the same land as the deed contained in the deed to Harold and Charley Acord.

After the Corrected Warranty Deed was filed, Elbridge and Mark Acord executed a quitclaim deed, dated June 4, 1997, in favor of Elbridge and appellee Merle Acord, his wife. The couple initially brought an action to partition the land, claiming that they owned an undivided 4/5 interest in it. Appellees later amended their complaint and asked the chancellor to reform the deeds or, alternatively, to reimburse them for money they had spent on improvements and taxes.[3]

Following a hearing, the chancellor set aside the quitclaim deed dated June 4, 1997, and vested title in the property to Mark Acord for life, with a remainder fee-simple interest to appellant. The chancellor then entered judgment against appellant for $41,433.28, which represented the fair market value of the improvements made by appellee on the land before appellant acquired any interest in it and reimbursement for real property taxes paid. It is from this judgment that appellant appeals.

Appellant's Arguments

Appellant raises three arguments. First, he contends that the chancellor erred as a matter of law in awarding appellee the value of improvements made and taxes paid by her and her late spouse as life tenants of the property in question. Second, he argues that the chancellor erred in applying the Arkansas Betterment Statute to the dispute between the parties. Finally, appellant contends that the chancellor erred in calculating the value of the improvements.

Appellee responds that appellant is incorrect in his assertion that the chancellor found that appellee was a life tenant. She creatively asserts that because there was no evidence at trial that she held a life tenancy interest in her own right, the chancellor's award of improvements and reimbursement of taxes to her should not be considered in a life tenant context. Thus, she concludes that she is entitled to reimbursement for taxes and improvements made on the

[3] Elbridge A.J. Acord died while this matter was pending.

land. Alternatively, she argues that life tenants may recover for improvements on land, and that the betterment statute applies so long as she had a good-faith belief that she owned the property in question. Appellee states that the chancellor did not err in calculating the amount of the value of the improvements made on the land in question.

Chancery decisions are reviewed *de novo* on the record. *See Bennett v. Hollowell*, 31 Ark. App. 209, 213, 792 S.W.2d 338, 341 (1990). This court does not disturb the chancellor's conclusions of law unless the chancellor's findings are clearly erroneous. *See* Ark. R. Civ. P. 52. Chancellors are in the best position to view the evidence presented at trial and assess the credibility of witnesses based on their demeanor and testimony. *See Duchac v. City of Hot Springs*, 67 Ark. App. 98, 104, 992 S.W.2d 174, 178 (1999). Although this court gives great deference to findings of fact by the chancellor due to the chancellor's superior position to determine credibility issues, it does not give such deference to matters of law, in that the chancellor stands in no better position to apply the law than this court. *See id.* at 104, 992 S.W.2d at 178. When we find that the chancellor misapplied the law and that, as a result, an appellant has suffered prejudice, we will reverse the erroneous ruling. *See id.*, 992 S.W.2d at 178.

Improvements and Taxes Paid by Life Tenants

The chancellor awarded appellee a judgment to reimburse her for improvements made to the land as well as taxes paid on the land by appellee and her husband while the couple resided on the land. The chancellor based his decision on the fact that appellee and her husband made substantial improvements to the land, including the construction of a dwelling house, outbuildings, clearing and landscaping. All of this was done with the appellant's knowledge and tacit consent.

Life tenants hold a limited, restricted interest in the estate. Although life tenants are required to keep the property in repair, they are not required to permanently improve it. *See Frazier v. Hanes*, 220 Ark. 765, 769, 249 S.W.2d 842, 845 (1952). Indeed, life tenants ordinarily are not compensated by remaindermen when they permanently improve the estate. *See Kelley v. Acker*, 216 Ark.

867, 871, 228 S.W.2d 49, 52 (1950). Therefore, a life tenant who makes improvements to the property, notwithstanding her knowledge of her interest in the property, does so at her own risk. *See Graves v. Bean*, 200 Ark. 863, 868-69, 141 S.W.2d 50, 53 (1940) (holding that because the life tenant was aware of the title she held, she could not make improvements that would impair the interest of the title in fee simple).

Section 26-35-301 of the Arkansas Code Annotated mandates that everyone is liable and has a duty to pay taxes on land "seized for life" every year. *See* Ark. Code Ann. § 26-35-301 (a)-(b) (Repl. 1997). This includes life tenants, who are charged with the responsibility of paying taxes on land. *See Hutchison v. Sheppard*, 225 Ark. 14, 17, 279 S.W.2d 33, 36 (1955). It also includes persons who live with a life tenant, rent free. *See Kelley v. Acker*, 216 Ark. 867, 872, 228 S.W.2d 49, 53 (1950). These persons are not entitled for reimbursement of taxes paid, and monies paid by them to discharge the obligations of the life tenant are considered gifts to the life tenant. *See id.*, 228 S.W.2d at 53.

There is no dispute that Elbridge Acord and his son Mark were originally granted a life tenancy with right of survivorship in 1986. The 1986 deed states on its face that the deed was "for their natural lives," and includes a clause stating as follows:

> *Limitations*: It is the purpose of this conveyance to convey a life estate unto both Elbridge A.J. Acord and Mark Elbridge Acord, for and during their natural lives. This conveyance is made on the condition that neither Elbridge A.J. Acord nor Mark Elbridge Acord, shall have the right to transfer, alienate, encumber or convey the hereinabove described lands.

The Correction Warranty Deed, recorded on May 31, 1988, purported to convey to Elbridge A.J. Acord and Mark Elbridge Acord and unto their heirs and assigns forever the same land involved in this appeal. However, the Correction Warranty Deed included the following limitation clause:

> this conveyance is made on the condition that neither Elbridge A.J. Acord nor Mark Elbridge Acord shall have the right to transfer, alienate, encumber or convey the hereinabove described lands.

During the trial, appellee testified as to her understanding of the interest that she and her husband held in the Workman Place.

Appellee testified that she and her husband received copies of the two 1986 deeds along with a letter from Joe Acord's attorney. In addition, appellee testified, "[W]e understood Joe intended for us to just have the right to live there. We were having trouble signing the deed. I said, '[D]on't put my name on it and Joe will sign it.' "

Appellee also testified that "we knew that all we had was the right to live there for Elbridge's and Mark's lifetime when we sold our property in Missouri." She testified that she thought a life estate meant that once her father-in-law died, the property would belong to her and her husband.

Appellee further testified that although she thought in 1987 that she and her husband had a life estate interest in the Workman Place, once the correction deed was recorded in 1988 she thought that she and her husband owned the land. Appellant testified she was in possession of the 1986 deed and the 1988 correction deed. She stated that she and her husband began constructing their home in 1991.

In addition to the testimony of appellee, the chancellor also heard the testimony of Don Acord and Jeffrey Levin. Both men testified that it was Joe Acord's intent to keep the property in the family to prevent it from being sold. Levin, the attorney who prepared the life estate conveyance testified that Joe Acord intended to avoid the selling of the property as a result of any marital problems that developed between Elbridge and appellee. Levin testified that he told Joe Acord that the only way to keep the property from being sold was to create a series of life estates, first in Elbridge Acord and then in Mark Acord. He stated that he sent a memo to Merle and Elbridge Acord dated May 5, 1986, which contained copies of the two 1986 deeds.

Appellee's name is absent on the 1986 and 1988 deeds. In fact, it is not until 1997 that appellee's name first appears on an instrument involving the property. This occurred when Elbridge and Mark Acord purportedly quitclaimed the property to Elbridge and Merle Acord.[4] During the trial, appellee testified that the purpose

[4] We note that Ark. R. Civ. P. 25(a)(2) provides that when a plaintiff dies in a pending action to recover real property or an interest in real property, the Court may substitute the personal representative, heirs, or assigns. It has not been argued on appeal that appellee stood in the shoes of her late husband, and as a result, gained any interest he had in

of the 1997 deed was for her to have a place to live.

As life tenants of the Workman Place, Elbridge and Mark Acord were required to pay taxes on the property. It is undisputed that appellee lived on the land with her husband, and received the benefit of living on the land rent-free. Thus, appellee is not entitled to reimbursement for taxes. As mentioned previously, life tenants ordinarily do not receive reimbursement from remaindermen when improvements are made to the estate. Life tenants who improve property notwithstanding the uncertainty of reimbursement assume the risk they will not be reimbursed. Appellee and her husband took this risk when they sold their home in Missouri, relocated to Arkansas, and built a home on the property knowing that Joe Acord only intended for them to live there for Elbridge and Mark Acord's natural lives.

Application of the Betterment Statute

A person may recover for improvements made to another's land under the Arkansas Betterment Statute, if she 1) believes herself to be the owner of the property; and 2) holds under color of title.[5] *See* Ark. Code Ann. § 18-60-213(a) (1987). A life estate interest does not confer color of title, and a deed that purports to be only convey a life estate is not sufficient color of title. *See Perry v. Rye*, 223 Ark. 594, 597, 267 S.W.2d 507, 509 (1954). In addition, a person may not recover for improvements that were made before color of title was acquired. *See Anderson v. Williams*, 59 Ark. 144, 146, 26 S.W. 818, 819 (1894).

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the land. Even so, Elbridge Acord's interest was a life tenancy and nothing more. *See* Ark. R. Civ P. 25(a).

[5] The language of the statute reads as follows:

> If any person believing himself to be the owner, either in law or equity, under color of title has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another, the value of the improvement made as stated and the amount of all taxes which may have been paid on the land by the person, and those under whom he claims, shall be paid by the successful party to the occupant, or the person under whom, or from whom, he entered and holds, before the court rendering judgment in the proceedings shall cause possession to be delivered to the successful party.

See Ark. Code Ann. § 18-60-213(a) (1987).

Appellee testified that she knew at the time she moved from Missouri in 1986 that she and her husband only had a right to live on the Workman Place for the life of her husband and son. Her testimony that she thought she and her husband owned the place in 1988 contradicted her testimony that the purpose of the purported 1997 quitclaim deed was for her to have a place to live.

Even if appellee thought she owned the property, she still had to hold the property under color of title. The 1986 deed conveyed by Joe Acord to Elbridge and Mark Acord stated on its face that it was a life estate with a limitation that neither Elbridge nor Mark had the right to transfer, alienate, encumber or convey the land. The 1988 Correction Warranty Deed, also conveyed by Joe Acord to Elbridge and Mark Acord, contained language that limited the grantees from transferring, alternating, encumbering, or conveying the Workman Place. The limiting language in both conveyances prevented creation of a fee simple interest.

■ Appellee was not a grantee in the 1986 deed or 1988 Correction Warranty deed, and her name does not appear on any instrument of conveyance until June 1997. Based on the absence of appellee's name from both the 1986 and 1988 deeds, appellee had no basis for a good-faith belief that she held the property under color of title at the time the improvements were made in 1991. Therefore, the chancellor erred in applying the betterment statute to appellee. Because the betterment statute is inapplicable to appellee, we need not reach the merits of appellant's argument that the chancellor's reliance on an appraisal was misplaced under the betterment statute.

■ The chancellor misapplied the law in awarding appellee a judgment against appellant. We reverse and remand for entry of an order consistent with this decision.

Reversed and remanded.

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

KOONCE and BIRD, JJ., dissent.

K. MAX KOONCE, II, Judge, dissenting. I respectfully dissent from the majority opinion in this case. Although I agree with the majority that this case should be reversed, I would

remand the case to the trial court to permit appellee to move for substitution of the proper parties pursuant to Ark. R. Civ. P. 25. The majority reverses the chancellor's decision on the basis that appellee is not entitled to the value of improvements or taxes because she has no interest in the land and never had any interest in the land. However, I believe the case should be remanded to allow appellee to substitute a proper party pursuant to Ark. R. Civ. P. 25 since her husband, who had an interest in the land at issue, died prior to the trial and would have been entitled to the taxes and value of the improvements under the betterment statute.

Appellant first contends that the chancellor erred in awarding appellees the value of the improvements to the land because they were not entitled to them based on Elbridge Acord's status as a life tenant. The Arkansas Supreme Court has held that a life tenant may not recover from the remaindermen the value of improvements made to the property during his tenancy. *Kelley v. Acker*, 216 Ark. 867, 228 S.W.2d 49 (1950); *Smith v. Stanton*, 187 Ark. 447, 60 S.W.2d 183 (1933). Although a life tenant is not entitled to the value of the improvements, Elbridge Acord would have been entitled to them under the betterment statute codified at Ark. Code Ann. § 18-60-213 (1987).

Appellant next contends that the chancellor erred in awarding appellees the value of improvements and taxes based on the betterment statute. As the majority opinion notes, the statute states in pertinent part as follows:

> (a) If any person believing himself to be the owner, either in law or in equity, under color of title has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another, the value of the improvement made as stated and the amount of all taxes which may have been paid on the land by the person, and those under whom he claims, shall be paid by the successful party to the occupant, or the person under whom, or from who, he entered and holds, before the court rendering judgment in the proceeding shall cause possession to be delivered to the successful party.

Ark. Code Ann. § 18-60-213(a). Under this section, one entitled to recover must meet the following tests: (1) he must believe himself to be the owner of the property; and (2) he must hold the property under color of title. *Tolson v. Dunn*, 48 Ark. App. 219, 223, 893

S.W.2d 354 (1995). The supreme court has stated that "color of title" connotes an instrument which, by apt words of transfer, passes what purports to be a title but which is defective in form. *Id.* (citing *Baker v. Ellis*, 245 Ark. 484, 486, 432 S.W.2d 871 (1968)). Black's Law Dictionary, 4th edition, defines "color of title" as "the appearance, semblance, or simulacrum of title; a writing on its face professing to pass title but which does not, either through want of title in the grantor or defective mode of conveyance."

As discussed by the majority, appellee Merle Acord testified that she and her husband received a copy of the 1986 deed from Joe Acord conveying a life estate in the property to Elbridge and Mark Acord. She stated that they moved from Missouri to the property at issue in 1987 and paid taxes on such until 1997. She stated they began to build a home on the property in 1991. Appellant, Don Acord, testified that he was aware appellees were building a home on the property but did not go to them and ask them to stop. Appellee Merle Acord also testified that they did not know about the 1986 deed to Harold and Don Acord until after the lawsuit was filed. She stated she knew that Joe Acord intended for them to just have the right to live on the property. She further testified that they thought a life estate meant they would receive the property when Joe Acord died. She stated that they thought they owned the land after the 1988 deed conveying the property to Elbridge and Mark Acord. Also, at that time they were still unaware of the 1986 deed to Harold and Don Acord conveying the fee estate.

The chancellor ruled in Merle Acord's favor, conclusively finding that she and her deceased husband, Elbridge Acord, honestly believed they were the owners of the property at issue and that they had color of title based on the 1988 deed purporting to convey Elbridge and Mark Acord fee simple ownership in the property. It should be noted that a deed conveying only a life estate is not sufficient color of title to bring the grantee of a life estate within the purview of the betterment statute. *Perry v. Rye*, 223 Ark. 594, 267 S.W.2d 507 (1954). However, the 1988 deed purported to convey a fee simple. The 1988 deed contained the following pertinent language:

> THAT I, JOE ACORD, . . . do hereby grant, bargain, sell and convey upon the following conditions, unto the said Elbridge A.J. Acord and Mark Elbridge Acord, and unto their heirs and assigns

> forever, the following lands lying in the County of Johnson and State of Arkansas, to-wit:
>
> [description of the property]
>
> *Limitations:* This conveyance is made on the condition that neither Elbridge A.J. Acord nor Mark Elbridge Acord, shall have the right to transfer, alienate, encumber or convey the hereinabove described lands.
>
> The purpose of this deed is to correct the warranty deed filed on May 21, 1986 at Book 186, Page 23, which erroneously limited the estates granted to Grantees hereinabove to life estates.

I believe that this deed, along with Merle and Elbridge Acord's honest belief that they owned the property subsequent to the 1988 deed, gave them color of title, bringing Elbridge Acord's claim for taxes and improvements within the purview of the betterment statute. As the majority states, appellant Merle Acord's name does not appear on the 1988 deed; however, Elbridge Acord's name does appear on the 1988 deed, and he would have been entitled to the value of taxes and improvements under the betterment statute had he not died prior to the hearing on the matter. Therefore, I believe that this case should be remanded to allow appellee to substitute the proper party pursuant to Ark. R. Civ. P. 25 and that the award of taxes and improvements should be awarded to the proper party based on the betterment statute.

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

ALLTEL ARKANSAS, INC. *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 98-1362 19 S.W.3d 634

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 21, 2000

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

Arthur H. Stunkel, for appellee.

MARGARET MEADS, Judge. Alltel Arkansas, Inc., appeals a narrow issue that resulted from Order Nos. 6, 7, and 10 entered by the Arkansas Public Service Commission in Docket No. 97-419-U. In these orders, the Commission adopted the Administrative Law Judge's holding that a carrier's ability to reclassify its services from toll to local and thereby reduce its responsibility to the Arkansas Intrastate Carrier Common Line Pool is not a violation of the Telecommunications Regulatory Reform Act of 1997 (Act 77). Because we find that the Commission failed to provide sufficient detail to enable this court to determine how it arrived at this decision, we must reverse and remand for additional findings.

This appeal began with a petition filed by Alltel for clarification of the settlement mechanism with respect to the intraLATA carrier common line revenue requirements of the Arkansas Intrastate Carrier Common Line Pool (AICCLP). The AICCLP is defined by Ark. Code Ann. § 23-17-403(3) (Supp. 1997) as the unincorporated organization of the providers of Arkansas telecommunications services, authorized by the Commission, whose purpose is to manage billing, collection, and distribution of the incumbent local exchange carriers's intrastate toll common line service revenue requirements. Carrier Common Line (CCL) service refers to the use of an incumbent local exchange carrier's (ILEC's) common lines by a carrier to provide intrastate communications services to end users. In exchange for a carrier's use of an ILEC's local loop network for the origination and termination of toll calls, the carrier pays a non-traffic-sensitive access rate to the AICCLP, which collects the access charges from the various carriers and distributes them to the ILECs for reimbursement of their revenue requirements. All carriers that use an ILEC's local loop network to originate or terminate a toll call are assessed a CCL charge. The access rate is set by the Intrastate Flat Rate Carrier Common Line Service Tariff (Tariff) and is determined by obtaining the sum of the ILECs' intrastate CCL revenue requirements, any applicable Arkansas Universal Service Fund (AUSF) requirement, the direct expenses incurred by the AICCLP Administrator and staff, claims for adjustments to final revenue requirements, and the charges or credits approved by the Commission. *See* IFR CCL Tariff, 3rd Rev'd Sheet 7. Once this sum is computed, the AICCLP Administrator determines each individual carrier's CCL pool charge by apportioning the total intrastate CCL pool charges based on the percentage of each carrier's reported intrastate net retail billed minutes of use (RBMOU) relative to the total intrastate net RBMOU reported by all carriers. Prior to the dissolution of the Arkansas IntraLATA Toll Pool (AITP), the ILECs used the AITP to settle the CCL charges among themselves and the AITP Administrator reported the ILECs' combined RBMOU to the AICCLP Administrator. The IXCs (pure-interexchange carriers such as AT&T, MCI, and Sprint) reported their RBMOU directly to the AICCLP Administrator.

Because of the dissolution of the AITP, Alltel's petition contended that none of the ILECs were settling their intraLATA CCL

revenue requirements with the AICCLP. Alltel proposed that the "post-toll pooling ILECs" begin settling all of their intrastate CCL revenue requirements directly with the AICCLP Administrator by reporting their RBMOU to the AICCLP Administrator and that the IXCs continue to report their RBMOU to the AICCLP Administrator. On January 9, 1998, Docket No. 97-419-U was established by the Commission to address Alltel's petition, and it was consolidated with two other dockets, not relevant to this appeal, for hearing purposes. Intervention was granted to a number of ILECs and AT&T Communications of the Southwest, Inc. The general staff of the Commission (Staff) also participated in the docket.

At the hearing, Jack Redfern, Staff Manager of Regulatory Matters for Alltel, testified in support of Alltel's petition. He proposed that the proportionate share of the intrastate CCL revenue requirement that is borne by each carrier, ILEC or IXC, be based on the relationship of their total intrastate RBMOU reported to the AICCLP compared to total RBMOU reported by all carriers. Initially, he argued that the reported RBMOU, used to compute the carriers' CCL pool charges, should be frozen at their December 31, 1996, levels and that increases or decreases in growth of RBMOU after December 31, 1996, not be considered, since the intrastate CCL revenue requirements were frozen at their December 31, 1996, levels by section 4(e)(4)(D) of Act 77, Ark. Code Ann. § 23-17-404(e)(4)(D) (Supp. 1997). In his surrebuttal testimony, however, Redfern amended Alltel's proposal. He stated that other carriers' concerns that Alltel's proposal would keep new entrants from paying for the non-traffic-sensitive portion of the network are well-founded and appear to justify that the actual RBMOU should not be frozen. Redfern, however, continued to argue that the categories of service, which were reported prior to December 31, 1996, must be frozen. Gerald Shannon, Regulatory Planning Manager for GTE Service Corporation (GTE), concurred with Alltel's position, arguing that if SWBT were to reclassify some of its services from toll to local, then the proportion of payments to the AICCLP would change.

Larry Walther, Executive Director for Regulatory Matters for Southwestern Bell Telephone (SWBT), disagreed with Alltel and GTE. He testified that SWBT can reassign service between its exchanges from toll to local and thereby remove minutes of use

from the AICCLP. He testified that some optional calling plans are toll services but he considered the flat rate plans, like the plan that SWBT implemented between Little Rock and Benton, to be an extended area service (EAS) type plan and local and should not be included in the AICCLP. When asked whether SWBT has historically reported the minutes of use associated with optional calling plans to the AICCLP, Walther replied: "[I]n the negotiations to establish those plans, [we] agreed to do that. That was not our position. We had always contended that those were local plans, and by agreement at the time we implemented them when we were in the toll pool.... We agreed with the AITP members that we would report them to the AITP." (Transcript pp. 193-94.)

John Bethel, manager of the telecommunications section for Staff, testified that Staff supports the settlement of all intrastate CCL charges directly with the AICCLP but disagreed with Alltel's initial recommendation that the RBMOU reported to the AICCLP should be frozen at their December 31, 1996, levels. He stated that section 23-17-404(e)(4)(D) did not freeze the level of minutes; that freezing RBMOU would prevent carriers initiating intrastate service after December 31, 1996, from reporting RBMOU and paying intrastate CCL charges; and that the CCL charges associated with the RBMOU of carriers that were operating at December 31, 1996, and have since ceased operating would be unrecoverable. Bethel also testified that ILECs could initiate optional calling plans or reclassify RBMOU from toll to local or intrastate to interstate, pursuant to Ark. Code Ann. §§ 23-17-408(c) and 23-17-412(a) (Supp. 1997), stating that it appears that electing ILECs are now able to initiate new telecommunications services and reclassify traffic from toll to local or intrastate to interstate without prior Commission approval and thereby remove the associated RBMOU from the AICCLP. He also stated that the ILECs previously initiated EAS routes, which expanded the local call area of an exchange for an additional monthly charge, and that the traffic affected by the introduction of EAS has been reclassified from toll to local.

At the conclusion of the hearing, the Administrative Law Judge (ALJ) accepted briefs from the parties. On July 1, 1998, she handed down Order No. 6, in which she held that, "[i]n the absence of the AITP, it is consistent with Act 77 and the IFR CCL Service tariff to settle the intrastate AICCLP charges of all participants directly with the pool as advocated by Alltel, GTE, and Staff."

Order No. 6 at 26. No party has appealed this holding from Order No. 6. However, the ALJ additionally held: "The ability to reclassify services from toll to local and reduce responsibility for AICCLP charges may be anti-competitive but it does not appear to be in conflict with any provision of Act 77." Order No. 6 at 30-31. The ALJ concluded that Alltel's Petition for Clarification should be granted as amended by Staff in the testimony of John Bethel and directed the AICCLP Administrator to amend and file the IFR CCL Service Tariff in accordance with the Staff's Exhibit.

The Commission entered Order No. 7 in July 1998, which adopted as its own without modification Order No. 6 in Docket No. 97-419-U. Thereafter, various parties to the docket petitioned the Commission to rehear Order Nos. 6 and 7. Alltel and GTE asked the Commission to clarify that a carrier's determination to reclassify services from toll to local does not alter the carrier's obligation to continue to report the associated RBMOU to the AICCLP and pay the AICCLP charges for such RBMOU. Alltel also requested oral argument on this issue. The Commission granted Alltel's and GTE's petitions for rehearing and Alltel's oral argument request in Order No. 9.[1]

In its argument before the Commission, Alltel asserted that the RBMOU are part of the CCL Pool charges that section 27-17-404(e)(4)(D) requires to continue as effective. It noted that, prior to Order No. 6, ILECs were required to report their total RBMOU, which by definition included the ILECs' minutes of use for those revenues reported to the AITP, and, although the AITP no longer exists, the same types of minutes must continue to be reported, otherwise part of the RBMOU included in the IFR CCL Tariff will be eliminated. Alltel also reiterated its argument that allowing ILECs to cease reporting minutes is anti-competitive and discriminatory, because it allows a reclassifying carrier to pay less pool charges while it increases the other carriers' pool charges. GTE supported Alltel's argument, explaining that it did not dispute that electing carriers have the flexibility to implement new services but disagreed that the reclassified minutes no longer have to be reported to the AICCLP. It argued that, in order for the CCL pool charges to continue as effective on December 31, 1996, as required

[1] Order No. 9 also granted SWBT's petition for rehearing, but the findings challenged by SWBT are not relevant to this appeal.

by section 23-17-404(e)(4)(D), it is only logical that the formula by which they were computed will remain consistent throughout this period.

Staff argued before the Commission that recategorizing minutes from toll to local is consistent with the Commission's practices; that, at the time Act 77 was passed, the Commission had the jurisdiction to consider communities of interest and to allow the provision of EAS services; and that, when EAS was allowed, the associated minutes of use were no longer considered toll and were removed from the CCL pool. Staff explained that Act 77's stated purpose is to implement the national policy of opening the telecommunications market to competition on fair and equal terms and in order to be competitive with non-ILEC carriers, which can designate local calling areas and properly implement Act 77's requirements, any ILEC ought to be able to offer up optional calling services and remove the associated minutes from the AICCLP. SWBT agreed with Staff that electing companies have the authority to initiate new local services and to reclassify services from toll to local. It noted that Act 77 makes no mention of freezing RBMOU or a specific allocation of the CCL charges. It emphasized that the Tariff defines the AICCLP using the word "toll," which would not include local services.

On October 14, 1998, the Commission entered Order No. 10, which denied the petitions for rehearing of Alltel, GTE, and SWBT, without making any findings. Thereafter, Alltel filed its notice of appeal from Order No. 6 and the Commission's orders, arguing that the Commission failed to regularly pursue its authority as required by Ark. Code Ann. § 23-2-423(c)(4) (Supp. 1997) in adopting Order No. 6. It contends that Order No. 6's holding, that the ability to reclassify services from toll to local and thereby reduce responsibility for AICCLP charges does not appear to be in conflict with Act 77, is clearly erroneous.

Section 23-2-423(c)(4) and (5) defines this court's standard of review as 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 of Arkansas or the United States. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 64 Ark. App. 303, 984 S.W.2d

61 (1998). This court has often stated that the Commission has broad discretion in exercising its regulatory authority, and courts may not pass upon the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion. *Id; Bryant v. Arkansas Pub. Serv. Comm'n*, 55 Ark. App. 125, 931 S.W.2d 795 (1996); *AT&T Communications of the S.W., Inc. v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 843 S.W.2d 855 (1992). Nevertheless, it is clearly for the courts to decide the questions of law involved and to direct the Commission where it has not pursued its authority in compliance with the statutes governing it or with the state and federal constitutions. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980). In questions pertaining to the regular pursuit of its authority, the courts do have the power and duty to direct the Commission in the performance of its functions insofar as it may deem necessary to assure compliance by it with the statutes and constitutions. *Id.*

In support of its contention that Order No. 6 violates section 23-17-404(e)(4)(D), Alltel relies on the meaning of the word "charges" in section 23-17-404(e)(4)(D), which provides:

> Except as provided in this subdivision (D), the intrastate Carrier Common Line (CCL) Pool charges shall continue as effective on December 31, 1996. The commission is authorized to develop and implement, commencing three (3) years after February 4, 1997, a phase-in reduction of intrastate CCL pool charges until such charges are equivalent to the interstate CCL charges. Any reduction of intrastate CCL pool charges of incumbent local exchange carriers ordered by the commission shall provide for concurrent recovery of such revenue loss from the AUSF, basic local exchange rates, or a combination thereof.

Alltel maintains that the term "charges" that appears in this section refers to the pro rata charge that each carrier is billed by the AICCLP administrator and, because this section freezes the CCL charges for a minimum of three years, it also freezes the mechanism for determining the CCL charges. It cites two sections from the IFR CCL Tariff to support its position:

3. General Description

. . . .

> The amount of the IRF 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 jurisdiction for each LEC specified in Paragraph 6; 2) the direct expenses incurred by the AICCLP Administrator for billing and collecting the IRF CCL charge; and 3) other Commission ordered charges and credits. The AICCLP Administrator shall use the approved amounts until they are superseded by subsequent Commission order.

IFR CCL Tariff, 4th 5th Revised Sheet 4.

> 5. *Rate Regulations*
>
> 5.1 The AICCLP Administrator shall determine the amount to be billed obtaining the sum of:
>
> — LEC's intrastate CCL revenue requirement specified in paragraph 6 following.
>
> — Other charges or credits approved by the commission.
>
> 5.2 The AICCLP Administrator shall determine each carrier's IFR CCL charge by apportioning the intrastate CCL revenue requirement based on the percentage of each carrier's reported intrastate net RBMOU relative to the total intrastate net RBMOU reported by all carriers as specified in 4.1, 4.2, and 4.3 preceding . . . . .

IFR CCL Tariff, 3rd Revised Sheet 7. Because the Tariff provides that the AICCLP Administrator shall determine the CCL charge by the reported RBMOU, Alltel concludes that section 23-17-404(e)(4)(D) requires that the types of RBMOU, which were reported December 31, 1996, must continue to be reported.

In addressing Alltel's argument that the word "charges" in section 23-17-404(e)(4)(D) refers to the individual charges the AICCLP Administrator bills to each carrier, the ALJ in Order No. 6 stated:

> [Staff witness] Mr. Bethel stated that Alltel is mistaken in its attempts to limit the definition of AICCLP charges, citing to the AICCLP charges referenced in Ark. Code Ann. § 23-17-404(e)(4)(D) and more specifically defined in Paragraph 3 of the IFR CCL Service Tariff, contending that this language "include[s]

> more than the sum of the ILECs' AICCLP revenue requirement identified in Paragraph 6 of the tariff." T. 302
>
> Mr. Bethel recommended that each telecommunications provider's portion of the intrastate CCL charges be determined by using each carrier's net RBMOU relative to the total net RBMOU reported by all of the carriers, a process described in Paragraph 5.2 of the IFR CCL Service Tariff.

Order No. 6 at 20.

We are unable to distinguish this statement of Bethel's testimony from Alltel's argument. Bethel testified in his prepared testimony that each carrier's responsibility for the intrastate AICCLP charges should continue to be proportional to its RBMOU relative to the total RBMOU reported by all carriers. Although he testified that the level of RBMOU is not frozen by section 23-17-404(e)(4)(D), he acknowledged that freezing the revenue requirement at a point in time without freezing the associated traffic fails to recognize the relationship between those items. He explained that, when ILECs reclassify RBMOU from toll to local and no longer report those minutes to the AICCLP, the relative portion of the AICCLP charges paid by other pool participants increases.

■ The ALJ held that "§ 23-7-404(e)(4)(D) freezes the CCL pool charges but not the RBMOU," stating:

> Alltel and GTE advocate that this section of Act 77 requires that the RBMOU should be frozen at the level reported in December, 1996, although the companies differ somewhat as to the calculation of the RBMOU. GTE and Alltel contend that it is necessary to freeze the RBMOU in order to prohibit ILECs electing "alternative regulation" from reclassifying certain services from toll to local, thereby reducing one ILECs portion of AICCLP charges and increasing the portion of AICCLP charges borne by other pool participants. As Staff points out, Ark. Code Ann. § 23-17-404(e)(4)(D) freezes the CCL pool charges, but not the RBMOU. Further, Staff witness Bethel pointed out that such a freeze "would prevent carriers initiating intrastate service after December 31, 1996, from reporting RBMOU and paying intrastate CCL charges" and "charges associated with the RBMOU of carriers that were operating at December 31, 1996, and have since ceased operating would be unrecoverable. T. 314. Carriers initiating service after December 31, 1996, would have a definite competitive advantage over other carriers in escaping any responsibility to

> pay CCL charges thereby enabling them to offer lower rates under the RBMOU freeze proposed by Alltel and GTE.

Order No. 6 at 30. However, the ALJ's reliance on Bethel's testimony in support of her holding suggests that she did not consider Alltel's amended argument that the method for determining the RBMOU is frozen by section 23-17-404(e)(4)(D), not the actual RBMOU. Alltel witness Redfern testified in his surrebuttal testimony:

> Mr. Lovell points out that under Alltel's proposal, new entrants, after December 31 1996, would pay nothing for the non-traffic sensitive portion of the network. This was not Alltel's intent when it interpreted that it was necessary to freeze RBMOU at December 31, 1996 levels. However, Mr. Lovell's concern seems well founded and appears to justify that the actual RBMOU should not be frozen. In suggesting it was necessary to freeze the actual RBMOU Alltel is merely recommending how the Commission should implement the freeze in order to actually freeze the AICCLP charges as required by Act 77. While the Act provides little guidance to the Commission on this issue, it is clear that unless the method for determining the charges is also frozen, then the AICCLP charges will not be frozen. For example, unless the method is frozen then there is considerable opportunity for abuse that will clearly unfreeze the charges . . . .
>
> The AICCLP charges, effective December 31, 1996, are frozen by Act 77 for three years. In order for this freeze of such charges to be effective, the method and formula for calculation of those charges must be frozen. This means the revenue requirement, as reflected in the Intrastate Flat Rate Carrier Common Line Service Tariff, is frozen effective December 31, 1996 and the categories of service, on which RBMOU were reported to the AICCLP, must also be frozen at December 31, 1996. Normal increases or decreases in growth in the RBMOU of these categories of service, utilized at December 31, 1996, probably should continue to be reflected after December 31, 1996. However, such matters as RBMOU for categories of services, whether or not these services have been unilaterally reclassified by a carrier in its retail relationship with its customer after December 31, 1996, must continue to be reported to the AICCLP until the Act 77 freeze is over and until such time as the CCL revenue requirement is no longer frozen, or until the Commission has mandated a different mechanism for the ILECs to receive their intrastate CCL revenue

> requirement, in order to avoid the potential abuse of the system shown in the above example.

(Transcript pp. 84-86.) Although Alltel clearly amended its argument in the hearing before the ALJ, Order No. 6 only addresses its original argument. Furthermore, the Commission also disregarded Alltel's amended argument in its appeal brief.

Alltel also argues that the Commission's interpretation of section 23-17-404(e)(4)(D) is not supported by Ark. Code Ann. § 23-17-408(c), which provides in part that "[a]n electing company may increase or decrease its rates for telecommunications services other than basic local exchange service and switched-access services and establish rates for new services by filing a tariff or a price list with the Commission." In his surrebuttal testimony, Staff witness Bethel relied on this section and Ark. Code Ann. § 23-17-412(a) (Supp. 1987)[2] in support of his statement that it appears electing ILECs are now able to initiate new telecommunications services and reclassify traffic from toll to local or intrastate to interstate without prior Commission approval. Alltel argues that, in reclassifying its optional calling plans, SWBT is not offering a new service and therefore section 23-17-408(c) is not relevant.

Although the ALJ noted Bethel's testimony in Order No. 6, no findings were made regarding it. Furthermore, we are unable to address Alltel's argument in regard to this section because it was not raised by Alltel in its petition for rehearing. Arkansas Code Annotated section 23-2-422(b) (Supp. 1997) provides that the application for rehearing shall set forth specifically the grounds upon which the application is based, and section 23-2-423(c)(2) provides that no objection to any order of the Commission shall be considered by the Court of Appeals unless the objection shall have been urged before the Commission in the application for rehearing.

For its final argument, Alltel contends that the Commission's holding conflicts with other provisions of Act 77. In Order No. 6, the ALJ held that the ability to reclassify minutes from toll to local

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[2] This section provides in part that rural telephone companies, excluding tier one companies, that file a notice with the commission of an election to be regulated in accordance with the provisions of this section are authorized to determine and account for their respective revenues and expenses ... and shall be subject to regulation only in accordance with this section. . . .

and reduce responsibility to the AICCLP may be anti-competitive, but does not appear to conflict with any provision of Act 77. It was undisputed by the parties that the removal of RBMOU from the AICCLP increases the relative proportion of CCL charges paid by other pool participants while decreasing the proportion paid by the reclassifying carrier. Staff witness John Bethel testified:

> [T]he electing ILECs' ability to reclassify services from toll to local and remove the associated RBMOU from the AICCLP, allows those carriers to reduce their portion of the AICCLP charges and increase the portion of the AICCLP charges borne by the other pool participants. This may not promote competition, in that it may create a competitive advantage over other pool participants, such as the non-electing ILECs and the IXCs, that may not be able to move similar minutes from the AICCLP, and must continue to pay a portion of the AICCLP charges based upon those minutes.

(Transcript pp. 350-51.) In cross-examination, Bethel admitted that he perceived a conflict between the legislative intent described in sections 23-17-408(c) and -412(a), on which he relied in support of his contention that ILECs can initiate new services and not report the reclassified RBMOU to the AICCLP, and Ark. Code Ann. § 23-17-402 (Supp 1997), which provides in part:

> It is the intent of the General Assembly in enacting this subchapter to:
>
> (1) Provide for a system of regulation of telecommunications services, consistent with the federal act, that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms, modifies outdated regulation, eliminates unnecessary regulation, and preserves and advances universal service.
>
> (2) Recognize that a telecommunications provider that serves high-cost rural areas or exchanges faces unique circumstances that require special consideration and funding to assist in preserving and promoting universal service.

Although the ALJ acknowledged in Order No. 6 that the ability to reclassify service from toll to local and reduce responsibility for AICCLP charges may be anti-competitive, she held that it did not appear to be in conflict with any provision of Act 77. This finding is not only contrary to Bethel's testimony, but it is also confusing in view of the fact that the ALJ relied so heavily upon

Bethel's testimony in Order No. 6. Without an explanation as to how the Commission resolved this conflict, we are not able to address this finding on appeal.

Arkansas Code Annotated section 23-2-421(a) (1987) requires that the Commission's decision be in sufficient detail to enable any court in which the action of the Commission is involved to determine the controverted question by the proceeding. *Bryant v. Arkansas Pub. Serv. Comm'n*, 64 Ark. App. 303, 984 S.W.2d 61 (1998). Courts cannot perform the reviewing functions assigned to them in the absence of adequate and complete findings by the Commission on all essential elements pertinent to a determination of the questions involved. *Id*; *see also Bryant v. Arkansas Pub. Serv. Comm'n*, 62 Ark. App. 154, 969 S.W.2d 203 (1998). When the Commission fails to set forth sufficiently the findings and the evidentiary basis upon which it rests its decision, this court will not speculate thereon or search the record for supporting evidence or reasons, nor shall we decide what is proper; instead, this court shall remand the case in order to provide the Commission an opportunity to fulfill its obligations in a supplementary or additional decision. *Id; see also Bryant v. Arkansas Pub. Serv. Comm'n,* 45 Ark. App. 56, 871 S. W.2d 414 (1994).

The Commission gives several reasons for affirming its decision on appeal. We find none of them dispositive. The Commission first states that it determined that Alltel's proposals were contrary to Act 77 because Act 77 requires fair and equal treatment of all carriers. It contends that, since other carriers are allowed to offer local calling plans, freezing the minutes reported for only ILECs would result in unfair and unequal treatment of ILECs. This finding was not made in Order No. 6 or the subsequent Commission orders. Furthermore, no evidence was presented to support such a determination. Although Staff's counsel argued before the Commission that other carriers, particularly cellular carriers, have the ability to offer local calling plans and reclassify minutes, it is well settled that arguments of counsel are not evidence. *Wright v. State*, 67 Ark. App. 365, 1 S.W.3d 41 (1999); *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996).

The Commission also contends that a known application of the "freeze" was provided in Commission Order No. 49 of Docket No. 86-159-U, which was entered March 8, 1996, approximately

one year prior to the adoption of Act 77. The Commission states that this order was entered to comply with the directives of the House and Senate Interim Committees on Insurance and Commerce of the Arkansas General Assembly and the Committees' Telecommunications Subcommittee and, pursuant to that directive, it froze the tariffs in place on March 8, 1996, but it did not freeze RBMOU reportable by any carrier. It concludes that, in view of the fact that the General Assembly directed the Commission to take no action affecting the general level of access charges and it complied by freezing the AICCLP revenue requirement but not the RBMOU, it must be presumed that the General Assembly was aware of the Commission's interpretation of the "freeze" and would have specified in Act 77 that the RBMOU were also to be frozen if that was their intent.

We are unable to consider this explanation because there is no evidence in the record to support it, nor was it given in Order No. 6 or the subsequent orders in support of the Commission's holding. Although the ALJ did refer to Order No. 49 and the legislative committees' directives in Order No. 6, she did not explain how Order No. 49 or those directives were relevant to her holding.

The Commission also argues that it is clear that, prior to the adoption of Act 77, ILECs have reclassified traffic from toll to local and discontinued reporting the associated RBMOU to the AICCLP. In support of this statement, the Commission cites the testimony of Staff witness Bethel; however, Bethel did not testify that the associated minutes from a reclassified service were not reported to the AICCLP. He actually stated: "[T]he ILECs have, with Commission approval, initiated extended area service (EAS) routes in the past (e.g., Marion to West Memphis).... The traffic affected by the introduction of EAS has been reclassified from toll to local." (Transcript p. 351.)

It is clear to us from the evidence presented at the hearing and the arguments of counsel both before the Commission and this court that there is a dispute as to whether reclassified minutes of use were required to be reported to the AICCLP or AITP prior to Act 77. In his surrebuttal testimony, Staff witness Bethel stated that SWBT witness Eldon Peters incorrectly argued that it was unfair for ILECs to report the RBMOU associated with intraILEC-inter-

exchange traffic to the AICCLP, stating that this traffic has been reported to the AICCLP and should continue to be. SWBT witness Walther testified on cross-examination that SWBT can reassign services from toll to local and thereby remove minutes of use from the AICCLP, but also admitted that when SWBT implemented its optional calling plan, it agreed to report those minutes of use to the AITP. Even in the arguments before this court it was unclear whether reclassified RBMOU were reported to the pool. Without a finding on this controverted issue, we are unable to decide this appeal. in trying to resolve this issue, we further note that nowhere in the orders under review or the record can we find an explanation of the differences between optional, mandatory, and extended area service calling plans. The evidence suggests that EAS calling plans existed prior to Act 77; optional calling plans were coined by SWBT after the passage of Act 77, and there is also a reference in a Commission argument to mandatory calling plans. Especially in appeals from the Commission where we rely on its expertise, we must have adequate explanations of its decisions and the facts supporting those decisions and not have to resort to speculation.

Because of the reasons discussed in this opinion, we must reverse and remand those portions of Order No. 6 and the Commission's orders that adopted the holding of the ALJ here in dispute, with directions to render adequate findings so that a meaningful review of that decision can be made.

Reversed and remanded.

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

Sandra HICKMON v. Randy HICKMON

CA 99-1300 19 S.W.3d 624

Court of Appeals of Arkansas
Division III
Opinion delivered June 21, 2000

[redacted]

Cuffman & Phillips, by: *James H. Phillips*, for appellant.

Glover Law Firm, by: *David M. Glover*, for appellee.

ANDREE LAYTON ROAF, Judge. Sandra Hickmon appeals an order from the Saline County Chancery Court denying her petition for permission to move out of state with her seven-

year-old daughter Miranda. Sandra had primary physical custody of the child and shared joint legal custody with her ex-husband, appellee Randy Hickmon. Since her divorce from Randy, Sandra had remarried and wanted to join her new husband in Phoenix, Arizona. Sandra's sole point on appeal is that the chancellor used an incorrect legal standard in deciding the merits of her petition. We affirm.

On May 16, 1996, Sandra and Randy were divorced after just over ten years of marriage. By agreement of the parties, "joint custody" of their only child, Miranda, was ordered. Pursuant to that agreement, Sandra had primary physical custody and Randy had extensive visitation.

On August 21, 1997, Randy moved to modify the decree, seeking joint physical custody, to include additional time with Miranda. Sandra opposed the motion and filed a counter-petition alleging that Randy had not cooperated with her regarding decisions concerning Miranda's welfare, asked for sole custody, and requested, in light of the fact that she had become engaged to be married to a resident of Phoenix, Arizona, that she be allowed to take Miranda with her to Phoenix. Randy then amended his motion to seek sole physical custody. By order entered October 28, 1997, the chancellor denied both parties' petitions.

On June 15, 1998, Sandra again petitioned for permission to move Miranda to Phoenix, stating that she had now married Dr. Alex McLaren. Randy again counter-petitioned for sole physical custody. The chancellor subsequently ordered the parties to make themselves available to psychologists Dr. Paul Deyoub and Dr. Margarita Garcia, experts retained respectively by Sandra and Randy. Both psychologists submitted reports.

In his report dated January 25, 1999, Dr. Deyoub stated that he interviewed Sandra, Randy, both stepparents, and Miranda. He stated that although Sandra was very depressed in January of 1997, two years had elapsed and she genuinely appeared to be in remission. Nonetheless, Dr. Deyoub stated that he had concerns about moving Miranda to Phoenix. He noted that "there will be a price to pay for this." Dr. Deyoub stated that if Miranda moved, by the time she was twelve, her formerly close relationship with Randy will be a "distant and possibly unretrievable memory." He opined

that while the move was in Sandra's best interest, it was not in the best interest of preserving Miranda's relationship with her father, and more to the point, it was in Miranda's best interest to remain in Arkansas with her mother to preserve her relationship with her father. According to Dr. Deyoub, Sandra told him that she would not move to Phoenix if it would jeopardize her retaining primary physical custody of Miranda. He also agreed with Sandra that Randy seems to "over do it" with Miranda, and stated that except for a small increase in visitation for Randy, the status quo should be maintained.

In a subsequent evidentiary deposition on April 30, 1999, Dr. Deyoub reiterated his conclusion that Sandra's depression was not currently a problem. He, however, did not retreat from the opinion that the proposed move to Phoenix would cause "some loss" in Miranda's relationship with her father, even if Sandra flew Miranda back for visits every other weekend. He opined that it was "better for the child" if Miranda was able to maintain the relationship that she "now has with her father." Dr. Deyoub noted that Sandra "has had her problems in the past," and opined that it "changed this whole situation a little bit," and accordingly, it "skewed a little bit more in the father's favor, in terms of maintaining that parental involvement." He also opined that Sandra's desire to make the move to Phoenix was in part inspired by her desire to get away from Randy and noted that Sandra expressed concern about Miranda's step-mother attempting to assume her role. Dr. Deyoub reiterated his concerns with the proposed move and stated, "if you only look at what Miranda needs, then I think she should stay here." He further stated that this conclusion was based on the level of involvement that Randy had in Miranda's life, and would not necessarily have the same opinion if Randy's involvement were only "peripheral."

Two documents authored by Dr. Garcia were entered into evidence. The first was a report, dated November 2, 1998, that was based on a series of office visits with Randy, his wife Devina, and Miranda. The report states that "Miranda is established in her community, she has family in Arkansas, friends at school, horses and other animals she dearly loves in her father's backyard," and has "a positive relationship with her father." Dr. Garcia opined, "Miranda's need for a stable childhood outweighs the mother's need to uproot her from Arkansas to Arizona. Miranda would have to

deal with more loss (i.e., her father, her home, her pets, her friends and teacher) which is unnecessary since Miranda has a very capable and devoted father who has succeeded in creating a stable home for her." A second report, dated February 4, 1999, which stated that it was based on sessions with Miranda and Sandra, was also made part of the record. It noted that Miranda's stated desire to stay in Arkansas or move with her mother to Arizona "shifted depending upon which parent she felt she needed to please on that particular visit." Nonetheless, Dr. Garcia found both Randy and Sandra to be "better than adequate" parents, and in part because Sandra "made it clear" that she will not move to Arizona without Miranda, "maintaining the minor child's current joint custody in Arkansas is in Miranda's best interest."

Also made part of the record was a deposition of Dr. George Hamilton, Sandra's treating psychiatrist, taken on September 11, 1998. In it he stated that Sandra's diagnosis was that of "Major Depressive Disorder, Recurrent, In remission."

A full hearing on the petitions was held on June 24, 1999. Sandra testified that she has had primary physical custody of Miranda since the divorce. She claimed that she married Dr. McLaren, an orthopedic surgeon in Phoenix, a year ago, and that it was very hard to be away from her new husband in a long-distance marriage. Sandra stated that she had a home there and a job lined up as research coordinator in orthopedics that would be better than her current job at the University of Arkansas Medical Center in that it would give her more pay, require that she work fewer hours, and allow her to do some of her work at home. She stated that it would not be practical for her husband to move to Little Rock. Sandra also expressed resentment about Randy's new wife Devina "trying to supplant" her role as Miranda's mother, and the intrusiveness of Randy's involvement with his daughter, particularly the frequency of his phone calls. She also expressed dissatisfaction with Randy's taking Miranda to Dr. Garcia. Sandra opined that she had previously been denied permission to move Miranda because of her depression, but stated that she was better now. She conceded that Randy and Miranda "are close," and she noted that Randy volunteered at Miranda's school and served as Miranda's soccer coach. Sandra also testified that she would fly with Miranda back to Little Rock every other weekend at her expense to enable Randy to maintain regular visitation, if the move were allowed.

Sandra's new husband Dr. McLaren testified that he was an orthopedic surgeon, but worked as chief of orthopedics and the director of the orthopedic training program at the Americorp Medical Center because a shoulder injury prevented him from actively treating patients. He stated that this disability prevented him from simply moving to Little Rock as there would not be a comparable position available. Dr. McLaren testified that he owned a nice but "modest home by a lot of professional standards" in Phoenix, and had two children, ages twelve and fourteen, that visit him from time to time and got along "very well" with Miranda when they met her.

Randy testified that he would withdraw his change of custody petition if Miranda stayed in Arkansas. He claimed that he always enjoyed a close relationship with Miranda. Randy stated that he was her soccer coach and regularly volunteered at her school. According to Randy, he tries to go to her school at least twice a week, to have lunch with her and talk to her teachers. Randy asserted that Miranda was also close to his parents and visits with them often, "about every other time we have her." He stated that Miranda loves animals, so he bought her a dog, a cat, and a pony. He claimed that he has constantly asked for more time with Miranda, for opportunity to help raise her, and to be involved in every aspect of her life and "not just a visitor." He generally denied Sandra's allegations that he was overly intrusive in seeking contact with Miranda.

At the close of all the testimony, the chancellor announced from the bench that he was denying Sandra's petition to take Miranda to Arizona. He noted that both experts stated that it was not in Miranda's best interest to leave the state, and was particularly impressed by Dr. Deyoub's methodology and conclusions.

On appeal, Sandra argues that the chancellor used an incorrect legal standard in deciding the merits of the custodial parent's petition to relocate out of state with the parties' minor child[1] In this regard, Sandra contends that the chancellor erred in only considering the best interest of the child and not applying the guidance set forth in *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994).

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[1] We note that although the parties had "joint custody" by agreement, Sandra clearly had primary physical custody of Miranda, and consequently, this case should be analyzed as a request by the custodial parent to relocate and not as a change of custody.

She asks that this court reverse and remand for further proceedings in which the chancellor would apply the *Staab* factors in determining whether she should be allowed to move Miranda out of state. In the alternative, Sandra prays that this court apply the *Staab* factors on *de novo* review, which she contends will weigh in favor of her being allowed to move away with Miranda. This argument is without merit.

This court reviews chancery cases *de novo* and reverses the findings of the chancellor only if his findings are clearly against the preponderance of the evidence. *Wilson v. Wilson*, 67 Ark. App. 48, 991 S.W.2d 647 (1999). In deciding which parent should have custody of a child and what is in the best interest of the child, the chancellor has the burden of evaluating the witnesses and their testimony. *Id.*

Contrary to what Sandra suggests, *Staab* did not abolish the best-interest-of-the-child standard in cases where a custodial parent wishes to move a child out of state. As this court stated in *Staab*:

> While we agree with the chancellor that achieving the "best interests of the child" remains the ultimate objective in resolving all child custody and related matters, we believe that the standard must be more specific and instructive to address relocation disputes. In particular, we think it important to note that determining a child's best interests in the context of a relocation dispute requires consideration of issues that are not necessarily the same as in custody cases or more ordinary visitation cases.

44 Ark. App. at 133, 868 S.W.2d at 519. This court merely provided more guidance for chancellors when they are confronted with this situation. *Id., see also Wilson v. Wilson, supra.* In the instant case, there is no indication that the chancellor decided this case in a manner that was inconsistent with this court's holding in *Staab*. We note further that Sandra did not, in accordance with Rule 52 of the Arkansas Rules of Civil Procedure, request specific findings of fact on the *Staab* factors. Accordingly, this case is analogous to *Mega Life & Health Ins. Co. v. Jocola*, 330 Ark. 261, 954 S.W.2d 898 (1997), where the supreme court held that the failure to ask for such findings constitutes a waiver of this issue on appeal. Therefore, Sandra's prayer for further proceedings is procedurally barred.

However, because this court's review is *de novo*, we must still address Sandra's argument on the merits to determine if the trial court's ruling was clearly erroneous. In *Staab v. Hurst, supra,* this court set forth five factors that should be "included" in determining whether to allow a custodial parent to remove a child from the state. These factors are:

> (1) the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children; (2) the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the non-custodial parent; (3) whether the custodial parent is likely to comply with substitute visitation orders; (4) the integrity of the non-custodial parent's motives in resisting the removal; and (5) whether, if removal is allowed, there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parent relationship with the non-custodial parent.

Id. Before a chancellor is to consider the *Staab* factors, the custodial parent bears the threshold burden to prove some real advantage to the children and himself or herself in the move. *Wilson v. Wilson, supra.*

On the threshold question, Sandra argues that it has been "proved" because she is now married to an orthopedic surgeon who owns his own home, has other children who get along with Miranda, and has secured her a position that would "maximize" the time she could spend at home with Miranda. We do not agree that a real advantage to Miranda is proven by these facts.

Obviously, the move would have significant advantages for Sandra; she would be with her husband and she would be away from her ex-husband, whom she perceives as an antagonist in her life. Although the evidence was somewhat sparse in this regard, she also would apparently be moving to a better-paying job, requiring fewer hours, and the flexibility to work at home. However, it is not apparent that there would be any "real advantage" for Miranda.

Significantly, both Dr. Deyoub and Dr. Garcia only perceived the move to Phoenix as inflicting yet another "loss" on Miranda. Not only would she have lesser contact with her father, she would also lose contact with friends, teammates, extended

family, pets, her teacher, and familiar home surroundings. Furthermore, in the instant case, we do not have a firmly rooted new family arrangement that is simply moving away. *Cf. Friedrich v. Bevis*, 69 Ark. App. 56, 9 S.W.3d 556 (2000). Sandra herself will be adjusting to life with a new husband. Finally, regarding the new family arrangement, although Sandra spoke of Dr. McLaren's children as providing an advantage to Miranda, given the disparity of her age and theirs, and the testimony that they visit "from time to time," it is not readily apparent how their potential relationship with Miranda would constitute an advantage for her.

We cannot say that there is compelling evidence of improper motive on Sandra's part in wanting to move, or Randy's part in opposing it; that any visitation order would not be complied with; or that the visitation Sandra offered would not be substantial. Nonetheless, we have before us a case in which Miranda's father is highly involved in her life, to her obvious advantage, and a paucity of evidence of any real advantage for Miranda in moving to Phoenix. Significantly, both experts opined that the move was not in Miranda's best interest. Under these circumstances, we cannot say that the chancellor's decision was clearly erroneous.

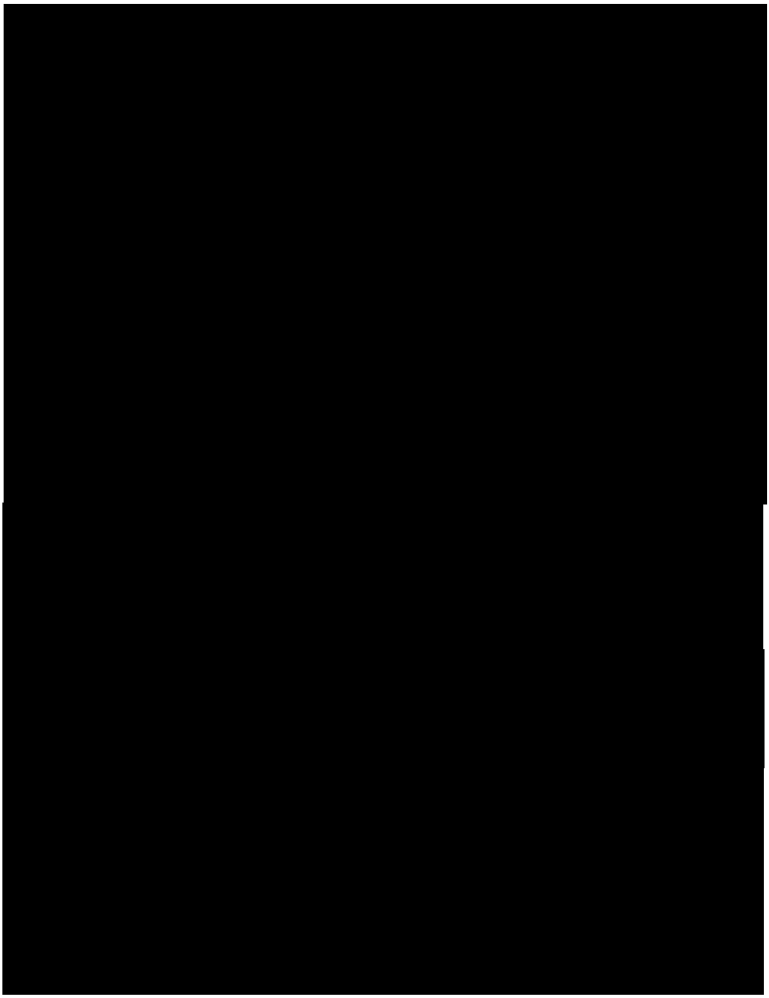
Affirmed.

CRABTREE and KOONCE, JJ., agree.

David CARTER *v.* Glenda MEEK

CA 99-1436 20 S.W.3d 417

Court of Appeals of Arkansas
Division IV
Opinion delivered June 28, 2000



Bullock & Van Kleef, by: *Bunny Bullock*, for appellant.

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

JOHN B. ROBBINS, Chief Judge. This is the second appeal taken by appellant David Carter from orders issued by the Pope County Probate Court. Mr. Carter's wife, Charlene, was involved in an automobile accident on September 1, 1997, and suffered injuries leading to her death on October 18, 1997. Mrs. Carter's mother, appellee Glenda Meek, filed a petition for appointment as personal representative and probate of the decedent's will on October 20, 1997, and on the same date the probate court appointed Mrs. Meek as executrix and admitted the will to probate. On December 10, 1997, the probate court issued an order approving Mrs. Meek's petition to settle the wrongful-death claim resulting from her daughter's death for $25,000.00.

In his first appeal, Mr. Carter challenged the December 10, 1997, order, arguing that the probate court erred in approving the settlement without first giving him notice. In *Carter v. Meek* (CA 98-264), an unpublished opinion delivered on October 28, 1998, we found that Mr. Carter was not entitled to notice and affirmed the order approving the wrongful-death settlement. In the first appeal, Mr. Carter also contended that the probate court erred in failing to hold a hearing on his motion to set aside the order admitting the will to probate and appointing a personal representative, but we declined to address that issue because it was raised for the first time in his reply brief.

After we issue our mandate, the trial court heard Mr. Carter's motion to set aside the order admitting the will to probate and appointing Mrs. Meek personal representative. During the hearing, Mr. Carter argued that the will should not have been admitted to probate because it was not proved by any accepted method set out in Ark. Code Ann. § 28-40-117 (1987), which provides in pertinent part:

> (a) An attested will shall be proved as follows:

> (1) By the testimony of at least two (2) attesting witnesses, if living at known addresses within the continental United States and capable of testifying; or
>
> (2) If only one 1 [*sic*] or neither of the attesting witnesses is living at a known address within the continental United States and capable of testifying, or if, after the exercise of reasonable diligence, the proponent of the will is unable to procure the testimony of two (2) attesting witnesses, in either event the will may be established by the testimony of at least two (2) credible disinterested witnesses. The witnesses shall prove the handwriting of the testator and such other facts and circumstances, including the handwriting of the attesting witnesses whose testimony is not available, as would be sufficient to prove a controverted issue in equity, together with the testimony of any attesting witness whose testimony is procurable with the exercise of due diligence.

The probate court refused to set aside its prior order, and issued an order on May 24, 1999, which stated, "the Order Admitting Will to Probate is hereby affirmed and the Proof of Will and its attestation were adequately shown by the evidence herein." Mr. Carter now appeals from the May 24, 1999, order, arguing that the trial court erred in admitting the will to probate because (1) the proponent failed to prove the will by either two attesting witnesses or two credible disinterested witnesses, and (2) there was no showing that any diligence was exercised in procuring the testimony of one of the attesting witnesses. We agree, and we reverse the order from which this appeal was taken.

The two attesting witnesses to the will were Rhonda Rugger and Gary Chapman, but only Ms. Rugger testified at the hearing. She stated that she was the attending nurse for Mrs. Carter when Mrs. Carter was hospitalized following the accident. At the request of Mrs. Carter, Ms. Rugger signed the will on September 10, 1997. According to Ms. Rugger, Mrs. Carter was lucid and fully understood what was happening and why she was executing a will. Ms. Rugger testified that she saw Mrs. Carter read and sign the will, but she could not recall who else witnessed the execution of the will. She stated, "I don't remember whether another gentlemen was there."

Mrs. Meek also testified at the hearing, and she stated that she was present when her daughter signed the will. Mrs. Meek further

testified that she witnessed both Ms. Rugger and Mr. Chapman sign it.

We hold that the probate court erred in failing to set aside its order admitting the will to probate because there was complete lack of evidence as to whether Mr. Chapman was living at a known address within the United States, or whether any diligence was exercised in procuring his testimony at the hearing. We acknowledge that, during the hearing, Mrs. Meek's counsel stated that Mr. Chapman had been subpoenaed for the hearing but failed to appear. However, this did not constitute evidence and there was no testimony as to any effort made on the part of the appellee to procure Mr. Chapman's presence. Moreover, while the record reflects that Ms. Rugger was subpoenaed, it does not contain a subpoena issued for the appearance of Mr. Chapman. The provisions of section 28-40-117 require that the will shall be proved by the testimony[1] of two attesting witnesses unless one or both witnesses are not living at a known United States address and capable of testifying, or cannot be secured by reasonable diligence, and in this case the appellee failed to present proof that either of these exceptions was applicable.

The proponents of a will have the burden of proving the genuineness of the signatures of the testatrix and the attesting witnesses, and once shown, the burden shifts to the contesting party to prove the signatures were forgeries. *Ross v. Edwards*, 231 Ark. 902, 333 S.W.2d 487 (1960). Probate cases are tried de novo on appeal, but the decision of the probate court will not be reversed unless it is clearly against the preponderance of the evidence. *Upton v. Upton*, 26 Ark. App. 78, 759 S.W.2d 811 (1988). In the instant case, the probate court's decision that Mrs. Meek met her burden to prove proper execution of the will was clearly against the preponderance of the evidence and contrary to the requirements of section 28-40-117. Therefore, its order affirming the admission of the will to probate must be reversed.

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[1] The subject will was initially admitted to probate with the testimony of the required witnesses being presented by proof-of-will affidavits, as permitted by Ark. Code Ann. § 28-40-118(a) (1987). However, because a contest of the will was subsequently filed, § 28-40-118(b) required that the attesting witnesses appear and testify at the will-contest trial unless one of the exceptions listed in § 28-40-117(a) was applicable.

Reversed and remanded for further action consistent with this opinion.

BIRD and MEADS, JJ., agree.

Charles Edward WHITFIELD *v.* STATE of Arkansas

CA CR 99-1400 20 S.W.3d 422

Court of Appeals of Arkansas
Division IV
Opinion delivered June 28, 2000
[Petition for rehearing denied August 23, 2000.*]

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

* GRIFFEN, J., would grant.

Mark Pryor, Att'y Gen., by: *Leslie Plowman Fisken*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant was charged with aggravated robbery and theft of property valued in excess of $2,500.00. The jury found him guilty of robbery and misdemeanor theft. This appeal followed.

For reversal, appellant contends that the evidence was insufficient to support his robbery conviction. Appellant's argument is that the only evidence of force presented at trial was the testimony that appellant displayed a weapon during his flight, and that the jury, by finding him not guilty of aggravated robbery, conclusively found that no weapon was employed.[1] This argument lacks merit for several reasons.

First, it was never presented below. At trial, there was evidence to show that appellant was seen shoplifting a $15.00 item at a Fred's store, refused to return to the store when directed to do so, and was chased for a few hundred yards to a secluded area. Once in the secluded area, with his pursuers approximately sixty-five feet behind, appellant slowed from a run to a walk and pulled a gun which he displayed at his side. In challenging the sufficiency of the evidence below, appellant merely argued that the evidence presented at trial was insufficient to convict him. Although the proceedings continued for some time after the jury returned its verdict, appellant never asserted that his acquittal of aggravated robbery was tantamount to a finding that no weapon was employed, so that the sufficiency of the evidence should be determined without considering the evidence presented at trial to show that appellant displayed a weapon during his flight. Appellant is changing his argument on appeal, and this he cannot do. *See Watts v. State,* 68 Ark. App. 47, 8 S.W.3d 563 (2000) (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).

Second, although the jury acquitted appellant of aggravated robbery, it does not necessarily follow that the jury found that

[1] A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102(a) (Repl. 1997). A person commits aggravated robbery if he commits robbery as defined in § 5-12-102 and is armed with a deadly weapon or represents by word or conduct that he is so armed. Ark. Code Ann. § 5-12-103(a)(1) (Repl. 1997).

no weapon was employed in the crime. It is equally likely that the jury's verdict was the result of leniency. *See United States v. Powell*, 469 U.S. 57 (1984). In the absence of a request for special findings or to poll the jury to determine the basis for its decision, appellant's argument that the inconsistency was based on a finding that no weapon was employed is based on pure speculation. *See id.* at 66.

Third, even when verdicts are not consistent, an appellant cannot complain of the jury's having extended him greater leniency than he was entitled to. *Cole v. State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991); *see Benton v. State*, 78 Ark. 284, 298-99, 94 S.W. 688, 693-94 (1906).

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

Charles E. MAYO *v.* STATE of Arkansas

CA CR 99-268 20 S.W.3d 419

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 28, 2000

James Law Firm, by: *William Owen James*, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Charles Mayo was charged in Pulaski County Circuit Court with possession of marijuana,

second offense, a class D felony, and simultaneous possession of firearms and drugs, a class Y felony. Following a bench trial on November 13, 1998, Mayo was found guilty of possession of marijuana, first offense, a class A misdemeanor. He was sentenced to one year in the county jail and fined $1,000.00. The sole issue on appeal is whether the evidence was sufficient to support the conviction. We hold that it was not and reverse.

Two witnesses testified at trial — Robert Hinman, a Little Rock Police Officer, for the State, and the defendant, Charles Mayo. Officer Hinman testified that he went to a house at 4020 Ludwig Street on a burglary call. With him were Officers Harland, Van Pelt, and Stankovitz. Hinman and Harland entered the house through the back door. Officer Hinman testified that as he walked down a hall he saw Mayo looking around the corner. He testified that although he did not see Mayo sitting on a couch it appeared to him that he was, based on Mayo's position when he looked around the corner.

The officers ordered everyone to the ground and entered what seems to have been a living room. They found Mayo and another man in the room and Officer Hinman testified that Mayo was lying down with his feet between a couch and a coffee table. On the coffee table there were three "cigars" with marijuana in them, two of which had been smoked. There was also a small amount of loose marijuana. Officer Hinman testified that he could smell an odor of marijuana in the room, but agreed on cross-examination that he did not include that fact in his report of the incident. A loaded pistol was also found on the couch on which the officer believed Mayo was sitting. Officer Hinman testified that the house did not belong to the defendant and that there was nothing found to link him to the house.

Charles Mayo testified that he lived on West 42nd Street and had stopped by the house on Ludwig because he heard a football game on the television and wanted to get the score. He said he knocked on the door and "Andre" answered. He testified that when the police officers arrived he was not sitting on the couch but was standing in the room watching the game. He admitted that he saw the marijuana on the table but denied that it was his and denied having smoked any of it.

Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without mere speculation or conjecture. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999). The law makes no distinction between circumstantial and direct evidence in a review for sufficiency. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999). However, for circumstantial evidence to be sufficient, it must exclude every other reasonable hypothesis consistent with innocence. *Smith v. State*, 337 Ark. 239, 988 S.W.2d 492 (1999). Whether the evidence excludes every such hypothesis is ordinarily for the trier of fact to determine. *See Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996). In determining the sufficiency of the evidence, we view it in the light most favorable to the State. *Freeman v. State*, 331 Ark. 130, 959 S.W.2d 400 (1998). The trier of fact is not required to believe the testimony of the defendant. *See, Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999). While the question of the sufficiency of the evidence is dependent on the facts of the particular case, the issue is one of law. *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994).

It is not necessary to prove actual or physical possession in order to prove a defendant is in possession of a controlled substance. *See Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993). Instead, a showing of constructive possession, which is the control or right to control contraband, is sufficient. *See Cerda v. State*, 303 Ark. 241, 795 S.W.2d 358 (1990). Constructive possession may be implied where the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control. *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990). Where there is joint occupancy of the premises where the contraband is seized, some additional factor must be found to link the accused to the contraband. *Embry v. State*, 302 Ark. 608, 792 S.W.2d 318 (1990). In such instances, the State must prove that the accused exercised care, control, and management over the contraband and also that the accused knew that the matter possessed was contraband. *Parette, supra.*

In the case at bar, the question is reduced to whether the State made a sufficient showing that Mayo "exercised care, control, and management over the contraband." Although appellant argues that he was not sitting on the couch, we conclude that the trial judge could find that he was based on the testimony. Even so, we

are not persuaded that the State proved that the defendant exercised control over the marijuana.

In *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986), the supreme court reversed the conviction of Gary Piercefield. Piercefield was found hiding in a closet in an apartment containing drugs and drug paraphernalia. The court pointed out that the apartment was not Piercefield's and that there was no evidence that he had any connection with it. In *Embry v. State*, 302 Ark. 608, 792 S.W.2d 318 (1990), the court reversed a conviction on somewhat similar facts, even though the defendant was "a frequent (if not full-time) occupant and kept personal clothing there." The court noted that the defendant made no effort to dispose of any incriminating matter and made no incriminating statement. In *Mosley v. State*, 40 Ark. App. 154, 844 S.W.2d 378 (1992), we reversed a conviction when the defendant was found with six other people in a small room in an apartment containing contraband and drug paraphernalia. We held that while control over the contraband may be inferred from the circumstances, the evidence was insufficient to permit that inference. We affirmed a conviction in *Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993). In *Sinks*, the defendant was the only person in the residence when a search warrant was executed. He was found lying on a bed where cocaine was located. In *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991), the court found the evidence sufficient to sustain a conviction on possession of drugs where the defendant and three others were sitting around a kitchen table where cocaine and marijuana were in plain view. In *Nichols*, the court pointed out that the house belonged to the defendant.

The State relies on *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994). First, we are not persuaded that cases involving the possession of contraband in automobiles are fully applicable to cases involving homes or apartments. Second, in *Bond* there was testimony that the officer smelled an odor of smoking marijuana and that the appellant appeared to have "glassy eyes." In the case at bar, there was no evidence that the marijuana "cigars" were burning at the time of the officers' entry. There is no evidence that the defendant was under the influence of drugs.

In the case at bar, the trial judge could find that the defendant was seated on a couch near a coffee table where marijuana was in plain view and the defendant admitted that he was aware of the

presence of contraband. As against that, it is undisputed that the defendant had no connection with the residence and that there was another individual present when the police entered the room. On these facts, we conclude that the evidence presented the trial court with a choice so evenly balanced that the finding of guilt necessarily rested on conjecture. *See Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981).

Reversed.

HART, PITTMAN, MEADS, and CRABTREE, JJ., agree.

ROAF, J., concurs.

James E. SHOFFEY *v.* PROGRESSIVE NORTHWESTERN INSURANCE COMPANY

CA 99-1283 20 S.W.3d 424

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 28, 2000

Robert S. Blatt, for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Karen J. Hughes* and *Brian A. Brown*, for appellee.

JOHN E. JENNINGS, Judge. Mrs. Olga Cusick had an automobile insurance policy issued by the appellee, Progressive Northwestern Insurance Company. On September 20, 1998, Mrs. Cusick and her husband, William, were involved in an automobile accident in which Mr. Cusick was killed and Mrs. Cusick was injured. Progressive filed suit for a declaratory judgment contending that the Cusick's policy had been canceled effective September 6, 1998. The trial court granted summary judgment in Progressive's favor and James Shoffey, administrator of the estate of Mr. Cusick, appeals. The sole issue is whether the court's decision to grant summary judgment was correct. We hold that it was and affirm.

In connection with the motion for summary judgment, Progressive provided the affidavit of Leigh Anne Steinberg, which stated:

> I, Leigh Anne Steinberg, having first been duly sworn, state:
>
> 1. I am a custodian of records for Progressive Northwestern Insurance Company.
>
> 2. On July 20, 1998, Olga Cusick paid a premium of $138.73 which provided coverage through September 1, 1998.
>
> 3. Olga Cusick was billed for additional premium, but failed to pay it.
>
> 4. On August 25, 1998, Progressive Northwestern mailed cancellation notices to Olga Cusick, to Jerry's Affordable Insurance, and to the Lienholder, Sequoyah Credit, Inc. These notices specified that coverage would end and the cancellation would take effect on September 6, 1998. The notice to Olga Cusick was mailed to her at 921 Hillside Drive, Fort Smith, AR 72908-7654.

5. Since Olga Cusick had only paid a premium to cover the period through September 1, she received five days of coverage for which she had not paid a premium.

6. After cancellation on September 6, no subsequent premium was received and the policy was not reinstated.

7. In particular, the policy was not in effect on September 20, 1998, the date of the accident.

There is no dispute that Mrs. Cusick's address was 921 Hillside Drive in Fort Smith. Also attached to the motion were excerpts from a deposition of Mrs. Cusick in which she said that she was unaware that the policy had been canceled until after the accident. Mrs. Cusick testified that she never made a payment to Progressive after July 20, 1998, and to her knowledge no one else did on her behalf. She testified that she never saw a cancellation notice from Progressive but that her memory was "real bad." A notice of cancellation to Mrs. Cusick dated August 25, 1998, was submitted to the court as appellant's exhibit 1. The notice provided that cancellation would take effect on September 6 unless payment was received.

■ Arkansas Code Annotated section 23-89-306 (Repl. 1999) provides: "Proof of mailing of notice of cancellation ... to the named insured at the address shown in the policy shall be sufficient proof of notice." In *Atlanta Casualty Co. v. Swinney,* 315 Ark. 565, 868 S.W.2d 501 (1994), the supreme court held that whether the insured received the notice of cancellation was irrelevant under the statute. The court held that the trial judge was correct in granting summary judgment because the insured presented no evidence to challenge the proof of mailing.

■ Appellant attempts to distinguish *Swinney* by noting that there an insurance company employee responsible for mailing of notices of cancellation testified that the notice was sent, where as here there is no indication that the affiant, Leigh Anne Steinberg, was the person who actually mailed the notice. While we agree that this is a difference we do not regard it as critical. Mrs. Steinberg's affidavit does not state how she acquired the knowledge, but it does state on oath that the cancellation notice was mailed to Mrs. Cusick. But even if Mrs. Steinberg's knowledge was based on her position as custodian of the records for Progressive, business records

are deemed sufficiently trustworthy to be admissible as an exception to the hearsay rule. *Wildwood Contractors v. Thompson-Holloway Real Estate Agency*, 17 Ark. App. 169, 705 S.W.2d 897 (1986).

Appellant also notes that in *Swinney* there was a certification by a postal employee verifying the mailing. Again, we do not regard the lack of such a certification as controlling. Here, as in *Swinney*, there was unequivocal testimony that the notice of cancellation was sent to Mrs. Cusick. The appellee presented no evidence to contradict the proof of mailing. We conclude that the trial court's decision was correct.

Affirmed.

STROUD, HART, PITTMAN, NEAL, and GRIFFEN, JJ., agree.

Helen VANT *v.* Paymela Jean LONG

CA 99-1383 20 S.W.3d 437

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 28, 2000

Lane, Muse, Arman & Pullen, by: *James S. Street*, for appellant.

Boswell, Tucker & Brewster, by: *W. Lee Tucker*, for appellee.

JOHN E. JENNINGS, Judge. In the summer of 1996, Helen Vant was a passenger in a van driven by her daughter, Paymela Long, in Dallas, Texas. In heavy traffic, Ms. Long collided with the rear of the car in front of her and Mrs. Vant was injured.

Mrs. Vant brought this action against her daughter, alleging negligence. After depositions were taken Ms. Long moved for summary judgment and the trial court granted the motion. The only issue on appeal is whether the trial court erred in granting summary judgment. We hold that it did and reverse and remand.

The special circuit judge who heard the case concluded that the decision was governed by the supreme court's holding in *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997). In that case Tammy Sublett was traveling south on Interstate 430 in Little Rock when she struck a pickup truck driven by Sharon Hipps from the rear. Sublett sued on a theory of negligence alleging that Hipps abruptly moved in front of her and decelerated rapidly. When her deposition was taken Sublett conceded: (1) that appellee Hipps did not cut her off, although traffic ahead was already stopped; (2) that there was approximately fifty feet between their vehicles when Hipps entered her lane; (3) that she had already applied her brakes when Hipps signaled to enter her lane; (4) that she briefly took her foot off the brake pedal to contemplate a maneuver into the next lane but did not attempt to do so; (5) that she subsequently applied more pressure to the brakes and began sliding on the wet pavement; (6) that there was adequate space for Hipps's vehicle to pull into her lane; and (7) that she was not aware of anything Hipps did wrong.

On these facts the supreme court held that the trial court correctly granted summary judgment.

In the case at bar the trial court had before it Mrs. Vant's deposition in which the following questions and answers were shown:

Q: Tell me what you recall about that accident, Mrs. Vant.

A: It just happened so quick. We were just driving along and we had seen a lot of accidents. The traffic was ...

Q: Bumper to bumper?

A: Yes, so we were really trying to be careful.

. . .

Q: Do you know of anything your daughter did to cause the accident down in Dallas?

A: No. All I know is, traffic was bumper to bumper.

The court also had before it, however, the deposition of Mrs. Long in which she said:

> I was in the far lane, left lane of traffic, traffic was heavy and the guy in front of me kept hitting his brakes, hitting his brakes and I told my mom, I need to get around this guy, and I looked over in my mirror to see what the other lane was like and when I looked back he was stopped, completely stopped, so I steered to the outside safety lane, I couldn't get clear — wide enough for the van and I hit just the left hand side of his vehicle.

We do not understand *Sublett* to stand for the proposition that any time there is a statement by the plaintiff that she does not know how the defendant caused the accident, summary judgment must follow. The decision in *Sublett* was based on the series of statements made by the plaintiff in her deposition. The court's final sentence notes that the plaintiff, Sublett, failed to meet proof with proof. In contrast, the trial court had before it a virtual admission of negligence by the defendant, Ms. Long. And although both *Sublett* and the case at bar involved rear-end collisions it was the plaintiff in *Sublett* who struck the forward vehicle — here, it is the defendant, Ms. Long, who struck another car from behind.

■■ Summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to summary judgment as matter of law. *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997). All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Lovell v. St. Paul Fire & Marine Ins. Co.*, 310 Ark. 791, 839 S.W.2d 222 (1992).

In the case at bar we cannot say there is no genuine issue of fact as to the question of Ms. Long's negligence. Accordingly, the trial court's order granting summary judgment must be reversed.

Reversed and remanded.

PITTMAN, HART, and NEAL, JJ., agree.

STROUD and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I dissent from the majority decision out of obedience to our supreme court's decision in *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997). There, the supreme court affirmed an order granting summary judgment in favor of defendants in a personal injury action involving a rear-end collision. The summary judgment motion in that case was based, as is the case in the present appeal, on the plaintiff Sublett's deposition testimony in which she admitted, among other things, that she was not aware of anything that Hipps did wrong in connection with the accident. Hipps contended in her summary-judgment motion that Sublett's version of the events as set forth in her deposition testimony presented no genuine issue of material fact and directly refuted allegations in her complaint. Hipps also contended that Sublett's admission that she was not aware of anything that Hipps did wrong established that Sublett was the sole proximate cause of her accident and damages. Justice Robert Brown, writing for the supreme court, addressed the effect of those admissions as follows:

> Sublett admits that Hipps did not cut her off when she changed lanes and further that Hipps did nothing wrong. These drastic admissions, which contradict her complaint, not only fail to create a genuine issue of material fact under Ark. R. Civ. P. 56(c), but they appear to concede lack of fault on Hipp's [sic]part. We have affirmed grants of summary judgment in the past when the plaintiff/appellant makes a pivotal admission that goes to the heart of the case. *See, e.g., Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992); *King v. Jackson*, 302 Ark. 540, 790 S.W.2d 904 (1990). This is such a case.

In the present case, the summary judgment motion was based on a question and answer during appellant's deposition. Appellant was asked, "Do you know of anything your daughter did to cause the accident down in Dallas?" She responded, "No. All I know,

traffic was bumper to bumper." This answer directly contradicts appellant's allegations of negligence against appellee.

It is settled law in Arkansas that the fact that an accident occurs is not evidence of negligence on the fault of anyone. *See* AMI Civil 4th 603; *see also Mahan v. Hall*, 320 Ark. 473, 897 S.W.2d 571 (1995); *Pilkington v. Riley*, 271 Ark. 746, 610 S.W.2d 570 (1981). There appears to be no rear-end collision exception to this settled principle of law.

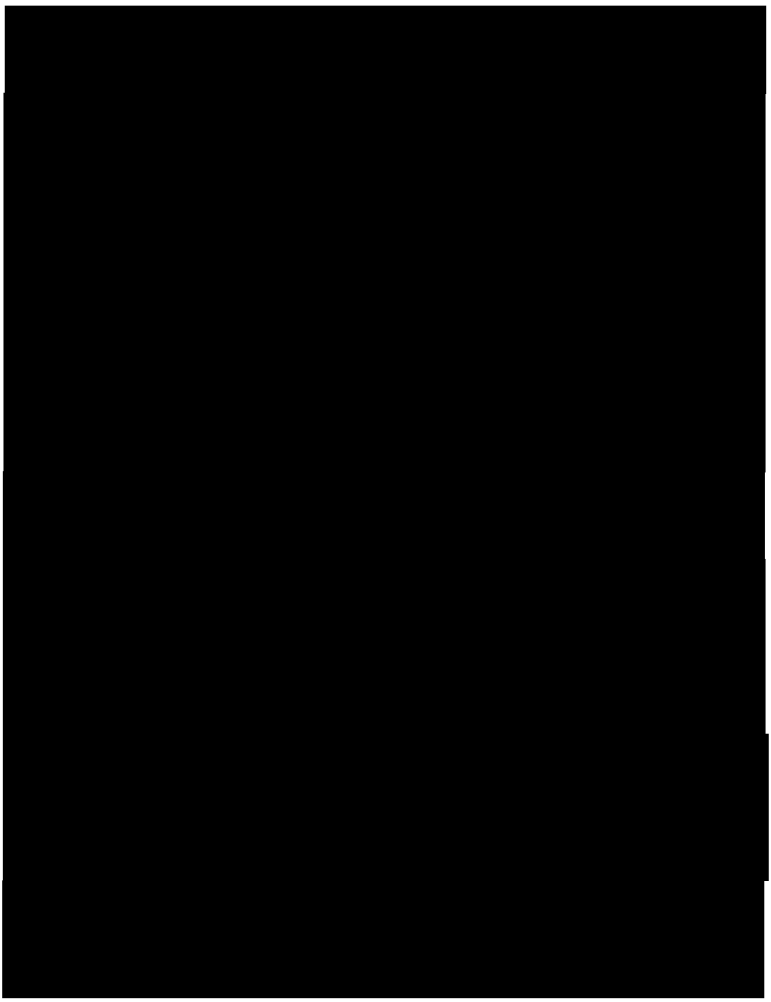
If the complaining party denies that the defending party to a negligence action did anything wrong, it appears that the rationale of *Sublett v. Hipps* and similar decisions by our supreme court compel the result reached by the trial court in this instance. Therefore, I am obliged to respectfully dissent from the decision to reverse the trial court and remand this case for further proceedings.

I am authorized to state that Judge STROUD joins in this opinion.

FORREST CONSTRUCTION, INC. *v.*
John MILAM, *et al.*

CA 99-1335 20 S.W.3d 440

Court of Appeals of Arkansas
Division I
Opinion delivered June 28, 2000
[Petition for rehearing denied August 23, 2000.]



Philip J. Taylor, for appellant.

Robertson, Beasley, Cowan & Ketcham, PLLC, by: *Kenneth W. Cowan*, for appellees.

JOHN F. STROUD, JR., Judge. This appeal comes from a chancery decree enjoining appellant from subdividing certain lots and from selling certain lots that had already been subdivided in the Meadowbrook South Addition in the city of Greenwood. The chancellor also refused to enforce a sewer easement over land owned by appellees Donnie and Carol Whitson, and awarded appellees $23,579.65 in attorney fees. Appellant contends that the chancellor's rulings were erroneous and raises eight arguments on appeal. Appellees ask that we dismiss the appeal on the grounds of mootness and lack of standing. We deny the motion to dismiss and reverse and remand the case.

In 1993, Forrest Griffith and his wife Gloria acquired title to over 100 acres of land in Sebastian County. The land was later

annexed to the City of Greenwood. In 1994, Griffith began developing the majority of the land into a subdivision called Meadowbrook South. He planned to divide the property into thirty-nine lots. However, before he could plat the subdivision, he sold two tracts by metes and bounds description. One tract was sold to appellees John and Claudia Milam; the other was sold to Melissa and Nelson Brock. Thereafter, Griffith platted the subdivision into lots. On May 4, 1994, he filed a plat with the circuit clerk reflecting thirty-seven lots[1] ranging in size from 1.05 acres to 5.52 acres. The plat was signed by the Griffiths, Milams, and Brocks as allotters. Forrest Griffith was listed as owner and developer of Meadowbrook South.

On May 9, 1994, five days after the plat was filed, Forrest Griffith filed a document containing ten restrictive covenants pertaining to the subdivision. The covenants provided, *inter alia*, that all lots were to be used for residential purposes only, that all residences were to have a minimum of 1,600 square feet of living area, and that all lots were to be used for single family dwellings. The document was signed only by Forrest Griffith.

After filing the plat and covenants, Griffith began to market the subdivision as one having estate-sized lots and offering "country living in the city." A few lots were sold in the summer of 1994 by Forrest and Gloria Griffith to various buyers, including appellees John and Claudia Milam and appellees Bill and Donna Dennis. In August 1994, the remaining property in the subdivision was transferred from the Griffiths to appellant Forrest Construction, Inc. After that time, the remaining appellees Maverick and Wendy Trozzi, Rush and Marcia West, Dean and Lena King, Rod and Sherry Hower, Ed and Andria Hawkins, Chris and Debra Honaker, Kenneth and Ann Hamilton, Donnie and Carol Whitson, and Charles and Kathryn O'Brien, purchased various lots in the subdivision.

In June 1996, Forrest Griffith, as president of Forrest Construction, Inc., decided to replat the subdivision by splitting nine of the unsold lots into twenty-two smaller lots. Lot 19 was split into eight lots approximately one-half acre in size, Lots 21 and 22 into three lots approximately three-quarters of an acre in size, Lots 31 and 32 into three lots approximately one and one-half acres in size,

[1] The lots were numbered one through thirty-nine, but the plat contained no lot twenty or twenty-nine.

and Lots 34, 35, 36, and 37 into eight lots ranging in size from .63 acres to 1.2 acres. The Greenwood City Council approved the replatting in September 1996. Thereafter, appellant began making improvements on the lots.

Griffith did not inform the appellee homeowners of his plan to split lots. However, they discovered his intention to do so. On February 18, 1997, a number of homeowners, including many of the appellees in this case, filed suit in Sebastian County Chancery Court to enjoin the splitting of lots. Within a few days thereafter, the Greenwood City Council withdrew its approval of the replatting. As a result, the homeowners voluntarily dismissed their chancery action without prejudice. Griffith, meanwhile, pursued judicial review of the city council's withdrawal of its approval. He ultimately obtained relief on May 8, 1998, when the Sebastian County Circuit Court found that the Council's withdrawal of approval had been wrongful.

Following the circuit court's ruling, Griffith began to sell the replatted lots. On August 19, 1998, appellees filed the suit that is the subject of this appeal. They alleged that appellant had split the lots in violation of the restrictive covenants filed in 1994, and they asked that appellant be enjoined from further violations. Appellant defended primarily on the grounds that none of the restrictive covenants expressly prohibited splitting the lots and that appellees' request for relief should be barred by the equitable doctrines of laches, waiver, estoppel, and unclean hands. The case went to trial, and the chancellor found that the restrictive covenant which stated that, "all lots are to be used for single family dwellings" prohibited appellant from splitting the originally platted lots. He also found that there was no basis for the application of appellant's equitable defenses. Appellant was permanently restrained from any further splitting of the originally platted lots and from allowing any of the lots already split to be sold unless the lots already had substantial construction on them.

We first address an issue originally presented by appellees in a motion to dismiss the appeal. We denied the motion without prejudice to raise it in appellees' brief, and they have done so. The motion concerns events that occurred after the notice of appeal was filed in this case. On September 14, 1999, a decree of foreclosure was entered as the result of a complaint filed by Farmers Bank of Greenwood against appellant. The decree ordered the sale of certain secured property owned by appellant in order to repay over

$1,000,000 owed to the bank. Among the properties that had been pledged as security were Lot 23 in the Meadowbrook South subdivision and seventeen of the twenty-two split lots in the subdivision. On or about October 26, 1999, those lots were in fact sold to Farmers Bank. Appellees argue that, because of the foreclosure sale, the issues in this case are now moot, and appellant has no standing to prosecute this appeal.

A case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Dillon v. Twin City Bank*, 325 Ark. 309, 924 S.W.2d 802 (1996); *Pentz v. Romine*, 62 Ark. App. 12, 966 S.W.2d 934 (1998). As a general rule, an appellate court will not address moot issues. *See Dillon v. Twin City Bank, supra.* However, we may elect to address moot issues when they raise considerations of public interest or when addressing them will prevent future litigation. *See Stair v. Phillips*, 315 Ark. 429, 867 S.W.2d 453 (1993).

We hold that the issues presented by this case are not moot. The case involves the use of property in a large subdivision, and the rights of a substantial number of persons will be affected. A ruling on the merits will have the practical legal effect of determining what actions may or may not be taken with respect to the subdivision lots. Additionally, appellant has filed a lawsuit in federal court against the City of Greenwood and the Whitson appellees and, according to him, that case has been stayed pending our resolution of this appeal. Thus, we perceive a public interest in the outcome of this case. Finally, a decision on the merits will have the effect of determining whether appellant is liable for over $23,000 in attorney fees, imposed as the result of the chancellor's ruling on the merits. On this point, appellees argue that the question of liability for costs does not prevent dismissal of an appeal for mootness. *See Cain v. Carl-Lee*, 171 Ark. 155, 283 S.W. 365 (1926). However, the term "costs" does not ordinarily include attorney fees. *See generally, State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994); *Lewallen v. Bethune*, 267 Ark. 976, 593 S.W.2d 64 (Ark. App. 1980), *overruled on other grounds, Elliott v. Boone County Indep. Living, Inc.*, 56 Ark. App. 113, 939 S.W.2d 844 (1997).

Appellees also rely on *Pentz v. Romine, supra*, for their contention that this case is moot. There, we dismissed a case for mootness when the property involved in the lawsuit was sold at a foreclosure sale. Appellants had filed a complaint for specific performance of a real estate contract. However, by the time the case

was heard on appeal, the property had been foreclosed upon. We held that the foreclosure rendered specific performance impossible and thus dismissed the case as moot. Unlike *Pentz*, the foreclosure in this case does not have the effect of rendering a judicial decision legally impractical. We will not be ordering appellant to take any action with regard to property he does not own.

The next question is whether appellant has standing to prosecute this appeal. It has been said that a party has no standing to raise an issue regarding property in which he has no interest. *Nash v. Estate of Swaffar*, 336 Ark. 235, 983 S.W.2d 942 (1999). However, it has also been said that a party is an aggrieved party and thus has standing to appeal if the trial court's order has impaired his economic interests. *Sebastian Lake Pub. Util. Co. v. Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996). Even though appellant has no present property interest in the lots that were replatted, he remains aggrieved by virtue of his liability for attorney fees in the amount of $23,579.65. The chancellor awarded those fees because he found that appellees were the prevailing party below. A reversal of that finding will necessarily entail a reversal of the attorney fee award against appellant. Thus, appellant has standing to prosecute this appeal.

Having disposed of the threshold issues, we turn now to the merits of the case. Appellant raises several points of error regarding the chancellor's finding that the subdivision covenants prohibit the splitting of the originally platted lots. Because we agree that the chancellor erred in his interpretation of the covenants, we need only address that point.

We begin by noting that chancery cases are reviewed *de novo* on appeal. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996). We do not reverse a chancellor's findings of fact unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998).

The chancellor in this case found that the subdivision's general plan of development, the plat showing oversized lots, the marketing of the subdivision by appellant, and the covenant which read, "all lots are to be used for single family dwellings," prohibited the splitting of the subdivision's lots. Courts do not favor restric-

tions upon the use of land, and if there is a restriction on the land, it must be clearly apparent. *Holaday v. Fraker, supra.* Restrictive covenants are to be strictly construed against limitations on the free use of property. *Casebeer v. Beacon*, 248 Ark. 22, 449 S.W.2d 701 (1970). All doubts are resolved in favor of the unfettered use of land. *See id.* However, this rule of strict construction is limited by the basic doctrine of taking the plain meaning of the language employed. *Holaday v. Fraker, supra.* The general rule governing interpretation, application, and enforcement of restrictive covenants is that the intention of the parties as shown by the covenant governs. *Id.*

The covenant at issue in this case, which is covenant number nine, provides simply that all lots are to be used for single family dwellings. As written, the covenant is directed more toward the type of use to which a lot is put rather than to the size of a lot. If there had been any intention to restrict the division of lots, such intention could have been clearly and unambiguously expressed in a covenant. *See Shermer v. Haynes*, 248 Ark. 255, 451 S.W.2d 445 (1970). In fact, there was evidence at trial that, prior to the filing of the ten covenants that now govern the subdivision, a set of twelve covenants was drafted, one of which contained an express restriction on the splitting of lots. However, those covenants were not filed. The ten covenants filed, including covenant number nine, contain nothing to make it clearly apparent that the splitting of lots is prohibited.

In addition to basing his decision on the language contained in covenant number nine, the chancellor considered three additional factors: the size of the lots as originally platted, the fact that Griffith advertised the subdivision as having "estate-sized" lots, and the existence of a general plan of development. We disagree with the chancellor that these factors impose a restriction against lot-splitting. First, it is generally recognized that no restriction on subdividing lots is implied by the mere filing of a map depicting the lots. *See* Milton Friedman, *Contracts and Conveyances of Real Property*, § 4.13(b) (4th ed. 1984). *See also* 20 AM. JUR. 2d *Covenants*, § 158 (2d ed. 1995); *Hickson v. Noroton Manor, Inc.*, 118 Conn. 180, 171 A. 31 (1934); *Bersos v. Cape George Colony Club*, 4 Wash. App. 663, 484 P.2d 485 (1971). Secondly, the fact that the lots in the subdivision were marketed as being estate-sized does not imply a restrictive covenant against splitting lots. Appellees cite us to no case, and our research has discovered none, in which the representations in an advertisement were used to create a restrictive

covenant. In any event, the split lots were still sizeable, ranging from .5 to 1.2 acres. Thirdly, the fact that a general plan of development existed in the subdivision is not evidence of a restrictive covenant against lot-splitting. The importance of a general plan of development is that, in its absence, a restrictive covenant cannot be enforced. *See Constant v. Hodges*, 292 Ark. 439, 730 S.W.2d 892 (1987). A general plan of development cannot *create* a restriction. *See Ray v. Miller*, 323 Ark. 578, 916 S.W.2d 117 (1996).

It is also important that we discuss the chancellor's reliance on the case of *Constant v. Hodges, supra*. That case has many similarities to the case at bar. In *Constant*, a property owner in the Robinwood subdivision in Little Rock wanted to divide his lot. The subdivision's restrictive covenants contained no express restriction against lot-splitting. Nevertheless, our supreme court held that lot-splitting was prohibited based upon the existence of a general plan of development and the language of three relevant instruments. Two of those instruments recited that "only one single family residence...shall be erected." It is this language that distinguishes *Constant* from the case before us. It avails itself of the interpretation that property use is restricted to "only one" house per lot. By contrast, the restriction in this case that "all lots are to be used for single family dwellings" is not susceptible to such an interpretation. Nothing in the latter language evidences an intent to prohibit the splitting of lots.

Having determined that the chancellor erred in his interpretation of the restrictive covenant, we reverse his order enjoining the further splitting of lots and the sale of lots that are already split. Our holding necessitates that we also reverse the chancellor's attorney fee award to appellees because appellees are no longer the prevailing party. *See* Ark. Code Ann. § 16-22-308 (Repl. 1999).[2]

The next issue to be addressed concerns the chancellor's decision not to enforce a fifteen-foot sewer easement over the lot owned by appellees Donnie and Carol Whitson. The easement was sought by appellant in late 1996 for the purpose of connecting sewer lines to some of the split lots. Donnie Whitson (unaware that the sewer lines would service split lots, which he opposed) executed the easement in December 1996 in favor of the city of Greenwood. In conjunction therewith, he executed an agreement with appellant

[2] We need not reach the issue of whether attorney fees are recoverable under § 16-22-308 in an action for breach of a restrictive covenant.

that, as compensation for the easement, appellant would clean up two ditches on Whitsons' lot, clean out a creek on the lot, repair any ground disturbed by the laying of the sewer lines, and hook Whitsons' house up to the sewer line at no charge. Both the easement and the agreement were signed by Donnie Whitson but not by Carol Whitson. In reliance on these instruments, appellant laid the sewer line across the Whitsons' property. According to Forrest Griffith, he was unaware that the easement might not be valid in the absence of Mrs. Whitson's signature.

Following the trial, the court initially declared that the City of Greenwood was granted an easement by estoppel across the Whitsons' lot. However, upon appellees' motion, he set that ruling aside on the ground that the City of Greenwood was not a party to the action and appellant was not the real party in interest with regard to whether the easement should be granted. Appellant contends that the chancellor's initial ruling should not have been set aside, and we agree. Arkansas law provides that every action is to be prosecuted in the name of the real party in interest. Ark. R. Civ. P. 17(a). A real party in interest is considered to be the person or corporation who can discharge the claim on which the allegation is based, not necessarily the person ultimately entitled to the benefit of any recovery. *Smith v. National Cashflow Systems, Inc.*, 309 Ark. 101, 827 S.W.2d 146 (1992). Here, appellant was actually a party to the easement agreement, although the easement ran in favor of the city. Appellant, as per its contract with Donnie Whitson, provided the compensation for the easement and relied on the easement in installing the sewer lines. The existence of the easement benefitted appellant as much as it did the city. The relationship between appellant and the City of Greenwood for the purpose of this easement was symbiotic enough to allow appellant to discharge the claim that an easement by estoppel should exist. We therefore reverse the chancellor's finding on this point and direct that his original order finding an easement by estoppel be reinstated.

Finally, we address appellees' argument, made in their brief and in motions filed prior to submission of the case, that they are entitled to costs and attorney fees due to appellant's noncompliance with our abstracting rules. They claim that appellant's abstract is deficient for failing to include the judgments appealed from and excessive for including too much extraneous material. Appellant has, in turn, filed a motion for costs and attorney fees incurred in responding to appellees' motion. We deny both motions. There was

no deficiency in appellant's abstract because he included the judgments appealed from in an addendum as required by Ark. Sup. Ct. R. 4-2(a)(8). Items included in an addendum are not to be abstracted. Ark. Sup. Ct. R. 4-2(a)(6). On the other hand, appellant did engage in excessive abstracting. His abstract consists of two volumes containing 464 pages. Much of this material could have been abridged or deleted entirely because it was not necessary to our understanding of the issues on appeal. Excessive abstracting is as violative of the rules as omissions of material pleadings, exhibits, and testimony. *See Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996). Our rules give us several options in dealing with abstract violations. However, none of them include awarding costs and fees for reviewing an excessive abstract. We may award costs to appellee for supplementing a deficient abstract or we may allow an appellant to file a substituted or revised abstract or we may affirm the case for flagrant deficiencies. *See* Ark. Sup. Ct. R. 4-2(b). However, we decline to exercise any of these options in this particular case.

We reverse and remand for entry of orders consistent with this opinion.

JENNINGS and GRIFFEN, JJ., agree.

Rick MARCUM, President of Phi Kappa Tau Housing Corp. a/k/a PKT Housing, Rick Marcum, Individually, and Anthony Capo, Individually, and as Vice-President of Phi Kappa Tau Housing Corp. *v.* Matt WENGERT, Paul Wengert, and Angie Wengert

CA 99-250 20 S.W.3d 430

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 28, 2000
[Petition for rehearing denied August 23, 2000.*]

* BIRD and MEADS, JJ., would grant.

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

Conners & Winters, P.L.L.C., by: *John R. Elrod* and *Vicki Bronson*, for appellees.

OLLY NEAL, Judge. This is an appeal from the Washington County Circuit Court's denial of appellants' request for

attorney's fees following the entry of judgment on a jury verdict for appellant Phi Kappa Tau Housing Corporation (hereinafter "PKT") against appellees Matt Wengert, Paul Wengert, and Angie Wengert in the amount of $10,500. On cross-appeal, appellees do not appeal from the jury verdict rendered but assert error in the trial court's refusal to grant them judgment as a matter of law on the ground that appellant Rick Marcum lacked authority to prosecute this action on behalf of PKT. We affirm the trial judge's decision in all respects.

In August 1994, appellees leased a building for a term of six months to PKT for use as a fraternity house by the Fayetteville chapter of Phi Kappa Tau Fraternity. Marcum signed the lease as president, and appellant Anthony Capo signed it as vice-president of PKT. After the term of the lease expired, PKT continued as a month-to-month tenant through the remainder of the school year. During the summer of 1995, several of the student fraternity members occupied the house with the permission of appellees, although the terms of that agreement were later disputed. The parties to this appeal were unsuccessful in reaching an agreement for the next school term, and appellees directed PKT to remove its personal property from the building. A few days later, appellee Matt Wengert notified Marcum that he must immediately remove the furniture or it would be considered abandoned. Paragraph seventeen of the lease provided: "Any personal property not removed at the termination or forfeiture of this Lease Agreement shall be deemed abandoned and become the property of Lessor without any payment or offset of such fixtures or property." Appellants did not remove the furniture from the building, and appellees later refused to return it or the security deposits to PKT.

In February 1996, Marcum, as president of PKT, filed a complaint against appellees for conversion of PKT's furniture, valued at $10,000, and for the return of $8,000 in security deposits and $2,000 for kitchen renovations. In response, appellees alleged that the personal property had been abandoned pursuant to the terms of the lease. They filed a counterclaim and a third-party complaint against Marcum and Capo, individually and in their capacities as president and vice-president of PKT, alleging breach of the lease and seeking damages in excess of $40,000. PKT filed an amended complaint requesting damages for appellees' failure to deliver the premises until three weeks after the lease was signed, for return of

its security deposits, and for conversion of the furniture. PKT also sought punitive damages of $100,000 in the amended complaint.

At trial, appellees moved for judgment as a matter of law on the ground that Marcum did not have authority to file the lawsuit on behalf of PKT because he was not a member of the board of directors or an officer of the corporation when the suit was filed. The circuit judge denied the motion, stating that appellees lacked standing to raise this question.

In its verdict on interrogatories, the jury found that appellees had converted PKT's property and awarded it damages of $8,500. It also found that appellees had breached the contract with PKT and awarded it $4,000 for that breach. The jury further found that appellees were entitled to recover $2,000 in damages from PKT. It found that Marcum and Capo were not liable to appellees for any damages.

In a letter opinion written after the jury returned its verdict, the circuit judge stated:

> [PKT] maintains it is entitled to recover an attorney's fee under either the provisions of A.C.A. section 16-22-308 or the terms of the parties' lease agreement providing for same.
>
> Under either theory of recovery, a party seeking entitlement to a fee must be the prevailing party. Here, [PKT] received more money under the jury's verdict than [appellees], and as [PKT] argues, could be considered the prevailing party. However, [PKT], in its amended complaint, sought at least $110,000 in damages, recovered $8,500 on its conversion theory and $2,000 on its breach of contract claim, thus hardly prevailing on its original claim.
>
> On the other hand, [appellees] claimed damage in excess of $40,000 in their counterclaim and obtained a net verdict of $2,000 — a far cry from their sought after recovery, but nonetheless a recovery.
>
> [PKT] seeks an attorney's fee and costs amounting to $54,432.69 and [appellees] maintain they have expended in excess of $20,000 defending [PKT's] claims and prosecuting their counterclaim. This case involves claims by [PKT] for conversion and breach of contract and a counterclaim by [appellees] for breach of contract. This is a simple case, neither complicated by facts nor esoteric questions of law. It is exceedingly difficult to imagine why,

> in a case of this nature, a litigant would authorize the expenditure of sums anywhere near those now claimed by [PKT], or for that matter, paid by the [appellees].
>
> Prevail is defined as being victorious. See *Webster's*, 1989 ed. Certainly neither [PKT] nor [appellees] have been victorious. In my judgment, neither party, as a matter of law, prevailed in this action and, accordingly, no fees or costs will be awarded.

On appeal, PKT argues that it should have been awarded attorney's fees according to the terms of the lease. Marcum and Capo assert that they should have been awarded attorney's fees as provided by Arkansas Code Annotated section 16-22-308 (Repl. 1999). We disagree with both arguments.

Arkansas Code Annotated section 16-22-308 provides for the recovery of a reasonable attorney's fee by the prevailing party in any civil action for breach of contract unless otherwise provided by the contract. There can be only one prevailing party in an action at law for the recovery of a money judgment; sometimes each party wins on some of the issues, but the party in whose favor the verdict compels a judgment is the prevailing party. *See ERC Mortgage Group, Inc. v. Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990).

Here, the jury awarded PKT $8,500 for conversion of its property, a tort, and $4,000 for breach of contract, which was offset by a $2,000 breach-of-contract verdict for appellees. Appellees were unsuccessful in their breach-of-contract claims against Marcum and Capo. We therefore hold that PKT was a prevailing party because, after setting off the award to appellees, it was awarded judgment of $8,500 on its tort claim and $2,000 on its contract claim. The fact that PKT did not recover all of the damages it sought is not determinative of whether it prevailed at trial. Also, Marcum and Capo are prevailing parties because they successfully defended appellees' claims against them. *See Marsh & McLennan of Arkansas v. Herget*, 321 Ark. 180, 900 S.W.2d 195 (1995); *Cumberland Financial Group v. Brown Chemical Co.*, 34 Ark. App. 269, 810 S.W.2d 49 (1991).

However, our analysis cannot end with the determination that appellants are prevailing parties. Even though Marcum and Capo are prevailing parties, we cannot say, given the record, that the circuit judge abused his discretion in denying them attorney's

fees. *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990).

PKT's claim for attorney's fees involves different considerations. Appellees argue that PKT is not entitled to fees because it recovered $8,500 on its tort claim for conversion and attorney's fees are not recoverable in tort actions. We agree. Where both contract and tort claims are advanced, an award of attorney's fees to the prevailing party is proper only when the action is based primarily in contract. *See Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 466 (1993); *Meyer v. Riverdale Harbor Mun. Property Owners Improvement Dist.*, 58 Ark. App. 91, 947 S.W.2d 20 (1997). We believe that, although PKT recovered some damages for breach of contract, this action is based primarily in tort. Therefore, the trial judge had no discretion as to whether to award attorney's fees to PKT. We may affirm the trial judge's decision if it is correct for any reason. *Alexander v. Chapman*, 299 Ark. 126, 771 S.W.2d 744 (1989).

PKT urges us to hold that it is entitled to attorney's fees under the terms of the lease, which states:

> In the case suit should be brought for recovery of the premises, or for any sum due hereunder, or because of any act which may arise out of the possession of the premises, by either party, the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney's fee.

PKT argues that this provision would require appellees to pay attorney's fees even in the context of a tort case. We do not agree.

In *Griffen v. First National Bank*, 318 Ark. 848, 888 S.W.2d 306 (1994), the issue was whether Arkansas Code Annotated section 16-22-308 limited the bank's right to an award of attorney's fees to those incurred at trial before the circuit court. There, the agreement provided that the appellant would "pay all expenses, legal and/or otherwise (including court costs and attorney's fees, paid or incurred by said Bank in endeavoring to collect such indebtedness, obligations and liabilities, or any part thereof, and in enforcing this guaranty." 318 Ark. at 855, 888 S.W.2d at 310. The supreme court held that the agreement was enforceable in accordance with its terms independent of the statute and, therefore, the bank was entitled to recover attorney's fees incurred in a related bankruptcy proceeding and upon appeal from the circuit court's judgment.

In our view, *Griffen v. First National Bank* cannot be read as providing support for PKT's position. In that case, the proceedings for which the attorney's fees were awarded were clearly within the specific terms of the agreement — the appellee incurred those fees in seeking recovery of the debt and in enforcing the guaranty. We do not read *Griffen v. First National Bank* as providing authority for the recovery of attorney's fees in actions such as this that are based primarily in tort. It is true that, in the case before us, the wording of the agreement to pay attorney's fees is broader than that involved in *Griffen v. First National Bank* and that the parties' entry into the lease provided the opportunity for their subsequent conflict. Nevertheless, the relevant language of the unambiguous lease before us does not expressly contemplate that appellees must pay attorney's fees in cases involving the tort of conversion, nor can we reasonably interpret it as doing so by implication. If the parties had chosen to provide otherwise, they were free to include such language in the lease. Accordingly, we hold that PKT is not entitled to recover attorney's fees under the facts of this case.

For their cross-appeal, appellees assert that the circuit judge should have granted them judgment as a matter of law because Marcum was not a director of PKT and did not have the authorization of the board when the suit was filed and, therefore, could not act on its behalf. The circuit judge denied appellees' motion by stating that they lacked standing to complain about this issue. At trial, appellants unsuccessfully sought to introduce into evidence a document stating that PKT's board had ratified Marcum's initiation of this lawsuit on PKT's behalf; however, appellants failed to include its rejection among their points on appeal.

Nevertheless, we have no difficulty in affirming the trial judge's decision in this regard on two bases. Appellees filed a counterclaim and third-party complaint seeking affirmative relief against Marcum and Capo in their capacities as president and vice-president of PKT. One may not complain of action he has induced, consented to, or acquiesced in. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998); *Neel v. Citizens First State Bank*, 28 Ark. App. 116, 771 S.W.2d 303 (1989). Additionally, we think this situation is analogous to one where a defendant waits until trial to argue that the action has not been prosecuted by the real party in interest. As we held in *Monaghan v. Davis*, 16 Ark. App. 258, 700 S.W.2d 375 (1985), a trial court has discretion whether to hold that

a party has waived this issue by waiting until trial to raise it. A trial court's ruling will be affirmed on appeal if it is correct for any reason. *Alexander v. Chapman, supra.*

Affirmed.

HART, STROUD, and CRABTREE, JJ.,agree.

BIRD and MEADS, JJ., dissent.

SAM BIRD, Judge, dissenting. I agree with the majority opinion that the trial court erred in holding that there was no prevailing party. I also agree with the majority opinion in its holding that the prevailing parties in this action are Phi Kappa Tau Housing Corporation (PKT), Rick Marcum, and Anthony Capo. However, I disagree with the majority opinion's holding that these prevailing parties are not entitled to an attorney's fee because their cause of action is "based primarily in tort." I believe that this case is based primarily in contract, and I would reverse and remand for the judge to determine a reasonable amount of attorney's fees to be paid to the prevailing parties.

I agree generally with the facts as recited in the majority opinion. I would add, however, that where the majority opinion states that appellees told appellants to "immediately" remove their furniture from appellees' house after negotiations for a new lease broke down, what was actually said by Matt Wengert to Rick Marcum was that PKT had "fifteen minutes" to remove their furniture from the house or the furniture would be deemed to have been abandoned. When appellants did not meet this obviously impossible deadline, appellees claimed appellants' furniture as their own and refused to return it. The majority opinion also fails to note that appellees specifically alleged in their counterclaim that PKT's furniture had been abandoned by the appellants and became the property of the appellees *pursuant to section 17 of the lease agreement.*

The general rule in Arkansas is well settled that attorney's fees are not awarded unless expressly provided for by statute or rule. *Gill v. Transcriptions, Inc.*, 319 Ark. 485, 892 S.W.2d 258 (1995). Arkansas Code Annotated section 16-22-308 (Repl. 1999) states:

> In any civil action to recover on an open account, statement of account, account stated, promissory notes, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares,

> or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.

This section has been held to authorize an award of attorney's fees to a party who successfully defends against a contract action. *Meyer v. Riverdale Harbor Mun. Property Owners Improvement*, 58 Ark. App. 91, 947 S.W.2d 20 (1997). This section does not allow for an award of attorney's fees in tort actions. *Id.* Where both contract and tort claims are advanced, an award of attorney's fees to the prevailing party is proper only when the action is based primarily in contract. *Id.* In determining what cause of action was litigated, the courts look to the basis of the claim and also consider the issue presented to the jury. *Id.*

In this case, the claim filed by appellants and the cross-claim filed by appellees were based primarily in contract. PKT's cause of action is not simply an action for conversion in which it seeks to recover its property from one who has appropriated it to his own use. This is an action that depends for its existence solely upon the parties' lease contract that resulted in PKT's furniture being placed in Wengert's house, the ownership of which furniture was claimed by Wengert solely in reliance upon the terms of the contract. Unless PKT wished to simply surrender to the Wengerts' bullying tactic to take their furniture in unreasonable reliance upon the forfeiture provision of their lease contract, the only recourse they had was to file an action for conversion. Nonetheless, the sole underlying basis for the suit was their lease contract.

In addition to the $8,500 awarded by the jury to appellants for PKT's furniture, the jury also awarded appellants $4,000 for their unrefunded security deposit as provided for in the contract. Clearly there is no dispute as to whether appellants' claim for the recovery of its security deposit was based solely on the contract. Nor is there any dispute that attorney's fees incurred by appellants in defending against appellees' counterclaim to obtain ownership of PKT's furniture was based solely on the contract. Under these facts, it is difficult to understand how the majority can hold that appellants are not entitled to recover attorney's fees under Ark. Code Ann. § 16-22-308 because their cause of action was "based primarily in tort."

I also believe that appellants should be entitled to a reasonable attorney's fee because their contract specifically provided for it. *Griffen v. First Nat'l Bank*, 318 Ark. 848, 888 S.W.2d 306 (1994). *See also C.R. Anthony Co. v. Wal-Mart Properties*, 54 F.3d 514 (8th Cir. 1995). In *Griffen v. First Nat'l Bank, supra*, the supreme court held that where the parties entered into a written contract that specifically provides for the payment of attorney's fees incurred in the enforcement of the contract, the agreement is enforceable according to its terms, independent of the statutory authorization set forth in Ark. Code Ann. § 16-22-308. The court went on to state that the intention of the *Griffen* decision was to make a clear statement of the law regarding the award of attorney's fees when parties enter into such agreements. Given this clear statement, it is also difficult for me to understand how the majority can avoid applying the law of *Griffen* to this case, even if Ark. Code Ann. § 16-22-308 (Repl. 1999) did not apply. Paragraph 16 of the parties' lease contract states:

> ATTORNEY'S FEES. *In the case suit should be brought for recovery of* the premises, or for *any sum due hereunder*, or because of any act which may arise out of the possession of the premises, *by either party*, the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney's fee.

(Emphasis added.)

This broad language does not limit the nature of the *suit* to an action in contract. An action in tort fulfills the definition of a *suit*. The only limitation imposed by this contract provision is that the suit be brought for the recovery of any sum due under the contract. The $8,500 judgment that the jury awarded to PKT for its furniture was a sum that became due under the contract. The contract provided that PKT's furniture would be deemed abandoned only if it was not removed from the Wengerts' house "upon termination or forfeiture" of the lease. PKT contended that the lease, by its terms, continued on a month-to-month basis and had not been terminated or forfeited, and that the Wengerts had acted unreasonably in allowing them only fifteen minutes to remove their furniture after the breakdown of their negotiations to renew the lease contract. That the Wengerts also considered the lease to have continued on a month-to-month basis is obvious from the fact that they continued to accept monthly rental payments after the original lease term had

expired. When the Wengerts refused to permit PKT to retrieve its furniture after negotiations broke down, the furniture's value became a "sum due under the contract." The jury found that value to be $8,500. Under those circumstances, the contract provided that "the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney's fee."

I would reverse and remand this case to the trial court with instructions to award a reasonable attorney's fee to the appellants. I am authorized to state that Judge MEADS joins with me in this dissent.

OFFICE OF CHILD SUPPORT ENFORCEMENT *v.* Shaun PITTMAN

CA 99-1297 20 S.W.3d 426

Court of Appeals of Arkansas
Division II
Opinion delivered June 28, 2000

Amy L. Ford, for appellant.

No response.

OLLY NEAL, Judge. Office of Child Support Enforcement has appealed from an order of the Lee County Chancery Court modifying appellee Shaun Pittman's child-support obligation for Shamara Pittman, who was born out of wedlock to Sonya Pointer and appellee on July 30, 1996. We agree with appellant that the chancellor erred in determining appellee's net income and the amount of child support required by the family-support chart in reference to that income. Accordingly, we reverse and remand.

In June 1997, appellee was adjudged to be Shamara's father and was ordered to pay child support in the amount of $95.00 every

two weeks. In September 1998, another child was born out of wedlock to appellee and a different woman, whom appellee married in July 1999. Appellee's support obligation for Shamara was reviewed at a hearing on August 5, 1999. At the hearing, appellee testified that he has a master's degree in business administration and is employed by Coahoma Community College in Mississippi. He stated that he has a second job at a casino, the commute to which requires an hour's drive each way. He said that he is also obligated by a Mississippi court order to pay $700 per month in child support for his four other children. Appellee testified that his wife is working on her master's degree in English education and is not employed during the school year. He said that he is the sole support for his wife, their child, and his wife's son; his wife does not receive any child support from her son's biological father.

At the conclusion of the hearing, the chancellor found appellee's after-tax income to be $4,400 per month. He stated that, from this $4,400, he would deduct $140 for appellee's commuting expenses and the $700 appellee was ordered to pay by the Mississippi court, to arrive at a net income of $3,600 per month. The chancellor also said that, in determining the amount of support required by the family-support chart, he would treat Shamara as one dependent, appellee's wife and his stepchild as one dependent, and appellee's child that was born to his present marriage as one dependent. He said that, based on appellee's net income of $3,600, appellee should pay $972 in support for three dependents and, therefore, he would order appellee to pay one-third of that amount for Shamara. On August 6, 1999, the chancellor entered an order directing appellee to pay $150 every two weeks in child support.

On appeal, appellant makes the following arguments: (1) the chancellor erred in determining appellee's net income by deducting his commuting expenses from his gross pay; (2) the chancellor erred in setting appellee's support obligation for Shamara as one-third of the amount established by the family-support chart for three dependents; and (3) the chancellor erred in granting appellee a credit for his current wife and her son, appellee's step-child.

■■ The amount of child support a chancery court awards lies within the court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. *Davis v. Office of Child Support Enforcement,* 68 Ark. App. 88, 5 S.W.3d 58 (1999). In setting the

amount of support, the chancellor must refer to the family-support chart. *Id.* Reference to this chart is mandatory. *Id.* 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 and that such amount can be disregarded only if the chancery court makes a specific written finding that application of the support chart is unjust or inappropriate. *Id.*; *In re Administrative Order No. 10: Arkansas Child Support Guidelines, 331 Ark. 581 (1998) (hereinafter "guidelines).*

Before a chancellor can refer to the child-support chart, the payor's income must be determined. *Office of Child Support Enforcement v. Longnecker,* 67 Ark. App. 215, 997 S.W.2d 445 (1999). The guidelines define "income" 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 for:
>
> 1. Federal and state income tax;
>
> 2. Withholding for Social Security (FICA), Medicare, and railroad retirement;
>
> 3. Medical insurance paid for dependant children, and
>
> 4. Presently paid support for other dependents by Court order.

Therefore, we agree with appellant that the chancellor erred in deducting appellant's commuting expenses from his after-tax income to arrive at his net income. However, as discussed below, such expenses may be considered by the chancellor in determining whether to deviate from the amount of child support established by the family-support chart.

We also agree with appellant that the chancellor erred in treating Shamara as one of three dependents and awarding her one-third of the amount of child support required by the family-support chart for three dependents. This method of determining support was disapproved in *Barnes v. Barnes,* 311 Ark. 287, 843 S.W.2d 835 (1992); *Arkansas Dep't of Human Servs. v. Forte,* 46 Ark. App. 115, 877 S.W.2d 949 (1994); and *Waldon v. Waldon,* 34 Ark. App. 118,

806 S.W.2d 387 (1991). We explained our decision in *Arkansas Department of Human Services v. Forte,* as follows:

> In the case at bar, there was evidence from which the chancellor could have found that appellee contributes to his other children's support. Therefore, we cannot say the chancellor's consideration of these children in setting support is in error. Nevertheless, we must reverse and remand this award to the chancellor because the method the chancellor employed in determining appellee's child support obligation is not appropriate.
>
> It appears that the chancellor applied appellee's income figure of $270.00 to the chart under the column for three dependents, which showed support of $101.00, and then divided that figure by three, to arrive at support for U.T. of $35.00. In *Waldon v. Waldon, supra,* this Court held that the chart should be applied to the child that is before the court and that it is improper for the chancellor to have applied the chart based on three dependents and then divide that amount by three. "The result of applying the chart as the chancellor did here is that the amount of support for the one child was diluted, as the chart is structured so that the amount of support per child decreases in proportion to the number of added dependents." 32 Ark. App. at 123, 806 S.W.2d at 390. Therefore, we must remand this decision to the chancellor with instructions to apply the chart based on the one child that is before it and then, if the chancellor finds this amount unjust or inequitable, to make such adjustments as he considers necessary supported by written findings.

46 Ark. App. at 119, 877 S.W.2d at 951-52.

Applying this reasoning to the case before us, we conclude that the chancellor erred in treating Shamara as one of three dependents and in setting her child support at one-third of the amount indicated by the chart for three dependents. As explained below, however, the chancellor may consider the needs of appellee's child from his current marriage, along with appellee's other obligations, in deciding whether it would be equitable to deviate from the amount set by the chart.

The guidelines provide that it is sufficient to rebut the presumption that the amount of child support calculated pursuant to the family-support chart is correct, if the court enters 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. According to the guidelines, 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 shall include food, shelter and utilities, clothing, medical expenses, educational expenses, dental expenses, child care, accustomed standard of living, recreation, insurance, transportation expenses, and other income or assets available to support the child from whatever source. The guidelines also include the following as additional factors that may warrant adjustment to the child-support obligation:

> 1. The procurement and/or maintenance of life insurance, health insurance, dental insurance for the children's benefit;
>
> 2. The provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children (e.g. orthopedic shoes, glasses, braces, etc.);
>
> 3. The creation or maintenance of a trust fund for the children;
>
> 4. The provision or payment of special education needs or expenses of the child;
>
> 5. The provision or payment of day care for a child;
>
> 6. The extraordinary time spent with the noncustodial parent, or shared or joint custody arrangements; and
>
> 7. The support required and given by a payor for dependent children, even in the absence of a court order.

331 Ark. at 586.

Therefore, it is clear that, in deciding whether to deviate from the amount of child support set by the family-support chart, the chancellor may consider appellee's support of his child by his present marriage. *See also Lovelace v. Office of Child Support Enforcement,* 59 Ark. App. 235, 955 S.W.2d 915 (1997); *Arkansas Dep't of Human Servs. v. Forte, supra.* He may also consider the fact that appellee is the sole support of his wife and her son, appellee's step-child. In *Green v. Green,* 232 Ark. 868, 341 S.W.2d 41 (1960), the appellee persuaded the chancellor to discontinue his obligation to pay $25 toward his child's educational fund primarily because he had remarried and assumed the support of his new wife and her daughter. On appeal, the supreme court reversed this aspect of the

order, noting that the appellee was actually better off financially than he was at the time of the divorce. The court also stated:

> Appellee mainly relies upon the fact of his remarriage to justify a modification of the decree. In *Bostic v. Bostic*, 229 Ark. 127, 313 S.W.2d 553, this Court, in quoting from 27 C.J.S., Divorce, § 322, p. 1245, said:
>
> The fact that a divorced husband has remarried or was contemplating remarriage is not alone ground for reducing the amount of the allowance, although it is a circumstance that may be considered in weighing the equities of the situation; and the same rule applies to the remarriage of the wife, *at least in the absence of an assumption by the second husband of any obligation to support the children of the first marriage*; nor is the remarriage of both husband and wife to third persons, in itself, regarded as such a change of circumstances as requires a modification of the allowance.
>
> Certainly, the remarriage is not a ground for modification in this case; the record reflects that Mr. Green married his present wife shortly after obtaining the divorce, and was well aware, at the time he asked the court, through his complaint, to enter the educational fund provision, that he was fixing to assume additional obligations, *viz.*, a second wife and a step-daughter.

232 Ark. at 870-71, 341 S.W.2d at 43 (emphasis added).

The child-support chart and the criteria used for deviating from it are not conclusive, and there may be other matters in addition to the child-support chart that have a strong bearing upon determining the amount of support. *Arkansas Dep't of Human Servs. v. Forte, supra.* Similarly, the chancellor may consider appellee's commuting expenses in making this determination. It is permissible for the chancellor to consider the effect of an increase in a payor's child-support obligation on his ability to pay his bills. *Roland v. Roland,* 43 Ark. App. 60, 859 S.W.2d 654 (1993).

On *de novo* review of a fully developed chancery record, the appellate court may enter the order that the chancellor should have entered, or it may remand if the court concludes that justice would be better served. *Office of Child Support Enforcement v. Longnecker, supra.* We note that, at the August 1999 hearing, appellee testified that his wife expected to complete her work toward her master's degree in about a year and a half. In our view, justice would be better served to remand this action so that, if the chancel-

lor wishes, he may take additional evidence about appellee's current financial condition, including whether appellee's wife has plans to re-enter the job market and whether she has taken any steps to collect child support from her son's biological father. Therefore, we reverse the chancellor's decision and remand this case for further proceedings consistent with this opinion.

Reversed and remanded.

PITTMAN and HART, JJ., agree.

Michael Ray POTTER *v.* STATE of Arkansas

CA CR 99-1248 20 S.W.3d 454

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered July 5, 2000

George B. Morton, for appellant.

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

JOHN B. ROBBINS, Chief Judge. Appellant Michael Ray Potter entered a conditional plea of guilty to possession of methamphetamine pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure. Mr. Potter was sentenced to three years' probation, twenty weekends in the Washington County jail, and ordered to pay $900.00 in restitution and costs and complete a thirty-day non-residential drug treatment program. He now appeals, arguing that the trial court erred in denying his motion to suppress evidence. We agree, and we reverse and remand.

At the suppression hearing, Officer Charles Edward Motsinger testified that, on May 24, 1999, he was dispatched to a picnic area in response to a call from a woman who called to report that she thought she was being followed. Officer Motsinger was provided a description of the vehicles of the complainant and the suspect, Mr. Potter, and was given the license number of Mr. Potter's truck. Upon arriving at the scene, Officer Motsinger parked his patrol unit behind Mr. Potter's truck.

After parking his car, Officer Motsinger noticed that Mr. Potter kept turning around and looking at him through the back window of his truck. The officer got out of his car to approach, at which time Mr. Potter exited the truck and was asked to return to his vehicle. Mr. Potter did as he was told and began fumbling around with something in the seat. Unaware of what appellant was doing, Officer Motsinger drew his weapon and, upon engaging in conversation with the appellant, he noticed that appellant's mouth was dry, which he stated was an indication of methamphetamine

use. Officer Motsinger became nervous when Mr. Potter reached behind the seat to get his wallet. He then instructed Mr. Potter to place his hands on the steering wheel, and he returned to his patrol car to call for backup.

When the backup arrived, Officer Motsinger ordered appellant away from his vehicle and began to question him about the woman's complaint. Mr. Potter denied knowing the woman, and as the interrogation continued, he was told to place his hands on his truck for a pat down "for weapons and what not due to the fact that he was so nervous and the nature of the call." During the pat down, Officer Motsinger "hit one of appellant's pockets," at which time Mr. Potter said, "You might as well go ahead and take me to jail." Officer Motsinger felt something in the pocket, but was unable to identify it. When he pulled it out, he found a plastic baggie containing contraband that included a small amount of methamphetamine. Officer Motsinger then arrested Mr. Potter, put him in the patrol car, and interviewed the complainant. She indicated that appellant had been following her for several days, that he followed her to the park where she was eating lunch, but that she did not want to press charges or make a report.

Mr. Potter argues that evidence of the methamphetamine should have been suppressed because it was seized in violation of his Fourth Amendment protection against unreasonable searches and seizures. For this proposition, he raises two specific arguments. First, he contends that the police had no right to detain him because there was no reasonable suspicion that he had committed a crime of violence. Next, he argues that the pat-down search was illegal because it was conducted without reasonable suspicion that he was armed.

Rule 3.1 of the Arkansas Rules of Criminal Procedure provides:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require

> the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Mr. Potter contends that Officer Motsinger did not have the authority to stop and detain him because he had no reasonable suspicion that he had committed, or was about to commit, a felony or a misdemeanor involving danger of forcible injury to persons or damage to property. Officer Motsinger testified that he was investigating either stalking or harassment. Mr. Potter acknowledges that stalking is a felony, but submits that the officer could not have reasonably suspected the commission of that offense because there was no evidence that any threat was actually made or that there was even an accusation that a threat was ever made, and stalking requires "a terroristic threat with the intent of placing that person in imminent fear of death or serious bodily injury[.]" *See* Ark. Code Ann. § 5-71-229(a)(1) & (b)(1) (Repl. 1997). Thus, Mr. Potter asserts, the only crime that he reasonably could have been suspected to have committed was harassment. Pursuant to Ark. Code Ann. § 5-71-208(b) (Repl. 1997), harassment is a misdemeanor, and since Officer Motsinger had no reason to believe the complainant was in any danger of injury, Mr. Potter argues that suspicion of this offense did not give the officer the right to stop and detain him.

Alternatively, Mr. Potter contends that, even if he was lawfully detained under Rule 3.1, the pat-down search was not authorized under Rule 3.4, which provides:

> 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 or someone designated by him 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. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

When asked what he was searching for at the scene of the detention, Officer Motsinger testified, "A weapon, that's what mostly I was looking for, a weapon, trying to find out what he was doing there." Mr. Potter asserts that the search was in reality an attempt to

find out "what he was doing" and not a legitimate search for weapons. Under the totality of the circumstances, Mr. Potter argues that the search was illegal because any suspicion that he was armed and dangerous was not based on objective, specific, and articulable facts.

In reviewing a ruling denying a defendant's motion to suppress, we make an independent determination based upon the totality of the circumstances and view the evidence in the light most favorable to the State. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998). We reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Id.* We agree that the officer lacked reasonable suspicion to stop and detain appellant, and hold that the trial court's failure to grant appellant's motion to suppress was clearly against the preponderance of the evidence.

The State does not dispute the fact that Officer Motsinger did not have reasonable suspicion that a felony or a misdemeanor involving danger of injury or property damage had been or was about to be committed. Nonetheless, the State argues that this was not necessary and cites several cases in which our supreme court indicated that a stop is legal if the officer reasonably suspects that the defendant is engaged in *any* criminal activity. (Emphasis ours.) *See Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998); *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 285 (1982). However, we disagree with the State's interpretation of the holdings in those cases. In each of the above cases, the appellant was being investigated for a felony, and given that such crimes are specifically covered by Rule 3.1, the point now being raised was not presented to or addressed by the supreme court. Although the court, in *Kilpatrick v. State, supra*, stated that the justification for a stop depends on whether the police have "specific, particularized and articulable reasons indicating the person or vehicle may be involved in criminal activity," in that case the police were investigating cocaine dealing, and the "criminal activity" referenced by the court was clearly an offense encompassed by Rule 3.1; the pertinent argument raised and rejected was that the information supplied by an informant about the drug-dealing was not sufficiently reliable.

The State also cites *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998), but the precedent set in that case weighs in

favor of appellant. In that case, the primary issue was whether the police had the authority under Rule 3.1 to order the occupant of a parked tractor-trailer out of his vehicle, when the officer suspected the occupant to be intoxicated based solely on a tip from an identified citizen informant. The supreme court held that the stop was justified, and announced:

> Before turning to the analysis in the present case, we would be remiss in not first emphasizing the significant policy considerations present where a tip reports a driver who is drinking. This court has previously recognized the magnitude of the State's interest in eliminating drunk driving in comparison to relatively minimal intrusions on motorists. *See Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997). In balancing the rights of a motorist to be free from unreasonable intrusions and the State's interest in protecting the public from unreasonable danger, one court has stated that "[a] motor vehicle in the hands of a drunken driver is an instrument of death. It is deadly, it threatens the safety of the public, and that threat must be eliminated as quickly as possible .... The 'totality' of circumstances tips the balance in favor of public safety and lessens the ... requirements of reliability and corroboration." *Mulcahy, supra*, (quoting *State v. Tucker*, 878 P.2d 855 (Kan. Ct. App. 1994)).

Frette v. City of Springdale, 331 Ark. at 120-21, 959 S.W.2d at 743. It is undisputed that driving while intoxicated constitutes a misdemeanor involving danger of injury to persons, and the supreme court found this significant in arriving at its decision.

Similarly, in *Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997), the supreme court's analysis of whether a stop was legal was based not on whether there was reasonable suspicion of any criminal activity, but whether the criminal activity was covered by Rule 3.1. The court stated:

> We would also point out that Ark. Crim. P. 3.1 provides that a law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person whom he reasonably suspects is committing, has committed, or is about to commit a felony or misdemeanor involving danger of forcible injury to persons. While this court has not been called upon to decide if a possible DWI offense falls within the language of Rule 3.1, our Court of Appeals has held, and we believe correctly, that a DWI violation carries with it the danger of forcible injury to others. *See Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989).

Id. at 562-63, 940 S.W.2d at 434. The court of appeals, when determining when a stop is authorized under Rule 3.1, also considers the types of crimes contemplated by the rule, and not merely whether there was reasonable suspicion of any kind of criminal activity. *See Coffman v. State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988); *Van Patten v. State*, 16 Ark. App. 83 (1985).

Rule 3.1 clearly provides for investigative stops for a particular set of crimes, and neither the supreme court nor this court has extended the plain wording of the rule to encompass an officer's suspicion of any crime. In the instant case, the arresting officer conducted the stop without reasonable suspicion that appellant was involved in any criminal activity covered by the rule,[1] and therefore we must reverse the trial court's denial of appellant's motion to suppress the illegally obtained contraband.

Because we find the stop to be illegal for noncompliance with Rule 3.1, we find it unnecessary to address whether or not the pat-down search was authorized by Rule 3.4.

Reversed and remanded.

BIRD, STROUD, and GRIFFEN, JJ., agree.

JENNINGS and MEADS, JJ., dissent.

MARGARET MEADS, Judge, dissenting. I believe that the law-enforcement officer in this case had reasonable suspicion to stop and detain appellant, as well as reasonable suspicion to frisk him. I would affirm.

Officer Motsinger was dispatched to Tyson Park on May 24, 1999, after a woman used her cellular phone to notify police that a man had been following her for about three weeks and that she believed he was stalking her. She identified herself, described both her car and the man's truck, and provided the truck's license num-

[1] The dissenting opinion recites that the woman who called in the complaint about appellant felt she was being stalked and was afraid. Officer Motsinger, however, testified on cross-examination that when he was dispatched to the scene of appellant's stop and arrest, the dispatcher did not relay to him any allegation that the appellant had approached, contacted, or threatened the complainant. Nor was there any indication to Officer Motsinger that the woman was afraid of appellant, but rather was only concerned that she was being followed. As noted above, the felony offense of stalking requires "a terroristic threat." Ark. Code Ann. § 5-71-229.

ber. Upon arriving at the park, Officer Motsinger observed appellant's truck parked seventy feet from the woman's car; he parked behind the truck and noticed that appellant repeatedly turned around and looked at him through the truck's rear window. The officer then got out of his vehicle and approached appellant's truck.

Appellant contends he was detained in violation of Ark. R. Crim. P. 3.1, because the officer lacked "reasonable suspicion that he had committed a crime of violence." I disagree. Rule 3.1 permits a law enforcement officer to "stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons . . . if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct." Rule 2.1 of the Arkansas Rules of Criminal Procedure defines a reasonable suspicion 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.

With the facts before him, I believe that Officer Motsinger, at the time he approached appellant, reasonably suspected that appellant was stalking the complainant. His knowledge, at the time of his approach, was that a woman lodged a complaint that appellant was following her; she felt she was being stalked; she was afraid; she reported her location and her vehicle's license number; she described appellant's vehicle, its license number and present location; and both vehicles were indeed in the park, a short distance from each other. This, in my view, is enough to satisfy the requirement of reasonable suspicion. It was not necessary, at that point in time, that the officer have probable cause to arrest appellant for stalking, which is a felony. Ark. Code. Ann. § 5-71-229 (Repl. 1997). All that was required was the officer's reasonable suspicion, and the woman's call provided the foundation for that. An officer's reasonable suspicion may be based on reports made by people who witness criminal activity, particularly when they identify themselves and the officer's own observations corroborate at least some of the information provided by the person. *See, e.g., Frette v. City of Spr-*

ingdale, 331 Ark. 103, 121, 959 S.W.2d 734, 743 (1998). Moreover, the test for reasonable cause depends upon the collective information of police officers, and not solely on the knowledge of the officer stopping the vehicle. *Willett v. State*, 298 Ark. 588, 592, 769 S.W.2d 744, 746 (1989); *Roark v. State*, 46 Ark. App. 49, 53-54, 876 S.W.2d 596, 598 (1994).

I also believe the officer's pat-down search of appellant was justified. As soon as Officer Motsinger got out of his vehicle and began to approach appellant's truck, appellant got out of his truck and began walking toward Motsinger, who ordered him back into the truck. As appellant returned to his truck, he began fumbling with something in the seat while looking back at the officer. Uncertain as to appellant's movements, Officer Motsinger drew his weapon and ordered appellant to step back into the truck, which he did. Appellant then started to reach behind the truck seat, and Officer Motsinger instructed appellant to place his hands on the steering wheel. Officer Motsinger described appellant as "very, very nervous" and "jittery." Once back-up arrived, Officer Motsinger ordered appellant out of his vehicle, conducted a pat-down search, and discovered the plastic baggie containing methamphetamine.

Appellant contends the pat-down search was illegal because it was conducted without reasonable suspicion that he was armed, and thus was in violation of Ark. R. Crim. P. 3.4. This rule provides:

> 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 or someone designated by him 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. In no event shall this search be more extensive than is reasonable necessary to ensure the safety of the officer or others.

An officer need not be absolutely certain that an individual is armed before conducting a frisk; however, he must have a reasonable belief that his safety or the safety of others is at stake. *Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 72 (1998) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). The essential question is whether a reasonably prudent person in the officer's position would be warranted in believing that the safety of the officer or others was in danger; the

officer's reasonable belief that the suspect is dangerous must be based on "specific and articulable facts." *Id.* A suspect's demeanor, manner, and furtive movements may be considered when determining whether the officer's suspicion was reasonable. *See, e.g. Muhammad v. State*, 64 Ark. App. 352, 356, 984 S.W.2d 822, 824 (1998), *aff'd* 337 Ark. 291, 988 S.W.2d 17 (1999).

Officer Motsinger testified that appellant was very, very nervous and jittery, that he kept turning around and watching him, that he fumbled around with something in the truck seat after being ordered back inside the truck, and that he reached behind the seat. I believe appellant's demeanor, manner, and furtive movements, as described by Officer Motsinger, are sufficient to warrant the officer's concern for his safety, and that a reasonably prudent person in the officer's position would have had the same concern. Thus, there was reasonable suspicion that appellant was armed, and the pat-down search of his person was not unlawful.

On review of a trial court's motion to suppress, we make an independent examination based on the totality of the circumstances and reverse only if the trial court's ruling was clearly against the preponderance of the evidence, and we review the evidence in the light most favorable to the State. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999). Applying this standard of review, I would affirm.

JOHN E. JENNINGS, Judge, dissenting. I agree with Judge Meads that the circuit judge did not err in denying the motion to suppress and I agree with much of her dissent. I cannot conclude, however, that Rule 3.1 was complied with and therefore dissent on alternate grounds. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court said:

> The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity.... Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected ele-

> ment into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.

Terry, 392 U.S. at 13. The test under the Fourth Amendment of the United States Constitution is whether the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate. *Terry*, 392 U.S. at 22. The *Terry* Court said:

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Terry, 392 U.S. at 24.

The *Terry* Court said that "no judicial opinion can comprehend the protean variety of the street encounter...," but our rules of criminal procedure classify these encounters into two types.

Assuming that the majority is correct in determining that there was a violation of Rule 3.1 it does not necessarily follow that the evidence must be suppressed. Rule 16.2(e) provides:

> (e) *Determination.* A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:
>
> (i) the importance of the particular interest violated;
>
> (ii) the extent of deviation from lawful conduct;
>
> (iii) the extent to which the violation was willful;
>
> (iv) the extent to which privacy was invaded;
>
> (v) the extent to which exclusion will tend to prevent violations of these rules;
>
> (vi) whether, but for the violation, such evidence would have been discovered; and

> (vii) the extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.

It is significant that this was not a vehicle stop — the defendant was already stopped when the officer approached. When the defendant got out of his car and approached the officer, the officer was certainly within his rights to ask him to return to his vehicle. When the officer subsequently ordered him out of the vehicle the defendant was "stopped" within the meaning of Rule 3.1. After considering the factors listed in Rule 16.2, I cannot agree that the violation was "substantial." The officer's subsequent decision to pat down the defendant seems to me to have been reasonable under the circumstances.

For these reasons I cannot say that the circuit judge's decision to deny the motion to suppress was error.

ESTATE OF Virginia McKASSON, Deceased *v.*
Harvey N. HAMRIC and Iva Hamric

CA 99-940 20 S.W.3d 446

Court of Appeals of Arkansas
Division III
Opinion delivered July 5, 2000
[Petition for rehearing denied August 23, 2000.]

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

Robert M. Abney, P.A., for appellees.

JOHN E. JENNINGS, Judge. The Estate of Virginia McKasson brings this appeal from an order denying its petition to set aside two deeds in which the decedent conveyed certain land to the appellees, Harvey and Iva Hamric. For reversal the estate contends that the conveyances were testamentary in nature; that the chancellor erred by not requiring appellees to show beyond a reasonable doubt that the decedent possessed sufficient mental capacity to make the conveyances, because they procured the deeds; and that the chancellor erred in finding that the deceased had the requisite mental capacity to execute the deeds. We affirm.

On October 12, 1996, Mrs. McKasson executed warranty deeds to appellees on two separate tracts of land. One tract con-

sisted of eighty acres; the other contained 113 acres. On the eighty-acre tract, which included Mrs. McKasson's home, appellees executed a note and mortgage in the amount of $160,000.00, at eight-percent interest per annum, payable in installments of $200.00 a month, plus an additional $2,000.00 due on December 31 of each year. The note also provided that the debt would be forgiven at Mrs. McKasson's death. Appellee Harvey Hamric testified that he had these instruments prepared by a lawyer based on notes he had taken from discussions with Mrs. McKasson. Prior to these conveyances, between May and July 1996, Mrs. McKasson had also made appellee, Iva Hamric, a joint tenant with right of survivorship on several certificates of deposit totaling $143,000.00, as well as her checking account with a balance of $10,000.00. In addition, Mrs. McKasson had executed a power of attorney to Mrs. Hamric in June. The appellees began living with Mrs. McKasson sometime after Mrs. McKasson was injured in a fall in September 1996.

Mrs. McKasson died on October 18, 1997. Her husband had passed away some years before, and she had no blood kin who lived in Arkansas but was survived by distant relatives from Florida and Oklahoma. This action was brought by the administratrix of Mrs. McKasson's estate, Mary Eaton, who is the wife of Mrs. McKasson's deceased brother. In the petition, the estate alleged that Mrs. McKasson was not of sound mind and that the appellees had exerted undue influence over her, and it sought to set aside the two deeds and the transfers of the certificates of deposit and checking account, as well as a mineral deed executed by Mrs. Hamric in September 1997 under the power of attorney. Although the chancellor set aside the conveyance of the mineral rights, he found that the estate had failed to carry its burden of proof as to the other transactions.

On appeal, the estate contests the chancellor's findings only with respect to the deeds conveying title to the eighty and 113-acre parcels of land. No argument is made concerning the certificates of deposit or checking account.

■ Appellant first contends that the deeds were testamentary in nature because of the debt-forgiveness provision in the note and because the yearly payments fell well short of the amount of interest that was due annually. A will is a disposition of property that is to take effect upon the death of the maker of the instrument. *Faith v.*

Singleton, 286 Ark. 403, 692 S.W.2d 239 (1985). On the other hand, a deed is a grant that operates to pass a present interest in property. *See Parkey v. Baker*, 254 Ark. 283, 492 S.W.2d 891 (1973); 23 AM. JUR. 2d *Deeds* § 8 (1999). Although the debt was to be extinguished at Mrs. McKasson's death, the deed itself conveyed a present interest in the property. We cannot agree that the chancellor should have found the deeds to be a will.

Next, appellant argues that because the appellees "procured" the deeds the chancellor erred in not placing the burden upon them to prove beyond a reasonable doubt that Mrs. McKasson was mentally competent at the time of the execution of the deeds. We disagree. When a beneficiary procures a will it is incumbent upon him to show beyond reasonable doubt that the testator had both the mental capacity and freedom of will to execute the will. *Orr v. Love*, 225 Ark. 505, 283 S.W.2d 667 (1955). This concept in Arkansas dates back at least to *McDaniel v. Crosby*, 19 Ark. 533 (1858). Apparently "procurement" originally meant that the beneficiary himself wrote the will. *See id.* It has been extended to situations in which the beneficiary caused the will to be prepared and participated in its execution. *See e.g., Smith v. Welch*, 268 Ark. 510, 597 S.W.2d 593 (1980). Even in the context of a will, the supreme court has held that "procurement" merely shifts the burden of going forward with the evidence and that the burden of proof, in the sense of the ultimate risk of nonpersuasion, remains on the will contestant. *Hiler v. Cude*, 248 Ark. 1065, 455 S.W.2d 891 (1970). *See also Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984).

■ We attempted to recognize and reconcile the two lines of authority in *Hodges v. Cannon*, 68 Ark. App. 170, 177 5 S.W.3d 89, 95 (1999), when we said:

> 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 which 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.

■ The rules relating to an alleged mental incapacity of the grantor of a deed are set out in *Watson v. Alford*, 255 Ark. 911, 503 S.W.2d 897 (1974). The burden of proving mental incapacity rests upon the person seeking to set aside the deed. The burden of proof

is by a preponderance of the evidence. *Id.* at 913. The fact that a grantor is old and in feeble health is a circumstance bearing on the question of mental capacity as is gross inadequacy of the purchase price. *Id.* at 912. Each case dealing with mental capacity must be decided on its own peculiar facts and circumstances. *Id.* at 913.

Appellant relies on *Neal v. Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981), and *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997), for the proposition that one who procures a deed has the burden of proving mental capacity and a lack of undue influence. The language in *Neal*, upon which appellant relies, was dicta. *Noland* involved an *inter vivos* trust with title to the real property to pass at the time of the settlor's death. It simply cannot be the law that in an ordinary deed transaction the grantee bears the burden of proving the grantor's mental capacity and his freedom from undue influence merely because the grantee has caused the deed to be prepared.

It is true that in certain circumstances a presumption of undue influence may arise in connection with the execution of a deed. *See Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999). (A gift to the dominant party in a confidential relationship.) Appellant does not contend that *Myrick* applies here. Our conclusion is that the trial court did not err in placing the burden of proof upon the appellant.

Finally, appellant argues that the chancellor erred in finding that Mrs. McKasson possessed sufficient mental capacity to execute the deeds. The law regarding mental capacity in the execution of a will is also applicable to the execution of a deed. If the maker of a deed, will, or other instrument 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, then he possesses sufficient mental capacity to execute such instrument. *Rose v. Dunn,* 284 Ark. 42, 679 S.W.2d 180 (1984). Evidence of the grantor's mental condition, both before and after the execution of the deed, is relevant to show his mental condition at the time he executed the deed. *Hodges v. Cannon,* 68 Ark. App. 170, 5 S.W.3d 89 (1999).

At trial, a number of Mrs. McKasson's longtime friends and neighbors testified that, to avoid going to a nursing home, Mrs. McKasson planned to have someone move in with her and that, in exchange, she intended to give her property to her care givers. The appellees had known Mrs. McKasson since 1978 and had rented pastureland on the eighty acres since 1990. Mrs. Hamric testified that she became closer to Mrs. McKasson when bringing her food during an illness in 1995 and that she saw her more often in 1996 when she started taking Mrs. McKasson to the doctor.

April Eagle, a vice president at the institution where Mrs. McKasson did her banking, handled the placement of Mrs. Hamric's name on Mrs. McKasson's accounts. She testified that Mrs. McKasson explained to her that she was single, old, and had no close heirs, and that the appellees had been good to her. Ms. Eagle said that Mrs. McKasson had brought the certificates of deposit to the bank with her, that she was aware of her assets, that she knew exactly what she was doing, and that she was not confused. To summarize the testimony of other witnesses, it was said that Mrs. McKasson was old and hard of hearing and that she drank beer, but that she was a sharp lady and mentally alert, and that she could not be talked into doing what she did not want. There was further testimony that Mrs. McKasson was happy that the appellees were living with her and that she was pleased to have her estate in order. Charlotte Wrigley, who had known Mrs. McKasson for twenty-five years and was the notary public who witnessed the signing of the deeds, testified that Mrs. McKasson was alert and knew what property she was transferring and to whom she was transferring it. Finally, Dr. Jerry Mann, who began treating Mrs. McKasson in July 1997, testified that he did not consider her incompetent the first time he saw her but that she showed signs of some sort of mental status problem during her second visit in August. He did not pinpoint a cause but surmised that if she had been suffering from an organic brain disorder, like Alzheimer's, it might have gotten worse over the past year, although Alzheimer's is a disease that progressed slowly in its early stages.

For reversal, the estate questions the credibility of various witnesses and places much emphasis on Mr. Hamric's testimony concerning the conveyance of the entire eighty-acre tract when it was said that Mrs. McKasson had spoken of giving Mrs. Hamric the house and five acres. The estate also emphasizes the testimony of

Dr. Leslie Anderson, a family physician who treated Mrs. McKasson for various illnesses until she came under the care of Dr. Mann. Dr. Anderson made a diagnosis of organic brain syndrome in June 1996. He testified that Ms. McKasson was experiencing the early stages of the disease, which he said was one that grows progressively worse over time. It was his opinion that from that time onward there was "a high degree of suspicion" that she would not be able to handle her affairs or to take care of herself. Dr. Anderson testified, however, that he probably would not have said that she was incompetent in June 1996, that he was only guessing as to what her condition might have been down the line, that it could change from day to day, and that there was a fifty-fifty chance, depending on the type of day she was having, that she would not have understood the transactions.

■ ■ Although chancery cases are reviewed de novo on appeal,we do not reverse a chancellor's finding of fact unless it is clearly erroneous. *See Belcher v. Stone,* 67 Ark. App. 256, 998 S.W.2d 759 (1999). We defer to the superior position of the chancellor to judge the credibility of the witnesses. *Aycock Pontiac, Inc. v. Aycock,* 335 Ark. 456, 983 S.W.2d 915 (1999). From our de novo review, we cannot say that the chancellor's finding is clearly erroneous.

Affirmed.

NEAL and GRIFFEN, JJ., agree.

Charles McCHRISTIAN, Jr. *v.* STATE of Arkansas

CA CR 99-1302 20 S.W.3d 461

Court of Appeals of Arkansas
Division II
Opinion delivered July 5, 2000

[redacted]

William R. Simpson, Jr., Public Defender, and *Tim Blair*, Deputy Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Judge. Charles McChristian, Jr., was convicted in a bench trial of possession of a controlled substance, cocaine, and was sentenced as a habitual offender to sixty months in the Arkansas Department of Correction. His attorney filed a motion to withdraw on the grounds that the appeal has no merit; pursuant to *Anders v. California*, 386 U.S. 738 (1967) and Ark. Sup. Ct. R. 4-3(j) (1999), his motion was accompanied by a brief including an abstract and an argument section that addresses all rulings adverse to appellant at trial. The clerk of this court furnished a copy of counsel's brief to appellant. Appellant then filed a *pro se*brief, and the State filed a brief responding to appellant's arguments.

Appellant's counsel notes that the trial court ruled adversely to appellant regarding the sufficiency of the evidence, admissibility of certain evidence, and sentencing. Appellant argues in his *pro se*

brief that cocaine admitted into evidence at trial was inadmissible because the chain of custody was not established and because there were differences in an officer's testimony and the crime lab report regarding the substance. We find the arguments to be without merit.

Sufficiency of the Evidence

Under Ark. Code Ann. § 5-64-401 (Supp. 1999), it is unlawful for any person to possess a controlled substance except as authorized by the code. On appeal of criminal cases, whether tried by a judge or jury, we review the evidence in the light most favorable to the State and affirm if there is any substantial evidence to support the trial court's judgment. *Ryan v. State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Substantial evidence is forceful enough to compel a conclusion one way or the other without resort to suspicion or conjecture; in determining the sufficiency of the evidence, this court need consider only the evidence most favorable to appellee and testimony that supports the verdict of guilty. *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993). Determination of credibility is solely within the province of the fact-finder. *Stephenson v. State*, 334 Ark. 520, 975 S.W.2d 830 (1998).

In the present case, Officer Singleton of the North Little Rock Police Department testified that while he was on patrol, appellant approached him to discuss a matter; that Singleton determined through a computer check that there was an arrest warrant outstanding for appellant; that Singleton conducted a pat-down search for weapons but did not check appellant's shoes; and that Singleton placed appellant, who was not handcuffed, into the back seat of the patrol car. Singleton also testified that he saw appellant's hand move down to his shoe and saw a Baggie fly from his hand to the floorboard, about eight inches from his foot; that Singleton removed appellant from the car and retrieved the Baggie; and that the Baggie contained about six rocks of what appeared to be crack cocaine. Singleton further testified that he took the evidence to the NLRPD's property room to be sent to the crime lab; that he put it inside a property envelope, which he marked and tagged as he normally did by covering the back with evidence tape, initialing through the tape, and signing at the bottom. Investigator Tim Willis testified that in his work with the narcotics division of the NLRPD,

he picked up the envelope from the property room and took it to the state crime lab; that the evidence was assigned a lab number; and that he had brought to court a certified copy of the lab report. The report, which was admitted into evidence, includes the item description "one (1) plastic bag containing a hard off-white rock-like substance (0.441 gram)," and shows the test results "cocaine base."

The above testimony of the police officers and the lab report constitute substantial evidence that appellant possessed cocaine. Thus, the evidence was sufficient to support appellant's conviction for possession of cocaine.

Admissibility of the Evidence

Appellant objected twice at trial to admission of State's Exhibits Nos. 1-3, which were, respectively, the Baggie of cocaine, the marked property envelope, and the state crime laboratory report. The first objection was to the chain of custody; the second was on the basis "that Officer Singleton testified that the drugs that he recovered were six individual rocks in a small Baggie, where the lab report is saying 'one plastic bag containing a hard off-white rock-like substance.' That's substantially different from what Officer Singleton is saying he recovered."

Officer Singleton testified that he marked and tagged the bag of suspected contraband, which he identified at trial as State's Exhibit No. 1, after seizing it from his patrol car; that he put it into a property envelope, which he identified as Exhibit No. 2, and placed it in the property room. Investigator Willis identified Exhibit No. 2 as the property envelope that he transported from the property room to the state crime lab, and he identified Exhibit No. 3 as the certified copy of the corresponding lab report. Their testimony sufficiently established the chain of custody for the three items.

Regarding Officer Singleton's and the lab report's different descriptions of the contraband, appellant relies upon *Crisco v. State,* 328 Ark. 388, 943 S.W.2d 582, *supp. op. on reh'g,* (1997). In *Crisco* an officer testified that he had purchased a substance from the defendant, had put the substance into a plastic bag, and had placed the bag inside a manilla envelope to which he attached an evidence

submission form. The form described the substance as "one bag of off white powder substance," but the state crime lab's report described it as "one triangular piece of plastic containing a tan rock-like substance (0.318 gram)." The *Crisco* court stated:

> The purpose of establishing chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997); *Lee v. State*, 326 Ark. 229, 931 S.W.2d 433 (1996); *Harris v. State*, 322 Ark. 167, 907 S.W.2d 729 (1995). See also Ark. R. Evid. 901. The trial court must be satisfied within a reasonable probability that the evidence has not been tampered with, but it is not necessary for the State to eliminate every possibility of tampering. *Newman v. State, supra*; *Lee v. State, supra*; *Harris v. State, supra*; *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988). Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissible as a matter of law. *Gardner v. State, supra*; *Nash v. State*, 267 Ark. 870, 591 S.W.2d 670 (Ark. App. 1979). We have stated that the proof of the chain of custody for interchangeable items like drugs or blood needs to be more conclusive. *Lee v. State, supra*; *Gardner v. State, supra*; *Brewer v. State*, 261 Ark. 732, 551 S.W.2d 218 (1977).

328 Ark. at 392, 943 S.W.2d at 584-85. The *Crisco* court, holding that the State failed to prove that the drug tested was properly authenticated, reversed the conviction for delivery of methamphetamine.

■ Here, the substance in question was identified by the officer who retrieved it as "six rocks" of what appeared to be crack cocaine, while the chemist's report described it as "a hard off-white rock-like substance." While in the *Crisco* case there was a difference in descriptions of the color and texture of the substance (white powder substance versus tan rock-like substance), here the difference is only in a specific number of rocks versus a reference to "a hard off white rock-like substance." We view differences in these descriptions, at most, as conflicts in evidence properly weighed by the finder of fact rather than as a failure to prove the authenticity of the cocaine. Furthermore, there were no allegations of tampering. Thus, the State sufficiently established the chain of custody. It is not necessary that the State eliminate every possibility of tampering; instead, the trial court must be satisfied that in all reasonable

probability the evidence has not been tampered with. *See Pryor v. State*, 314 Ark. 212, 861 S.W.2d 544 (1993).

Sentencing

The final ruling adverse to appellant was the court's decision to sentence him to five years rather than to the minimum of three years. The five-year sentence was within the range of possible sentences for this offense, and appellant had an extensive criminal record that the court was allowed to consider. If the sentence fixed by the trial court is within legislative limits, we are not free to reduce it absent three extremely narrow exceptions: 1) the punishment resulted from passion or prejudice; 2) it was a clear abuse of discretion; or 3) it was so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. *Henderson v. State*, 322 Ark. 402, 910 S.W.2d 656 (1995). Because none of these exceptions apply in this case, any argument regarding the length of the sentence is without merit.

Motion granted; conviction affirmed.

ROBBINS, C.J., and KOONCE, J., agree.

OFFICE of CHILD SUPPORT ENFORCEMENT
v. Joe Morris CALBERT

CA 99-1174 20 S.W.3d 450

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered July 5, 2000

Joseph P. Mazzant, III, for appellant.

R. Blake Marsh, for appellee.

OLLY NEAL, Judge. The Office of Child Support Enforcement (OCSE) appeals the Bradley County Chancery Court's order terminating appellee Joe Morris Calbert's child-support obligation. For reversal, OCSE contends that the trial court erred in terminating appellee's child-support obligation for his eigh-

teen-year-old son, Cedric, because Cedric is still in high school and will not graduate until May 2000.

Appellee Joe Calbert and Denise Calbert were divorced on June 25, 1984. Denise Calbert was awarded custody of the parties' minor children, and appellee was ordered to pay $40 in weekly child support. On May 13, 1999, appellee filed a notice to terminate income withholding for child support pursuant to Arkansas Code Annotated section 9-14-237(a)(1). OCSE filed an objection to appellee's notice, and countered that appellee's child-support obligation should extend beyond Cedric's eighteenth birthday, because he would not graduate from high school until May 2000. The chancellor found that the parties' son should have graduated in May 1999; that his eighteenth birthday was June 2, 1999; and that appellee's child-support obligation would terminate as of that date. This appeal followed.

There is no factual dispute in this case. It was tried largely on stipulations. The parties stipulated that appellee and his ex-wife agreed that the child would repeat the second grade, that he had completed twelve years of public school, and that he would reach his eighteenth birthday before graduating from high school. The parties also stipulated that the child spends about seventy-five percent of his time in homes other than that of his mother. That time is spent at his girlfriend's home and at the appellee's home. The only issue at trial was whether the appellee's obligation to pay child support would terminate when the child reached eighteen years of age.

OCSE points out that appellee and his ex-wife mutually agreed to have Cedric repeat the second grade, and were it not for that decision, Cedric would have graduated prior to his eighteenth birthday. OCSE contends that the chancellor's order should be reversed because the facts in evidence show that although Cedric Calbert is eighteen, he remains a high school student and will not graduate until he is nineteen years old.

Arkansas Code Annotated section 9-14-237(a)(1) (Repl. 1998) provides:

> (a)(1) An obligor's duty to pay child support for a child shall automatically terminate by operation of law when the child reaches eighteen (18) years of age or should have graduated from

> high school, whichever is later, or when the child is emancipated by a court of competent jurisdiction, marries, or dies, unless the court order for child support specifically extends child support after such circumstances.

OCSE cites *McFarland v. McFarland*, 318 Ark. 446, 885 S.W.2d 897 (1994), and *Matthews v. Matthews*, 245 Ark. 1, 430 S.W.2d 864 (1968), in which the appellate courts have affirmed an award of child support beyond a child's eighteenth birthday where the child has remained in school. Indeed, Arkansas Code Annotated section 9-12-312(a)(5)(A) provides:

> The court may provide for the payment of support beyond the eighteenth birthday of the child to address the educational needs of a child whose eighteenth birthday falls prior to graduation from high school so long as such support is conditional on the child remaining in school.

This court reviews chancery cases *de novo*, and "when we can plainly see where the equities lie, we may enter an order that the chancellor should have entered, or we may decline to do so if justice will be better served by remand." *See McKay v. McKay*, 66 Ark. App. 268, 989 S.W.2d 560 (1999). Here, we affirm the order terminating child support for a different reason than that given by the chancellor.

The parties stipulated the following facts: 1) Denise and Joe Calbert divorced on June 25, 1984; 2) Denise and Joe Calbert agreed that the child would repeat the second grade; 3) Denise and Joe Calbert agreed that the child had completed twelve years of public school education beginning with the first grade; 4) Denise and Joe Calbert agreed that the child would be eighteen years old on June 2, 1999; 5) Denise agreed that the child spends seventy-five percent of the time outside of her home and that time is spent with his girlfriend and the appellee.

The chancellor seemed to base his decision on the fact that Cedric should have graduated from high school by his eighteenth birthday. That decision, however, ignores the fact that appellee was instrumental in delaying Cedric's graduation by one year in agreeing that he should repeat the second grade.

The language of Arkansas Code Annotated section 9-14-237(a)(1) provides that "[a]n obligor's duty to pay child support for

a child shall automatically terminate by operation of law when the child reaches eighteen (18) years of age *or should have graduated* from high school, whichever is later...." (emphasis supplied). Appellee's position that the child should have graduated from high school disregards his central role in changing when the child should have graduated. A parent cannot prevent a child from graduating and then complain about the result of his own conduct.

We affirm the order, even though Cedric has not graduated high school, because the evidence shows that the majority of his time is spent outside of the custodial parent's home. This court is bound by the stipulations of the parties. *See Turner v. Eubanks*, 26 Ark. App. 22, 759 S.W.2d 37 (1988). The stipulations of the parties indicate that Cedric spends only twenty-five percent of his time in Denise Calbert's home. The overwhelming majority of the child's time is spent at the home of appellee or the child's girlfriend. Based on this evidence we conclude that the trial court's decision to terminate child support was not clearly wrong.

Affirmed.

JENNINGS, J., agrees.

STROUD and ROAF, JJ., concur.

ROBBINS, C.J. and HART, J., dissent.

JOHN F. STROUD, JR., Judge, concurring. Although I agree that the order of the trial court should be affirmed, I write separately because I reach that result for a reason different than that stated in the prevailing opinion. The reasoning of the prevailing opinion is inconsistent with the concept of Ark. Code Ann. § 9-12-312(a)(5)(A) (Supp. 1999) and *Fonken v. Fonken*, 334 Ark. 637, 976 S.W.2d 952 (1998), which allows a child upon reaching majority to sue for back child support not paid for periods of time when the child did not live with the custodial parent at all.

The case before us was based on the chancellor's interpretation and application of Ark. Code Ann. § 9-14-237 (Supp. 1999), which provides:

> (a)(1) An obligor's duty to pay child support for a child shall automatically terminate by operation of law when the child reaches eighteen (18) years of age or should have graduated from

> high school, whichever is later, or when the child is emancipated by a court of competent jurisdiction, marries, or dies, unless the court order for child support specifically extends child support after such circumstances.

The chancellor terminated the noncustodial parent's child-support obligation of the child who reached age eighteen but had not graduated from high school, finding that the child should have graduated. It was stipulated that the child would have graduated shortly before his eighteenth birthday if he had not been held back by his parents to repeat the second grade. I think "should" in the context of the statute means without repeating a grade, whether it be for failing marks, sickness, or a decision of the parents that a child repeat a grade.

I also think section 9-14-237 was enacted by the Arkansas General Assembly to provide a method for automatic termination of the child-support obligation without the expense of hiring an attorney and having a court hearing. This view of automatic termination is consistent with the remainder of the statute, which automatically terminates support upon the removal of the minor's disabilities, or upon his marriage or death. My position is further supported by another statute that gives the court all the flexibility needed to extend the support obligation beyond the eighteenth birthday for a child who has not graduated from high school for reasons such as the ones just enumerated. Arkansas Code Ann. § 9-12-312(a)(5)(A) (Supp. 1999) is that statute, and it provides:

> The court may provide for the payment of support beyond the eighteenth birthday of the child to address the educational needs of a child whose eighteenth birthday falls prior to graduation from high school so long as such support is conditional on the child remaining in school.

Reading the two statutes together, and applying the statutes to the facts of this case, I cannot say that the chancellor clearly erred in ruling that appellee's child-support obligation did not extend beyond the child's eighteenth birthday to the anticipated delayed date of the child's graduation from high school. I would therefore affirm for the reasons stated by the chancellor.

I am authorized to say that Judge ROAF joins in this concurring opinion.

JOHN B. ROBBINS, Chief Judge, dissenting. I agree with the prevailing opinion to the extent that it finds error in the chancery court's determination that child support cannot extend through Cedric's graduation because he should have graduated a year earlier. Cedric's graduation was delayed through no fault of his own and due to a mutual decision by his parents, and he has remained in school in pursuit of his high school diploma. Under these facts, I agree that, for purposes of Ark. Code Ann. § 9-14-237(a)(1) (Repl. 1998), the date he "should have graduated" is the same as his actual expected graduation date. However, I do not agree with the alternate basis upon which the prevailing opinion affirms the chancery court's order. Therefore, I must respectfully dissent.

The prevailing opinion relies on a stipulation between the parties to the effect that Cedric spends seventy-five percent of his time in homes other than that of his mother. The only mention of such an arrangement was by Mr. Calbert's attorney, when he stated before the chancery court:

> I believe that Ms. Calbert has agreed that the child spends about three-quarters of the time in homes other than hers. I think he stays part of the time at his girlfriend's home and part of the time at the home of Mr. Calbert.

Even if this comment rises to the level of a stipulated fact, I submit that it is insufficient to support termination of Mr. Calbert's child-support obligation.

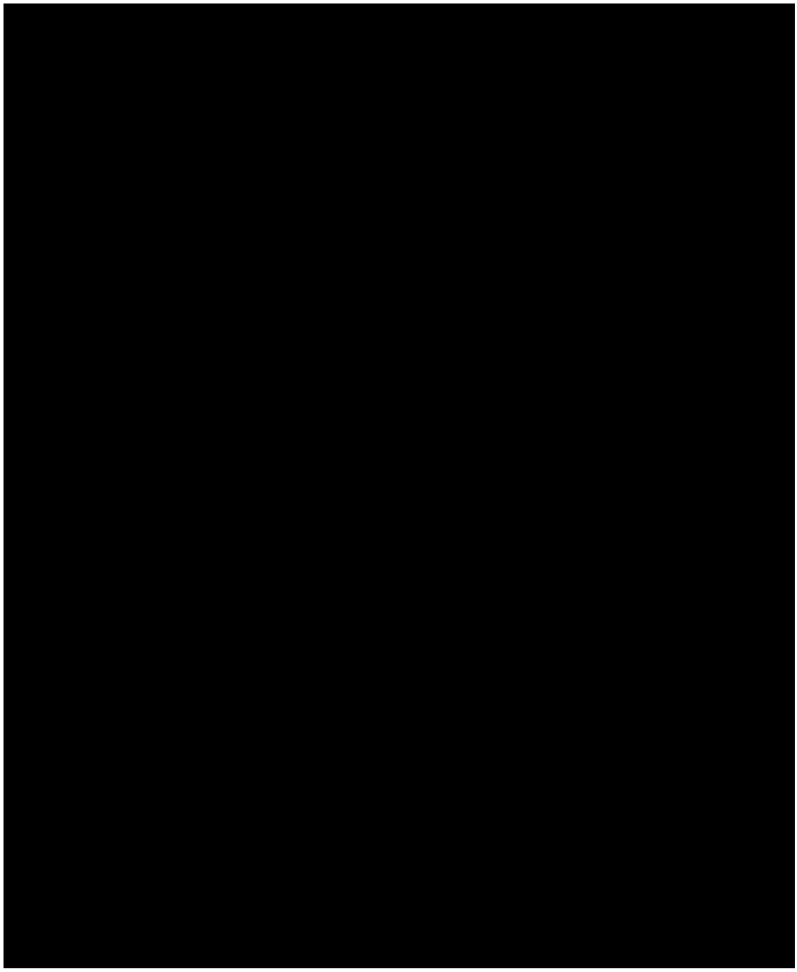
In Mr. Calbert's pleading requesting termination of child support, he asserted only that his obligation "will terminate on June 2, 1999, the date of the child's eighteenth birthday, because he should have graduated from high school in May of 1999."; he did not ask for termination or a reduction because of Cedric's living arrangements or for any reason other than that stated above. As such, the issue was not presented and was not addressed by the chancery court. In its order terminating child support, the chancery court relied solely on its finding that Cedric should have graduated in May 1999. It is well established that a question not raised in the court below by the pleadings or arguments of counsel cannot be considered for the first time on appeal, *see Robinson v. Winston*, 64 Ark. App. 170, 984 S.W.2d 38 (1998), and because the issue was not

raised or developed in the chancery court, we should not address it now.

Moreover, the issue has not been raised in either of the parties' arguments on appeal. Both the appellant's and appellee's briefs focus solely on whether or not child support should terminate as a result of Cedric's being held back, and thus attaining the age of majority a year before his anticipated graduation date. Under our long standing procedures, we consider only arguments raised by the parties. *Schmidt v. McIlroy Bank & Trust*, 306 Ark. 28, 811 S.W.2d 281 (1991).

The issue seized on by the prevailing opinion was not argued below, addressed by the chancery court, or argued on appeal. For these reasons, the issue was not properly before this court for our consideration. I would reverse the decision of the chancery court because it erred in its disposition of the only issue before it.

HART, J., joins in this dissent.



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